National Health Care Reform: Has Its Time Finally Arrived?\(^1\)

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Our nation’s health care system is in crisis, and both Democrats and Republicans are in agreement that something must be done to fix it.\(^3\) While there is consensus in Washington that it is time to take action and pass health care reform legislation, politicians are now faced with the difficult task of crafting a final health care reform package that passes muster in both houses.

This article compares proposals by President Obama, Democratic Senators Ron Wyden (D-Ore.), Max Baucus (D-Mont.), and the late Ted Kennedy (D-Mass.), as well as bills recently introduced by House Republicans and House Democrats, and suggests key points from the different proposals that should be incorporated into final health care reform legislation.

\(^1\) © Corrine Propas Parver 2009. This article was submitted prior to final Congressional action on health care reform.

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\(^3\) See 155 CONG. REC. S9631-01 (2009) (Senator Richard Durbin (D-III.) explaining problems with current health care system). In 2008, 46.3 million people in America were uninsured. \textit{Id}. Moderate income families, minorities, and veterans are among the nations uninsured. \textit{Id}. Insurance premiums for the insured are becoming unaffordable because the insured’s premiums must subsidize emergency room treatment of the uninsured. \textit{Id}. 155 CONG. REC. S8893-01 (2009) (Senator Lamar Alexander (R-Tenn.) proclaiming need for health care reform); Barack Obama & Joe Biden, \textit{Barack Obama and Joe Biden’s Plan to Lower Health Care Costs and Ensure Affordable, Accessible Health Coverage for All}, http://www.barackobama.com/pdf/issues/HealthCareFullPlan.pdf (last visited Oct. 21, 2009).
I. Overview of the Plans: Initial Proposals

A. President Obama: Eight Principles

During the 2008 presidential campaign, then-candidate Barack Obama introduced a comprehensive health care reform proposal which made health reform a top priority in his campaign. Since his inauguration, President Obama has maintained this commitment to health care reform, laying out, in the FY 2010 budget, eight principles that he believes are crucial to successful health care reform:

- **Protect Families’ Financial Health.** The plan must reduce the growing premiums and other costs American citizens and businesses pay for health care. People must be protected from bankruptcy due to catastrophic illness.

- **Make Health Coverage Affordable.** The plan must reduce high administrative costs, unnecessary tests and services, waste, and other inefficiencies that consume money with no added health benefits.

- **Aim for Universality.** The plan must put the United States on a clear path to cover all Americans.

- **Provide Portability of Coverage.** People should not be locked into their job just to secure health coverage, and no American should be denied coverage because of preexisting conditions.

- **Guarantee Choice.** The plan should provide Americans a choice of health plans and physicians. They should have the option of keeping their employer-based health plan.

- **Invest in Prevention and Wellness.** The plan must invest in public health measures proven to reduce cost drivers in our system—such as obesity, sedentary lifestyles, and smoking—as well as guarantee access to proven preventive treatments.

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4 See Obama & Biden, supra note 3.
• **Improve Patient Safety and Quality Care.** The plan must ensure the implementation of proven patient safety measures and provide incentives for changes in the delivery system to reduce unnecessary variability in patient care. It must support the widespread use of health information technology and the development of data on the effectiveness of medical interventions to improve the quality of care delivered.

• **Maintain Long-Term Fiscal Sustainability.** The plan must pay for itself by reducing the level of cost growth, improving productivity, and dedicating additional sources of revenue.  

In addition to these eight principles, President Obama disclosed some of his ideas regarding the specifics of a health care reform package in a letter to the late Senator Kennedy and Senator Baucus. In his letter, President Obama stated his strong belief that there should be a public health insurance option, adding to the range of choices for the American people. Other issues of importance to the President include: available coverage notwithstanding preexisting conditions, hardship waivers for Americans who cannot afford health insurance, deficit neutral health care reform that does not add to the deficit over the next ten years, and reducing Medicare and Medicaid spending by $200 to $300 billion over the next 10 years.

B. “Healthy Americans Act”

With Senator Robert Bennett (R-Utah) as a co-sponsor, Senator Wyden’s Healthy Americans Act (hereinafter “HAA”) is a comprehensive, bi-partisan health reform plan that is compatible with President Obama’s eight health reform principles

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7 *Id.*
8 *Id.* If new health care legislation requires individuals to purchase their own insurance, there must be a provision to allow for a hardship waiver. *Id.* Medicare and Medicaid spending can be reduced by cutting waste, fraud and abuse, reducing overpayments to Medicare Advantage private insurers, improving post-hospitalization care for Medicare patients, and creating “accountable care organizations to improve the quality of Medicare.” *Id.*
and seeks to implement universal coverage. He proposes to end the current employer-based system by creating a framework that would enable individuals to make informed decisions and purchase their own affordable health care. Although employers would no longer be purchasing insurance with pre-tax dollars, they would still have a responsibility to contribute to the cost of insuring America’s workforce.

In this regard, an important issue on the table for health care reform is whether to restructure the employer-based system. Currently, health insurance premium payments paid by employers for employer-sponsored health insurance are exempt from federal income and payroll taxes. Because employers receive favorable tax treatment for purchasing health insurance, our nation’s health care coverage tends to be tied to employment. Employers choose a plan, or a small selection of plans, and employees have very little choice in the type of coverage that they are offered. Because the coverage is dependent on employment, if an individual changes jobs or becomes unemployed, they then lose their health insurance benefits (except for temporary benefits available under COBRA). Several of the proposals seek to drastically change this system.

The Healthy Americans Act proposes to eliminate the tax exemption for employer purchased health insurance and replace it with a fixed deduction for

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9 See Healthy Americans Act, H.R. 1321, 111th Cong. (2009) (introducing most recent version of Healthy Americans Act, introduced March 5, 2009); see also 153 CONG. REC. S5676-01 (2007) (Senator Wyden introducing Healthy Americans Act to Congress); 155 CONG. REC. S8893-01 (2009) (Healthy Americans Act provides leverage to the insured by creating state-run insurance exchanges through which insureds can select plans, including their existing employer-sponsored plan). Senator Lamar Alexander also supports the Healthy American Act and discusses the basic framework. Id.

10 See H.R. 1321 (text of the Healthy Americans Act bill as of March 5, 2009).

11 See H.R. 1321 § 611 (2009). The Healthy Americans Act requires employer shared responsibility payments and prohibits employer deductions for employer shared responsibility payments. Id.


13 Id.

14 Id.


Employers would be required to make Employer Shared Responsibility Payments ("ESRPs"), payments based on the number of employees as well as the plan premium amount, instead of directly covering employees' health insurance costs. Employers already offering health insurance coverage to employees prior to enactment of the HAA would be required to make payments equivalent to the cash value of the health insurance they provided. Employers would be required to make these payments for the first two years after enactment of the HAA, and they would be a substitute for the employers' ESRPs. After the two year transition period, these employers would then begin making ESRPs.

In addition, every individual would have a responsibility to enroll in a "Healthy Americans Private Insurance" Plan. Senator Wyden asserts that health care reform should not include a universal public plan option, and he has noted that the issue of whether to include a government-run plan in health care reform legislation is a major barrier to bipartisan support. According to Senator Wyden, successful legislation will only be attainable by foregoing the idea of a government-run health insurance system.

The HAA would fully subsidize individuals whose income places them below 100% of the federal poverty level. Individuals with incomes between 100 and 400% of the poverty level would receive a partial subsidy to assist them with paying their health

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17 See H.R. 1321 § 3422.
18 See H.R. 1321 § 3411.
19 Id. Any employer who provided health insurance coverage for employees on the day before the date of enactment of the Healthy Americans Act, the employer shared responsibility payment shall be, in lieu of the amount determined under subsection (a), an amount equal to 100% of the designated employee health insurance premium amount of such employer, minus the employee salary investment amount. Id.
20 Id.
21 Id.
22 See Healthy Americans Act, S. 334, 110th Cong. § 102 (2007). Adult individuals, however, are not required to enroll in a HAPI plan if they provide evidence of enrollment in a health plan offered through particular specified programs or if they are “opposed to health plan coverage for religious reasons.” See id.
24 Id. Instead, Wyden proposed that the government offer a public plan option only in underserved areas and focus on keeping private sector insurance as part of the reform. Id.
insurance premiums.\textsuperscript{26} Health insurance coverage would not be tied to employment and could be maintained when individuals change jobs, lose jobs, retire, go to school, or become too sick to work.\textsuperscript{27} Eligibility for insurance coverage would be guaranteed, and age, gender, genetic information, and pre-existing health conditions would not be a bar to coverage under the HAA.\textsuperscript{28} The Healthy Americans Act seeks to encourage chronic care programs, require hospitals to demonstrate improvements in quality control, provide improved Medicare payments to primary care providers, establish a national website to post research concerning improvement of quality of care and institute a pilot program to incorporate such research into medical school curricula, and provide improvements for end of life care.\textsuperscript{29}

Senator Wyden posits that the $2.2 trillion currently spent on health care in the United States would fully pay for the HAA, and the plan would save $1.45 trillion over the next decade.\textsuperscript{30} Cost and coverage estimates prepared by the Lewin Group estimate that this plan would cover 246.8 million Americans, or roughly 99% of Americans.\textsuperscript{31} In addition, the Congressional Budget Office reports that Wyden’s Healthy Americans Act would be roughly budget-neutral and essentially self-financing in the first year that it was fully implemented.\textsuperscript{32}

C. Baucus’s First “White Paper”

In A Call to Action: Health Reform 2009, Senate Finance Committee Chair Max Baucus lays out a health reform plan that would provide universal, mandatory

\textsuperscript{26} See H.R. 1321 § 121.
\textsuperscript{27} See id. See also Katherine V.W. Stone, A Fatal Mismatch: Employer Centric Benefits in a Boundaryless World, 11 LEWIS & CLARK L. REV. 451, 470 (2007) (stating health insurance reform should ensure health insurance is not linked to employment).
\textsuperscript{28} See H.R. 1321 § 121.
\textsuperscript{31} John Sheils, Randall Haught & Evelyn Murphy, THE LEWIN GROUP, Cost and Coverage Estimates for the “Healthy Americans Act” 1 (Dec. 2006), http://www.standtallforamerica.com/media/uploads/costreport.pdf. The Healthy Americans Act establishes a system of private health insurance for all Americans and it would provide coverage at least as comprehensive as provided to members of Congress. Id.
The Baucus plan comports with the eight health reform principles outlined by President Obama, and is based on six defining principles that Baucus finds crucial to obtaining health care coverage for all Americans. First, every American has a responsibility to obtain health care coverage once affordable options exist. Second, Senator Baucus believes the employer-based system offers many advantages, and he proposes continuing and strengthening this system.

Under Senator Baucus's proposal, however, employers' contributions would no longer be voluntary. Senator Baucus proposes to retain the current tax exemption for employer-purchased health insurance, and all except the smallest employers would provide employees with a Section 125 plan. If employers chose not to offer Section 125 plans, they would still be required to contribute to employees' health care coverage, or they would be required to pay a percentage of their payroll to a fund to assist the uninsured in obtaining coverage. Senator Baucus would also require mid-size and smaller employers to contribute towards coverage or contribute to the fund. Payments to the fund would be based on the size and annual revenues of the employer, so that

33 See Max Baucus, Call to Action: Health Reform 2009 9 (2008), http://finance.senate.gov/healthreform2009/finalwhitepaper.pdf. The plan would provide affordable, accessible coverage to everyone through the creation of a nationwide insurance pool, the prohibition of insurers discriminating based on health status, and "providing subsidies to low-income families." Id.
34 See id. at 13 (aiming to reform health care system by assigning responsibility to every American).
35 See id. at 15. "Insurance works because policyholders pay into their plans when healthy, and have their medical bills paid when they are sick. If a significant portion of Americans does not purchase coverage until sick, then premiums for all enrollees will increase to cover insurer outlays, and ... [the] problem of unaffordable coverage will persist." Id.
36 See id. at 13, 16-17. When health insurance is purchased through an employer, it generally costs less because employers can pool risk by covering both healthy and unhealthy employees and the pooling of coverage reduces administrative costs. Id. at 16.
37 See Baucus, supra note 33, at 16-17. Employers can obtain lower premiums as a result of their ability to evaluate benefits and through the strategic negotiating position they have with insurance companies. Id. at 16.
39 See Baucus, supra note 33, at 16-17. The majority of American employers would provide coverage in an effort to competitively recruit employees. See id. at 16.
40 Id. at 17. According to a 2007 survey of the National Federation of Independent Business members, only 47% of small businesses provided health insurance to their employees. Eve Tahmincigil, Small Businesses Want, Fear Health Care Reform, Sept. 16, 2009, http://www.msnbc.msn.com/id/32766627/ns/business-small_business. Small business owners ranked health care costs as their primary concern, but are also concerned that the current proposals in Congress are all harmful to small business owners. Id.
smaller employers would have a lower payment requirement than larger companies.\textsuperscript{41} Finally, incentives would be offered to the very smallest employers in the form of tax credits so that they too could purchase insurance coverage for their employees.\textsuperscript{42}

Third, he proposes the creation of a Health Insurance Exchange to ensure affordable coverage for individuals and small businesses.\textsuperscript{43} Fourth, his plan seeks to strengthen public programs such as Medicare, Medicaid, the State Children’s Health Insurance Program (SCHIP) and the Indian Health Service (IHS).\textsuperscript{44} Senator Baucus

\textsuperscript{41} See Baucus, supra note 33, at 16-17. Larger employers with over 50 full-time workers would be required to pay a fee for each employee who receives a tax credit for insurance purchased through the proposed health insurance exchange. Brett Ferguson & Heather M. Rothman, \textit{Baucus Unveils $856 Billion Health Plan with New Taxes on Insurers}, Sept. 17, 2009, http://www.bnasoftware.com/News_Articles/News/Baucus_Unveils_$856_Billion_Health_Plan_With_New_Taxes_on_Insurers.asp. Reports show that the fees would be based on the amount of the tax credit the employee receives, but the fees would be capped at an amount equal to $400 multiplied by the total number of employees. \textit{Id.} Additionally, the Baucus proposal stated that the fee calculation would not include disabled employees, employees participating in the welfare-to-work program, or children in foster care. \textit{Id.}


\textsuperscript{43} Baucus, supra note 33, at 17. The Health Insurance Exchange (“Exchange”) would be an independent entity, with the primary purpose being to organize affordable health insurance options, provide information on the various plans, and also to develop a standard application for enrollment in a chosen plan. \textit{Id.} Furthermore, the Exchange would have the authority to implement mechanisms to ensure that plans would not suffer a financial disadvantage by insuring more expensive, higher-risk patients. \textit{Id.} at 18.

\textsuperscript{44} \textit{Id.} at 20-28. In 2007, 12\% of people aged fifty-five to sixty-four were uninsured. Baucus, supra note 33, at 21. Baucus’s plan would make health care coverage immediately available to people aged fifty-five to sixty-four through a Medicare buy-in to fill this gap in coverage. \textit{Id.} This Medicare buy-in, however, would only be available until the Health Insurance Exchange was established, but those already enrolled in the buy-in could remain in the program until they qualified for Medicare. \textit{Id.} Noting that the Medicaid coverage is limited to very few low-income adults, Baucus has also proposed to extend Medicaid to every American living below the poverty line. \textit{Id.} at 23. This change would provide over 7.1 million low-income Americans with access to some form of health care. Baucus, supra note 33, at 23. Additionally, the Baucus plan would require that states use CHIP “to cover all children at or below 250\% of the poverty level and who are not Medicaid eligible, putting help within reach for more needy Americans.” \textit{Id.} at 26. Lastly, the Baucus plan would increase funding for HIS to provide care to Native Americans and Alaska Natives. \textit{Id.} at 27-28.
proposes a public plan that would be similar to Medicare and would be bound by the same rules as private plans, although he has left open for discussion certain key questions, such as who would run the plan, who would be eligible to participate, and how to ensure that the competition between public and private insurers achieves the overarching goal of lowering cost and improving the quality of Americans’ health care.  

Fifth, his proposal places a large focus on prevention and wellness, including a special program for the uninsured to ensure that they have access to preventive care. Finally, Senator Baucus’s proposal seeks to address health disparities so that all Americans have equal access to health coverage and health care. 

Senator Baucus’s plan is the most comprehensive vis-à-vis improvements in care, with a plan to (1) strengthen the role of primary care and chronic care management, (2) refocus payment incentives towards quality by fixing the unstable Medicare physician payment formula, (3) promote provider collaboration and accountability, and (4) improve health care infrastructure. His plan includes detailed suggestions for improvements in each of these areas to both improve the efficiency as
well as the quality of health care received. In order to strengthen the role of primary care and chronic care management, Senator Baucus proposes ensuring accurate and improved payments for primary care services, implementing patient-centered medical homes (so that practitioners are paid for comprehensive care management services), and promoting community health centers and rural health clinics. According to Baucus, refocusing payment incentives toward quality is also a critical component of successful reform. To achieve this goal, he proposes to implement a gradual transition to value-based purchasing (pay for performance) in inpatient hospital settings based on hospital quality reporting, rewards for hospitals that achieve quality goals, and increased transparency for hospital quality performance scores and payments.

49 Id. at 37-64. In order to ensure accurate and improved payments for primary care services, Baucus suggests seeking a “continued focus on the high value of primary care-related services, with corresponding reductions in relative values for overvalued services.” Id. at 38. Baucus also suggests creating budget changes to the Medicare payment system, specifically, increasing payments to primary care providers while cutting payment amounts to specialists. Id. at 39. Baucus, however, recognizes that reforming the Medicare payment system may result in controversies among physicians. Baucus, supra note 33, at 39. Baucus’s proposal to implement patient-centered medical homes is in response to evidence that suggests medical homes improve patient health and reduce costs. Id. Baucus states “mechanisms for compensating rural health (RHCs) clinics are also deficient and should be improved.” Id. at 41. Improvements in compensation are necessary because rural health centers are instrumental in meeting the needs of patients who are unable to access care. Id.

50 Baucus, supra note 33, at 36-41. Fewer medical students choose a career in primary care over specialty care due to the system’s current de-emphasis on primary care even though access to primary care, specifically for those individuals who are constantly ill, is a proven key factor in ultimately achieving high-quality care for patients. Id. at 36. One way to change the current trend and strengthen the role of primary care physicians, as Baucus suggests in his plan, is to use the federal reimbursement system as a way to place significant more value on the services primary care physicians provide. Id. See also THOMAS S. BODENHEIMER & KEVIN GRUMBACH, UNDERSTANDING HEALTH POLICY: A CLINICAL APPROACH 54 (James Shanahan & Kim J. Davis eds., McGraw Hill 2009) (1995) (discussing primary care-specialty care income differences and how this relates to medical students choosing specialty care).

51 Baucus, supra note 33, at 41 (stating improving health care quality is critical component of delivery system reform). In addition, several reports have urged a heightened focus on quality initiatives and have suggested various new methods for measuring the physicians’ quality and performance. Id. See also John V. Jacobi, Article, Reform With a Patient Focus, 37 CUMB. L. REV. 437, 440 (2007) (discussing how lack of quality and medical errors often lead to preventable deaths and adverse outcomes).

52 Baucus, supra note 33, at 41-43. Baucus also states “every effort must be made to align hospital and physician goals... [especially in] safety net, low-volume and rural hospitals... and the value-based purchasing program should be subject to ongoing mentoring and evaluation.” Id. at 43. In
Other measures for refocusing payment incentives toward quality in the Baucus plan include a physician quality reporting incentive that improves upon current physician reporting and a requirement that physicians participate, with incentives for those that do and penalties for those that do not; use of a provider feedback program and episode groups that can lead to more efficient care; quality improvement for providers other than hospitals and private plans, such as home health and nursing care; and reforming the sustainable growth rate formula.53

In an effort to promote collaboration and accountability among health care providers, Senator Baucus sees a need to reduce hospital readmissions and would do so through (1) providing hospitals with confidential information from CMS regarding resource use for select hospitalizations so that providers can better understand their spending, (2) new Medicare incentives for hospitals to better coordinate care of patients, and (3) bundling of payments for all services provided to a patient during hospitalization.54 Other measures he hopes to implement include funding a pilot program of incentive payment systems Accountable Care Organizations (integrated delivery systems) and increased collaboration through gainsharing.55 Finally, the Baucus

2003, Congress first established a hospital pay-for-reporting program for Medicare. Id. at 41. Congress required that hospitals track and report their performance on ten factors that measured quality. Id. At this point, this Medicare program has appeared to be successful and improve the quality of care in inpatient hospital settings. Baucus, supra note 33, at 42. An example of this thus far is the Hospital Quality Incentive Demonstration (HQID). Id. This is a more detailed pay-for-quality model, but early results suggest an 11.8% average quality improvement rate among the participating hospitals over the past two years. Id.

53 Id. at 42-46. Baucus notes that there were substantial concerns regarding the implementation of the Physician Quality Reporting Initiative (PQRI). Baucus, supra note 33, at 44. In dismissing such concerns, however, Baucus points out that since its enactment in 2006, the program has nearly achieved its goals of engaging clinicians and other health care stakeholders in implementing quality mechanisms to improve the delivery of care. Id. While there have certainly been technical challenges in the program, overall it has been proven as one way to start improving the quality of care. Id. The Baucus plan intends to build upon this foundation and implement positive financial incentives for participating physicians and give Congress guidance on how to best improve the system. Id. at 45.

54 Baucus, supra note 33, at 48-51. Using the example of the Geisinger Health System, a health insurer in the private market, Baucus argues that that bundling payments is an effective way to improve the quality of care. Id. at 51. Accordingly, initial results of this plan indicate that roughly 86% of patients were receiving all the recommended services related to a particular surgery. Id. Baucus’s plan hopes to mimic these results while also including appropriate risk adjustments to ensure providers are not discouraged from treating less healthy individuals and also limiting inappropriate reductions in care to simply increase profit. Id.

55 Baucus, supra note 33, at 51-54. Accountable Care Organizations (ACOs) would serve the purpose of reporting on a list of quality measures endorsed by the National Quality Forum
plan also includes comprehensive improvements to health care infrastructure through
comparativeness effectiveness research, an investment in more advanced health
information technology and a push to increase the number, quality and diversity of our
nation’s health care workforce.

Senator Baucus’s proposal addresses the immediate need for better health care coverage by taking steps to improve access to care even while his long-term changes are being implemented.

In the time leading up to creation of his Exchange, Senator Baucus suggests expanding Medicare by eliminating the two year waiting period for the disabled and by allowing adults aged 55 to 64 to buy into Medicare.

The Right Choices program, another of Baucus’s suggestions, would be “a temporary program to provide the uninsured with immediate access to a set of proven preventive services such as a health risk assessment, physical exam, immunizations, and age and gender appropriate cancer screenings recommended by the U.S. Preventive Services Task Force.” Individuals whose participation in the Right Choices program results in the detection or diagnosis of one of the most common, costly chronic conditions would qualify to receive treatment for the detected conditions on a temporary basis until permanent coverage was obtained through the National Health Exchange, and those individuals with incomes at or below 200% of the Federal Poverty Level would receive that treatment at no cost.

(NQR).

Through this pilot program, Baucus would establish a timeline that within five years, ACOs would focus on the following quality measures: risk adjusted health outcomes, improving ambulatory and inpatient chronic conditions, and patient experience measures for both ambulatory and inpatient care. Furthermore, the Baucus plan would mandate a formula to determine whether ACOs are successful in controlling costs.

In support for his push to reform America’s nation’s health care workforce, Baucus states that efforts to expand and diversify the health care workforce “are critical if we are to place our nation’s workforce on sound footing to address the health care needs of current and future generations.”

Initially, health care reform will require a substantial financial investment to make the necessary improvements. While health care reform may be more costly in the short term, the vast improvements in care, costs, and quality over the long term will not only cover the millions of Americans currently uninsured, but also, it will more importantly, put the system on a more sustainable path. As Baucus correctly notes, this next crucial step is dependent on the public, policymakers and stakeholders uniting on common ground to work towards health care reform.

See also 42 U.S.C. § 1395(c) (2008) (providing the current Medicare eligibility requirements for adults age 65 and older, people younger than 65 with disabilities for longer than two years, and individuals with end-stage renal disease).

See Baucus, supra note 33, at 28-29.
D. "Affordable Health Choices Act"

The goal of the Senate Health Education Labor and Pensions (HELP) Committee's Affordable Health Choices Act proposed by the late Senator Kennedy is to "make quality, affordable health care available to all Americans, reduce costs, improve health care quality, enhance disease prevention, and strengthen the health care work force." The Affordable Health Choices Act is based on five foundational concepts: (1) choice; (2) cost reduction; (3) prevention; (4) health system modernization; and (5) long term care and services.

The Affordable Health Choices Act proposes the establishment of American Health Benefit Gateways in each State to facilitate "the purchase of health insurance coverage and related insurance products." The Secretary of Health and Human Services would award federal grants to states to establish Gateways that would "make available qualified health plans to qualified individuals and qualified employers," including a public health insurance option. Since the public option is highly controversial, the details are "under discussion" and are not developed in the most recent draft of the Act. Individuals have a choice between keeping their current insurance policy or participating in a Gateway and enrolling in a qualified health plan.

The Affordable Health Choices Act creates a framework of shared responsibility in which all Americans would be required to obtain health insurance coverage and employers would be required to contribute to the purchase of such coverage. Since the issue of the shared responsibility of employers for health care

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64 Id. at § 3101(c)(2)(A)-(B). The community health insurance plan would be optional. Id. at § 3106(a). In addition, the plan would be required to cover essential services, such as ambulatory care, emergency care, hospitalizations, maternity and newborn services, mental health care, prescription drug coverage, rehabilitation care, laboratory services, preventative care, and pediatric care. Id. at §§ 3106(b)(3)(A), 3103(a)(1)(A)(i)-(x).
66 Id. at § 3101(b)(3).
coverage is such a controversial topic, the Senate HELP Committee opted not to flesh out this section in its most recent draft of the Act, stating only that the policy is “under discussion.”

In order to guarantee the availability of health care coverage to all Americans, the Affordable Health Choices Act imposes a series of requirements and restrictions on health insurance issuers. First, the Act requires health insurance issuers to accept every individual and employer that applies for coverage. Second, the Act prohibits group health plans and health insurance issuers from excluding individuals from coverage based upon any preexisting conditions. Third, the Act requires health insurance issuers to renew coverage of individuals. Finally, the Act prohibits group health plans and health insurance issuers from establishing rules for eligibility based upon health status-related factors, including but not limited to: “medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, [and] disability.” While the Affordable Health Choices Act is likely to change form as amendments are made throughout the Committee markup process, any modifications will reflect the goal of strengthening what about the current health care system works and fixing what does not.

E. House Democrats: Discussion Draft of Health Reform Bill

Democratic members of the U.S. House of Representatives Committees on Ways and Means, Energy and Commerce, and Education and Labor are currently working on a health care reform plan that complies with President Obama’s health care reform principles. House Democrats released a discussion draft of a bill which builds on the current employer-based system by creating a national Health Exchange that allows States to either create a State or regional exchange if they prefer. Individuals would be able to keep their current employer sponsored coverage if they choose to, or

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68 Id. at § 3115.
69 Id. at § 101 (outlining proposed amendments to the Public Health Service Act).
70 Id. at § 2702(a).
71 Affordable Health Choices Act, S. 1679, 111th Cong. § 2705(a) (2009).
72 Id. at § 2703.
73 Id. at § 2706(a)(1)-(9).
76 Id.
they could obtain coverage through the exchange.\textsuperscript{77} The proposal establishes a system of shared responsibility between individuals, employers, and the government to ensure universal health care coverage.\textsuperscript{78}

The plan includes a requirement that employers provide coverage for employees or employers pay a fee to assist in paying for coverage.\textsuperscript{79} “Certain small business[es]” (which are not specified at this time) would be exempted from this requirement.\textsuperscript{80} In order to ensure that affordable coverage is available for all, the proposal offers “sliding scale” credits for low and middle-income individuals and families.\textsuperscript{81} In addition, the House Democrats seek to invest in prevention and public health programs and jump start health care delivery reforms to reduce costs, maintain fiscal sustainability, and improve quality.\textsuperscript{82} Several of the plans tackle health care fraud and abuse.\textsuperscript{83} The House Democrats’ proposal both adopts measures to reduce fraud and abuse in Medicare as well as enhances penalties for such fraud and abuse.\textsuperscript{84}

The House Democrats’ Discussion Draft also includes improvements to the health care delivery system.\textsuperscript{85} The plan contemplates using federal health programs to

\textsuperscript{77} Id. at § 202(b)(1) (defining “individual”). An “Exchange-eligible individual” refers to an individual eligible to be enrolled in the Health Insurance Exchange, including, with respect to family coverage, dependents of eligible individuals. Id.

\textsuperscript{78} See generally id. at §§ 324-412 (describing basic terms for shared responsibilities).

\textsuperscript{79} See HOUSE TRI-COMMITTEE PROPOSAL, supra note 75, at §§ 312-313 (describing plan requirements of employers). The plan would require that employers contribute no less than 72.5% of the lowest cost plan meeting “essential benefits package” for individuals; no less than 65% for family plans for full-time employees. Id. Plan defers proportion for less than full-time employees to the rules of “Health Choices Commissioner,” “Secretary of Labor,” “Secretary of Health and Human Services,” and “Secretary of the Treasury.” Id. Employers may make contributions in lieu of coverage, to Health Choices Commissioner for deposit into Health Insurance Exchange fund in an amount equal to 8% of wages paid to employee by employer during period of plan enrollment. See id. See also supra note 44 and accompanying text.

\textsuperscript{80} See HOUSE TRI-COMMITTEE PROPOSAL, supra note 75, at § 412(c)(4) (noting small business exception where the Committee provides space for an exemption but adds no further specificity). Id.

\textsuperscript{81} Id. at § 244 (outlining cost-sharing plan).

\textsuperscript{82} Id. at § 1162 (setting forth possible measurements). Committee provides examples of advantages of benefits, including improvements in rates of admission to hospitals, prevention quality, and patient safety. See id.

\textsuperscript{83} See HOUSE TRI-COMMITTEE PROPOSAL, supra note 75, at § 1601 (noting a proposition to increase funding to prevent fraud).

\textsuperscript{84} Id. at § 1611-18. (describing impositions of civil penalties). See also supra note 41 and accompanying text.

reward high quality, efficient care and reduce disparities, adopting innovative payment approaches and promoting better coordinated care in Medicare and the new public option through programs such as accountable care organizations, and attacking the high rate of cost growth to generate savings for reform and fiscal sustainability, including a program in Medicare to reduce preventable hospital readmissions. 86

The House Democrats' proposal also seeks to make some immediate changes to jumpstart to the road to reform. 87 While comprehensive health care reform will take years to implement, the Discussion Draft proposes to immediately simplify health insurance administration, such as standardized language, standardized forms, and standards for claims attachments; establishing operating rules and companion guides for using and processing health care transactions; increasing the consistency of claims edits and code corrections across health plans and products; and standardizing quality reporting requirements. 88 Another immediate investment proposed by the Discussion Draft is to ensure value in health care coverage by lowering premiums and ensuring a minimum loss ratio of not less than 85%, enforceable through a rebate back to consumers. 89 In addition to simplifying health insurance administration, the House Democrats also propose new programs to be implemented during the transition period, including a reinsurance program to assist in coverage of early retirees; an "Insurance Smart Card," an electronic insurance card; and a Preventive Care Visit Card to promote the use of preventive care services. 90


86 Id. at § 1151 (suggesting options that would curb the cost of healthcare).
87 See generally H.R. 3200, 111th Cong. § 2
88 Id. at § 163 (detailing measures that could bring immediate changes to healthcare system).
89 Id. at § 116.
90 Id. at § 164.
92 See id.
in Medicare Part D coverage, cap annual spending, and offering a public health insurance option.\textsuperscript{93} The Department of Health and Human Services providing a public plan option is intended as another choice on the Exchange to stimulate further competition, through a public funded insurance plan.\textsuperscript{94} The stated goal of the public plan option "is to create a low-cost plan without compromising quality or access to care."\textsuperscript{95}

Among other items, the bill also "prohib[its] pre-existing condition exclusions from coverage, provid[es] for guaranteed coverage to all individual and employers and automatic renewal of coverage, prohibit[es] premium variances, except for reasons of age, area, or family enrollment, and prohibit[es] rescission of health insurance coverage without clear and convincing evidence of fraud."\textsuperscript{96} H.R. 3200 would also impose an individual mandate for coverage, or in the alternative, assign a penalty tax of 2.5\% of income.\textsuperscript{97} Likewise, employers would also be required to either provide their employees with health insurance coverage or contribute a penalty tax of 8\% of payroll expenditures.\textsuperscript{98} However, small employers with payrolls under $250,000 would be exempt.\textsuperscript{99}

\section*{F. House Republicans: Patients' Choice Act of 2009}

In response to the Democrats' recent health reform proposals, Republican Senators Tom Coburn (R-Okla.) and Richard Burr (R-N.C.), along with Republican Representatives Paul Ryan (R-Wis.) and Devin Nunes (R-Cal.), introduced a health reform bill entitled the Patients' Choice Act of 2009 (the "PCA").\textsuperscript{100} This proposal seeks near-universal coverage by putting affordable coverage choice within the reach of all Americans.\textsuperscript{101} The PCA is built around eight core concepts: (1) an emphasis on

\begin{footnotesize}
\begin{itemize}
\item[93]See id.
\item[95]See id.
\item[97]See id.
\item[98]Id.
\item[99]Id.
\end{itemize}
\end{footnotesize}
prevention, thereby lowering long-term costs; (2) creating an insurance market that allows for convenient and affordable options; (3) guaranteed choice of coverage options; (4) insisting on fairness for every patient (i.e., fewer bureaucratic barriers for patients already in government programs and equal tax treatment for all individuals); (5) fair legal representation and fair compensation for patient injuries; (6) no tax increases or new government spending; (7) restoring accountability to government programs such as Medicare; and (8) inclusion of ideas from governors and states. Like the other proposals, the Republican Patients' Choice Act includes provisions to improve the quality and performance of our health care system. The Patients' Choice Act proposes the creation of a President-appointed Health Care Services Commission which would conduct and support research and prepare reports on price, quality, and effectiveness of health care services. The Patients' Choice Act contemplates the creation of a Forum for Quality and Effectiveness in Health Care within the Health Care Services Commission, with the goal of promoting transparency in price, quality, appropriateness, and effectiveness of health care. Coverage under the PCA will be portable and eligibility will be guaranteed. The PCA adheres to most, but not all, of the principles outlined by President Obama as crucial to successful health reform. However, by failing to require mandatory health coverage, Republicans are not aiming for true universality with their plan. Most outstanding amongst the differences, the PCA does not incorporate the idea of a

102 Id. at 2 (summarizing core concepts of the Act).
104 Patients' Choice Act, supra note 100, at §§ 801-03 (explaining authorities and duties of Health Care Service Commission).
105 Id. at § 813 (noting duties of Forum for Quality and Effectiveness in Health Care).
108 See The Henry J. Kaiser Family Foundation, supra note 106 (stating that the GOP plan does not mandate insurance).
government-run public plan.\textsuperscript{109} The drafters of the PCA have clearly stated, "[i]n solving our health care crisis, Americans already know that government-run programs are not the solution."\textsuperscript{110} They claim "[t]he federal government would run a health care system—or a public plan option—with the compassion of the IRS, the efficiency of the post office, and the incompetence of Katrina."\textsuperscript{111}

In contrast to the House Democrats’ plan, the Republican drafters of the Patients’ Choice Act chose not to impose mandatory obligations upon employers to assist with the purchase of health insurance.\textsuperscript{112} Under the PCA, if individuals are happy with their current insurance and would like to keep their employer-sponsored plan, they may do so.\textsuperscript{113} Like the Healthy Americans Act, the Patients’ Choice Act seeks to eliminate tax benefits from insurance-purchasing corporations and instead give tax credits directly to individuals, thereby increasing wages.\textsuperscript{114} By increasing take-home pay, as well as creating new tax subsidies, Republicans believe that health insurance will be more affordable for individuals.\textsuperscript{115}

\textsuperscript{109} See Ryan & Nunes, \textit{supra} note 103, at A17 (opposing public option); \textit{see also} Editorial, \textit{The Health Care Divide}, CHI. TRIB., Sept. 13, 2009, at C36 (noting GOP fear of the public option).

\textsuperscript{110} See Ryan Homepage, \textit{supra} note at 101, at 1. Recognizing the major issues with the current health care system, the PCA is an attempt to help the system reach its “major potential.” \textit{See id.} The Patients’ Choice Act is a direct Republican response to the Democrats’ current proposed healthcare reform. \textit{See generally id.} It is a bill “to provide comprehensive solutions for the health care system of the United States.” H.R. 2520, 111th Cong. \textsuperscript{5} (2009).

\textsuperscript{111} See Ryan Homepage, \textit{supra} note at 101, at 2 (criticizing the government’s ability to successfully run a government program).

\textsuperscript{112} \textit{Compare} Healthy Americans Act, H.R. 1321, 111th Cong. \textsuperscript{5} 319 (detailing the House Democrats’ proposed plan placing some of the health care burden on employers) \textit{with} Ryan Homepage, \textit{supra} note at 101, at 1, 2 (outlining the proposed Patients’ Choice Act which does not place mandatory obligations on employers and instead emphasizes efficiency).

\textsuperscript{113} See Ryan Homepage, \textit{supra} note at 101, at 6 (allowing employees happy with their employer-provided healthcare the option to keep that plan). The PCA instead aims to provide more options for people, not taking away current, satisfactory healthcare plans. \textit{See id.}

\textsuperscript{114} See \textit{id.} at 6 (allowing Americans an individual tax rebate for their healthcare). This rebate would be approximately $2,300 for individuals and $5,700 for families. \textit{See id.} The bill also emphasizes the fact that lower healthcare costs would also result in higher wages for employees. \textit{See Ryan Homepage, \textit{supra} note at 101, at 6.}

\textsuperscript{115} See \textit{id.} at 6. The combination of the rebate and the pay “increase” would “enable individuals to obtain more affordable and efficient health coverage.” \textit{Id.} These tax cuts would be a significant improvement to the $102 in tax breaks the “poorest Americans” receive for healthcare benefits. \textit{Id.} The shifting of healthcare gives the individual more buying power with that money and gives them the opportunity to determine where that money will go. \textit{See Ryan Homepage, \textit{supra} note at 101, at 6.} Health Savings Accounts (HSAs) already provide a “personal, tax-free savings account” and the new proposal will allow for healthcare premiums to be paid out of these accounts as well; providing individuals another opportunity to increase the value of their money.
Instead of mandatory insurance, the PCA relies on auto-enrollment to assist in enrolling a high percentage of citizens in insurance plans. In a summary of the PCA, the drafters state:

**Simple auto-enrollment.** An Exchange would make it easy for individuals to obtain health insurance by providing new and automatic opportunities for enrollment through places of employment, emergency rooms, the DMV, etc. If individuals do not want health insurance, they will not be forced to have it. Research has shown that auto-enrollment mechanisms—which overcome inertia, complexity, and status quo bias—have achieved near universal levels of coverage. An auto-enrollment mechanism has also been demonstrated to increase the percentage of employee-participation in employer-provided 401(k) plans by 70%—from 20% of new employees enrolled after three months under self-employment, to 90% of new employees participating under auto-enrollment.

Under the Republicans' bill, tax credits can only be used to purchase health insurance or to pay for other medical and preventative services. With auto-enrollment, individuals could choose a plan and pay the insurance company themselves, or the tax credit could be automatically designated to a high deductible private plan that would be fully covered by the credit, if the individual did not opt out. According to Republicans, this method would give near-universal coverage without forcing people to have insurance if they do not want it.

The Patients’ Choice Act includes a provision that changes the Medicare beneficiary identifier number so that social security numbers are not used and includes

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See id. at 7.

116 See id. at 5 (allowing for more patients to have easier access to healthcare coverage).

117 See Ryan Homepage, supra note at 101.


119 Id. (highlighting options). In describing how auto-enrollment works, Senator Coburn described three options: (i) select a plan and write the check themselves; (ii) chose to have the tax credit “automatically” designated to a high deductible private plan; or (iii) opt out. Id. Further, “the credit would cover the full cost of the policy so there would be no fines or penalties.” Id.

120 Patients’ Choice Act Q&As, supra note 118 (outlining how auto-enrollment can create a “positive default” action, which, in turn, “can help millions of Americans currently without insurance have real health coverage for the first time”).

the implementation of systems to better detect fraud and abuse.\textsuperscript{122} The Patients' Choice Act also seeks to end lawsuit abuse by giving grants to states to create alternatives to current tort litigation.\textsuperscript{123}

II. The President Speaks and Congress Returns from Summer Session

A. President Obama’s Joint Session Address/Update Plan

The President sought to reinvigorate the push for health care reform in a recent, high profile address to a joint session of Congress. President Obama outlined three overarching goals for a comprehensive health care reform plan: (1) increase security and stability to those already covered by a private health insurance plan; (2) provide coverage to the uninsured; and (3) lower the cost of health care expenditures for families, business and government.\textsuperscript{124} Regarding the first goal, the plan would prohibit denial of coverage or increasing premiums due to pre-existing conditions, prohibit gender-based insurance discrimination, limit age-based premium variation, and prohibit insurers from rescinding coverage except due to fraud. He would also establish caps on out-of-pocket expenditures to prevent medical bankruptcies, ensure access to free preventative care services (e.g., mammograms, colon cancer screenings, etc.), extend new protections to Medicare beneficiaries, and fill the so-called “donut-hole” in prescription drug benefits under Medicare Part D.\textsuperscript{125}

The President’s second goal, to provide coverage to the uninsured, raises the most controversial issues. Importantly, the President would impose an individual mandate, which requires individuals to obtain health insurance coverage, although a hardship waiver would be available.\textsuperscript{126} In a similar vein, large employers would be required to offer health insurance or else subsidize their employees’ coverage through a fee.\textsuperscript{127} Obama urges the creation of ‘The Exchange,’ a new insurance marketplace that allows individuals and small businesses to compare plans and seeks affordable

\begin{thebibliography}{99}
\bibitem{122} \textit{Id.} \S 513 (requiring a provider of services of supplier to implement fraud and abuse detection mechanisms, and giving oversight to Congress through annual reports on effectiveness).
\bibitem{123} \textit{Id.} \S 601 (permitting grant awards to States to create alternatives to tort litigation).
\bibitem{124} Remarks by the President to a Joint Session of Congress on Health Care (Sept. 9, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/ [hereinafter Remarks] (announcing three basic goals).
\bibitem{125} \textit{Id.} (detailing plan to increase stability and security to those already insured).
\bibitem{126} \textit{Id.} (describing plan to provide universal health care).
\end{thebibliography}
options.128 Until the Exchange takes effect, in four (4) years time, Obama adopts an
interim measure providing low-cost coverage to those with pre-existing conditions by
creating a national “high risk” pool.129 He would also provide need-based tax credits, on
a sliding scale, to help individuals and small businesses better afford insurance
premiums.130

Obama prefers a publicly funded health insurance plan (also referred to as a
“public plan” or “public option”) to ensure that those presently without health insurance
can afford coverage.131 He did express his willingness to consider other alternatives,
specifically citing co-ops and a trigger option, advocated by key Senator Olympia Snowe
(R-Me.).132 It is worth mentioning that the President vigorously disputes charges that
his plan would cover illegal immigrants, abortions, or establish “death panels.”133

Finally, Obama seeks to reduce the costs of national health care expenditures.
He demands that any plan be deficit-neutral, estimates it would cost approximately $900
billion over 10 years, and require additional cuts if savings are not realized.134 He
advocates for a plan that obtains cost savings by eliminating waste, fraud, abuse, and
inefficiencies in the health care system, especially in Medicare and Medicaid.135 Finally,
in a nod to the Republicans, Obama conceded that medical malpractice abuse spurs
defensive medicine, which in turn creates unnecessary costs. He would curb these costs
by adopting medical malpractice reforms. In fact, the President has already ordered the
Department of Health and Human Services to provide incentive grants to those states
that attempt reforms of their respective medical liability systems.136

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128 Id.
129 Id.
130 Id. (providing new tax credits to aid in purchase of insurance).
131 Obama Plan, supra note 127 (summarizing public health insurance option).
132 See Remarks, supra note 124 (discussing other proposals).
133 See id. (addressing controversies).
134 See id. (estimating cost).
135 See id. (discussing burden of health care system).
136 See Memorandum for the Secretary of Health and Human Services: Demonstration Grants
for the Development, Implementation, and Evaluation of Alternatives to the Current Medical
Presidential-Memorandum-Concerning-Medical-Liability-Reform/ (requesting Department make
available demonstration grants for local alternatives to medical liability system).
B. Fall 2009 Congressional Activities—The Baucus Plan, Etc.

Senator Baucus, Chairman of the Senate Finance Committee, responded to the President’s call for health reform by introducing a comprehensive, but complex, health care reform package, entitled America’s Healthy Future Act (Chairman’s Mark). Senator’s Baucus’s proposal, after significant amendments after introduction in committee, was recently passed by the Senate Finance Committee, 14-9, with the influential support of one Republican, Senator Snowe.137 The Baucus plan mirrors the President’s plan in key aspects, especially in its individual mandate for insurance coverage beginning in 2013.138 This plan also supports the creation of state insurance exchanges and affordability tax credits.139 Beginning in 2013, tax credits would be offered on a sliding scale to individuals up to 300% of the federal poverty level to make health care coverage affordable, as well as a modified premium credit for income levels up to 400% of the poverty level.140 The Baucus plan helps the very poor by expanding Medicaid earning up to 133% of the poverty line, but the plan would not cover illegal immigrants.141

According to the Congressional Budget Office (CBO), the Amended Chairman’s Mark has a total expected cost of $829 billion over fiscal years 2010 to 2019, achieves a net reduction in federal deficits over that period of $81 billion, and reduces the number of uninsured by nearly 30 million Americans.142 The large price tag for the bill would cover tax credits and subsidies to facilitate affordable purchases of health care coverage ($345 billion), expansion of Medicaid and CHIP ($461 billion), and small business tax credits ($23 billion).143 In turn, the amended Baucus plan is largely funded by over $400 billion in reductions in direct Medicare and Medicaid spending, various penalties and fees, as well as a 40% excise tax on high-premium insurance plans ($201 billion revenues) of over $8,000 for single policies and $21,000 for family policies.144

139 Id.
140 Senate Comm. on Finance, supra note 138 at 30.
141 Senate Comm. on Finance, supra note 138, at 22, 30.
143 Id. at 5.
144 Id. at 4-7.
There would also be flat fees on several medical industries that would be assessed pro-rata by market share, including pharmaceutical drug manufacturers ($2.3 billion annually), medical device makers ($4 billion annually), health insurance providers ($6.7 billion annually)—although, as a result of the amendment, a previously proposed annual fee ($750 million annually) will not be imposed on clinical laboratories. 145

Importantly, the Baucus plan institutes an individual mandate for all American citizens and legal residents to obtain basic health insurance coverage. There would be an excise tax assessed on adults who fail to obtain or maintain health insurance with the minimum required benefits, in a phased-in amount of $750 per adult in the household by 2017. 146 Notably, this penalty was reduced during the amendment process from an initially proposed maximum amount of $3800 per family. 147 On the other hand, the Baucus plan does not go so far as to mandate employers, large or small, to offer adequate health insurance for their employees. 148 Those employers, with over 50 employees, that fail to offer coverage would still be required to contribute to national health care funding by paying a fee for each employee who receives an affordability tax credit. 149

Baucus advocates significant cuts in Medicare spending, namely to the annual schedule of payments for Part A providers (hospitals), Part B (physicians) payment schedule updates, and Part D premium subsidies. 150 As desired by the President, the plan creates an independent Medicare commission to reduce excessive growth and costs. 151 There would also be reforms to Medicare Advantage plan payments, Medicare disproportionate share hospital payments for uncompensated care costs, home health payments, hospice payments, radiological/imaging service payments, and outpatient payment rates for cancer hospitals, among other elements of Medicare. 152 In addition, his plan seeks to reduce fraud, waste, and abuse in Medicare and Medicaid. 153

146 Senate Comm. on Finance, supra note 138, at 32, 34-35.
147 Id. at 32, 34-35.
148 Id. at 33-35.
149 Id. at 36-38.
150 Senate Comm. on Finance, supra note 138, at 154-188.
151 Id. at 191.
152 Id. at 162-188.
153 Baucus Introduces Landmark Plan, supra note 145, at 16. "The Chairman’s Mark will combat fraud, waste, and abuse by requiring the review of health care providers prior to granting billing.
Importantly, the Baucus plan fails to adopt a public option idea; instead, Senator Baucus advocates for a Consumer Operated and Oriented Plan (CO-OP) program to promote the creation of non-profit, member-run health insurance companies that serve individuals in one or more states. His plan would provide $6 billion to help create these co-ops, although they may not be sponsored state, county or local government entities. Importantly, through Committee amendments, the Baucus proposal now also contains a state plan option, albeit a limited one. States will have access to “establish a federally-funded, non-Medicaid state plan for people with incomes above Medicaid eligibility but below 200% of the federal poverty level (FPL).” Still, these state plans would not be state-run insurance agencies, but must instead contract out to private health insurers.

However, the final version of healthcare reform legislation that is introduced on the Senate floor by Senate Majority Leader Harry Reid will differ from the Finance Committee proposal, in that it contains a public option proposal. Importantly, Reid’s public option proposal contains an “opt-out provision,” allowing states to decline participation in any government-sponsored insurance plan. Reid, sensing difficulty in passage, has commented ultimate passage of legislation may not occur before the end of 2009 as originally expected.

Not to be outdone, the House Democrats, under the leadership of Speaker Nancy Pelosi, just barely passed (220-215) a new comprehensive healthcare bill in the House, entitled “H.R. 3962, the Affordable Health Care for America Act.” The bill offers the latest version of healthcare reform legislation by House Democrats. H.R.

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154 See Senate Comm. on Finance, supra note 138, at 43-44.
155 See id. at 43-44.
156 See id. at 15.
157 See id.
158 See id. at 15-17.
160 See id.
3962 is based on H.R. 3200, America’s Affordable Health Choices Act of 2009, although discernable differences emerge. Endorsements by the American Association of Retired People (“AARP”) and the American Medical Association (“AMA”) proved crucial to passage of H.R. 3962. The CBO estimates H.R. 3962 would produce net costs of nearly $900 billion during 2010-2019, but actually achieve savings of $109 billion in federal deficits over the same period. There is also companion legislation (H.R. 3961, “Physician Medicare Payment Reform Act of 2009”) to rescind scheduled cuts in Medicare payments to physicians, which the CBO estimates to cost $210 billion in direct federal expenditures. Thus, even the net costs of the bills together are in excess of $1 trillion. However, the bill does achieve a major goal of significantly increasing healthcare access, as the CBO estimates that H.R. 3962 decreases the number of uninsured by 36 million Americans.

H.R. 3962, the Affordable Health Care for America Act, “focuses on reducing the number of uninsured, restructuring the private health insurance market, setting minimum standards for health benefits, providing financial assistance to certain


165 See Letter from Douglas M. Elmendorf, Director, Congressional Budget Office, to Congressman John D. Dingell, U.S. House of Representatives 1 (Nov. 6, 2009), available at http://www.cbo.gov/ftpdocs/107xx/doc10710/hr3962Dingell_mgr_amendment_update.pdf. "That net cost itself reflects a gross total of $1,052 billion in subsidies provided through the exchanges (and related spending), increased net outlays for Medicaid and the Children’s Health Insurance Program (CHIP), and tax credits for small employers; those costs are partly offset by $167 billion in collections of penalties paid by individuals and employers." Id. at 3. See also Martin Vaughan, CBO Puts House Health Bill Total Cost at $1.055 Trillion, NASDAQ, available at http://www.nasdaq.com/aspx/stock-marketnewsstory.aspx?storyid=200910291728dowjonesdj online000980 (last visited Nov. 10, 2009).


167 See Letter from Douglas M. Elmendorf, supra note 165, at 5.
individuals, and, in some cases, small employers.” This extremely large bill, nearly 2,000 pages long, would have far-reaching implications for American healthcare, including an individual mandate for universal health insurance coverage, closing the Medicare Part D “donut-hole” in prescription coverage, expanding health insurance coverage to 96% of Americans through federal subsidies, prohibiting exclusion from coverage based on pre-existing conditions. The bill would be partially funded through a surtax on wealthy Americans, at a 5.4% tax rate for individuals with gross income over $500,000 or joint filers with gross income over $1 million.

The Affordable Health Care for America Act legislation passed by the House keeps many of the basic tenets of the earlier version of healthcare reform embodied in H.R. 3200. As alluded to, the public option remains, as do other important aspects of the original bill, such as the individual mandate for health insurance coverage with a penalty tax of 2.5% of income, creation of a national health insurance market/“exchange,” creation of affordability tax credits and expansion of Medicaid, a surtax on wealthy Americans, and a ban on denying coverage to those with preexisting conditions.

Key differences, however, arise between H.R. 3962 and H.R. 3200. First, the final version of the bill contains the controversial Stupak amendment, which purports to codify the Hyde amendment into the healthcare reform bill. Specifically, it prohibits federal funding of abortion services in the public option plan and further prohibits the use of affordability tax credits for subsidizing the purchase of even private plans providing elective abortions. Essentially, federal funds would not be allowed to cover abortion services, either directly or indirectly. Second, unlike H.R. 3200, there are new provisions in H.R. 3962 to establish not-for-profit co-operatives (co-ops). Third, under H.R. 3962, the Secretary of Health and Human Services (Secretary of HHS) will

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168 See CRS Reports, supra note 163, at 5.
170 See id. at § 551.
172 See CRS Summary: H.R. 3962, supra note 171.
173 See id. See also CRS Summary: H.R. 3200, supra note 171.
174 See CRS Summary: H.R. 3962, supra note 171.
175 See id.
177 H.R. 3962, 111th Cong. § 310 (2009).
also be allowed to give incentive grants to states that experiment with new medical liability models, but provisions do not allow any limits on attorney fees or caps on court awarded damages. Fourth, the small business exception for employer contributions has been raised from $250,000 (H.R. 3200) to $500,000 (H.R. 3962). Fifth, H.R. 3962 makes an important change to Medicare Part D, in requiring the Secretary of HHS to negotiate lower drug prices with drug companies. Sixth, quite interestingly, H.R. 3962 also removes the traditional antitrust exemption from the health insurance industry, which could have broad-reaching ramifications.

The most prominent component of the bill is its public option provision, which directs the Secretary of HHS to implement a federal health insurance plan, although it does not contain any provision for individual states to “opt-out” as does Senator Reid’s version. Republicans and the insurance industry have severely criticized the public option because it would have a competitive advantage over private plans, and thereby ultimately drive private plans out of business. The insurance industry criticizes the Affordable Health Care for America Act bill both for its public option and for lack of cost-containment measures. Indeed, a health insurance trade association lambasts the bill, stating “[a] new government-run plan would bankrupt hospitals, dismantle employer coverage, exacerbate cost-shifting from Medicare and Medicaid, and ultimately increase the federal deficit” and “[e]stimates show that a government-run plan would cause millions of people to lose their current coverage.”

178 See id. at § 2531.
179 See id. at § 413; CRS Summary: H.R. 3200, supra note 171.
180 See H.R. 3962 § 1186.
181 See id. at § 262.
182 See id. at §§ 321-31.
185 AHIP Statement on Affordable Health Care for America Act, supra note 184.
It is worth mentioning that House Republicans did recently introduce new healthcare reform legislation as an alternative to the Democrat bill, in the form of an amendment to H.R. 3962, which was rejected by the House membership. Whereas the Democrat approach focused on expanding access, the Republican approach attempts to achieve lower costs in healthcare through greater competition. Some of the major components of the new Republican House measure are to allow cross-state consumer purchases of healthcare, implement medical liability reforms, allow small businesses to create insurance pools, and expand and reform high-risk insurance pools, regardless of pre-existing conditions. The Republican bill was quite limited in scope, expanding coverage to only 3 million currently uninsured individuals. This likely prevented serious bipartisan consideration of the measure.

In the latest turn in the Senate, following the passage of the House bill, Senate Majority Leader Harry Reid has introduced legislation for the full Senate body that incorporates elements of both the HELP Committee’s progressive Affordable Health Choices Act (S. 1679) and the more conservative Baucus proposal. Reid’s proposal differs significantly from the Finance Committee proposal in that it contains a public option proposal, which aligns it more closely with both S. 1679 and the House-passed bill. Unlike the House version, however, Reid’s public option proposal contains an “opt-out provision,” allowing states to decline participation in any government-sponsored insurance plan. Echoing the Baucus plan, there is a provision for fostering co-ops through $6 billion of loans and grants. Overall, the CBO estimates the Reid plan would reduce the federal deficit from 2010-2019 by $130 million, with gross costs of $848 billion over the same period.

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187 See id.
188 See id.
190 See H.R. 3590, 111th Cong. § 1323 (2009).
191 See id.
193 See H.R. 3590 § 1322.
Among other elements in Senator Reid's bill, there will be an individual mandate for health insurance coverage, accompanied by the institution of an exchange for each state (multistate and regional plans can be authorized by each state) to promote competition among health insurance plans and to improve access for consumers. In that regard, CBO estimates large improvements in the insured from 83% currently to 94% by 2019, reducing the number of uninsured by thirty-one million. The plan would institute other reforms to the private health insurance market, such as banning denial of coverage based on preexisting conditions and eliminating annual and lifetime caps on coverage. Reid’s plan also reinforces the theme of all the Democratic proposals of making health insurance more affordable, through tax credits to reduce the effective costs of premiums, for individual and families between 133% and 400% above the FPL and expanding Medicaid up to 133% of the FPL.

The plan would be partly funded through “hundreds of billions of dollars of cuts in Medicare;” and “tens of billions in new fees” on health insurers, drug manufacturers and medical device makers. A potentially controversial item is a proposed increase in Medicare payroll taxes on couples earning over $250,000 a year, from 1.45% to 1.95%, which Reid deemed a “hospital insurance tax.” There would also be an excise tax on high-end employer-sponsored insurance plans as in the Baucus proposal, but with higher tax thresholds ($8,500 for individuals and $23,000 for families), so as to minimize the punitive effect upon union members.

As for abortion, Reid’s Senate bill offers a compromise measure, banning direct spending of federal funds through the public insurance plan while not interfering with private insurance purchases on health insurance exchanges. That is, the Senate plan

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195 See H.R. 3590 § 1322.
196 See id. at § 1311.
197 See Letter to Harry Reid, supra note 194, at 8-9.
198 See H.R. 3590 § 1201.
199 See id. at § 1001.
200 See id. at § 1401.
201 See id. at § 2001.
205 See H.R. 3590 § 1303; see also Ryan Grim, Read the Abortion Compromise in Harry Reid’s Senate
"[w]ould allow people who receive insurance subsidies to choose a plan that covers elective abortions, but insurers must use premium money or co-payments contributed by consumers, and not federal subsidies, to cover the cost of the abortions." Further, it "[w]ould also require that every state offer at least one insurance plan that covers abortion and one that does not."

Ultimate passage may be difficult, causing Reid to comment that ultimate passage of legislation may be as late as 2010. Even if a Senate bill is passed, it is unclear in what manner the final legislation would be achieved, especially with the possibility of several fast-track processes (e.g., mini-conferences and reconciliation), although some form of resolution between the House and Senate bill differences would be needed regardless.

III. Putting the Pieces Together

As the controversial public debate over health care illustrates, on the airwaves and in town halls, it appears that the differences over the various proposals could ultimately define (or cripple) any efforts at reform.

A. Public Plan Option

A major and perhaps overriding source of contention between the Democrats and Republicans over health care reform is whether the final package will include a government-run public health insurance component. President Obama has expressed

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See id.


his support of a public plan option.211 Similarly, most Democrats are in favor of a public plan option.212 The House Democrats' proposal includes a public health insurance option which "is self-sustaining and competes on 'level field' with private insurers in the Exchange."213 This public plan option would offer varying levels of benefits, from basic to premium.214 In addition, a bloc of Senate Democrats has passed a resolution expressing their desire to include a public plan in health care reform legislation.215

There are several forms that a public plan could take. According to a recent study by the Lewin Group, premiums under a public plan would be up to 30% less than private insurance premiums if Medicare payment systems are used.216 The Lewin Group study estimated that this price differential would result in up to 119.1 million of the 171.6 million currently covered by private insurance switching to coverage under the public plan.217 Numbers such as these concern Republicans, who worry that a public plan would "underpay doctors and hospitals, reduce the number of talented professionals in the medical field, and eventually lead to rationing of care," ultimately driving private providers out of the market.218 Republicans argue that a public plan is not necessary because competition and incentives will ensure reasonable risk sharing among plans and encourage plans to offer coverage to high risk populations.219

B. Universal Coverage (the Individual Coverage Mandate)

Yet another major difference between the plans is whether obtaining health insurance coverage should be mandatory. President Obama included aiming for universality as one of his key principles of health reform, and Democrats are heeding his

211 See Letter from President Barack Obama, supra note 6 (stating, "I strongly believe that Americans should have the choice of a public health insurance option operating alongside private plans.").
212 See Thomas B. Edsall, Going Dutch, THE NEW REPUBLIC, Oct. 7, 2009, at 17 (stating "most of the left is focused on preserving the public option, in some form"); see also David Gratzer, The 'Consumer Protection' Racket, WKLY. STANDARD, Sept. 28, 2009, at 15 (2) (mentioning Democrats have been in favor of a public health care option).
213 See generally HOUSE TRI-COMMITTEE PROPOSAL, supra note 75.
214 See id. at 221.
217 See id. at 3.
218 See Ryan Homepage, supra note 101, at 7.
219 See id. at 9.
call by including mandatory coverage in their proposals. Senator Wyden, Senator Baucus, and the House Democrats all seek mandatory coverage for every American in their respective proposals. Republicans, on the other hand, are highly opposed to the idea of mandating that all adults carry health insurance.

At the outset, one concern with mandatory health insurance coverage is whether it would pass Constitutional muster. A recent paper by the O'Neill Institute for National and Global Law at Georgetown analyzed this issue and determined that because mandating health insurance directly affects interstate commerce, Congress does have the authority to issue an individual mandate to purchase health insurance under the Commerce Clause of the United States Constitution. The authors did find, however, that a federal law mandating states or municipalities to pay for employee health insurance could possibly be subject to a challenge under the Tenth Amendment. The

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220 See Obama & Biden, supra note 3.
223 See Mark A. Hall, The Constitutionality of Mandates to Purchase Health Insurance, 37 J. LEGAL MED. & ETHICS 40, 41 (2009) (noting the likelihood of compulsory health insurance purchase to be upheld). A requirement of purchasing health insurance falls within the power of the federal government under the Commerce Clause. Id. In addition, where enforcement may fall solely on the federal tax system, federal power to enforce such a requirement is within the broad powers inferred upon Congress to levy taxes. Id. at 42. In regards to possible violations of personal liberties, no Supreme Court precedent provides for a constitutional objection based on religious liberties, though a statutory objection may be raised, which may be avoided with an exception under the Religious Freedom Restoration Act. Id.
224 Hall, supra note 223, at 42.
225 See id. at 43-44 (discussing recent Supreme Court decisions addressing the Tenth
O'Neill Institute found that, although First and Fifth Amendment Constitutional challenges could possibly arise, they would be unlikely to succeed as long as the individual mandate included a religious exception.226

C. Employer-Based System

A third major source of contention is whether and/or how to restructure the employer-sponsored health care tax exclusion. It appears, however, that successful health care reform must also change the current employer-based health insurance structure.227 While Senator Wyden's plan would eliminate the employer tax exclusion, Senator Baucus, the House Democrats, and the Republicans' Patients' Choice Act would keep the current employer-based system, although each would make changes to it.228

As reported by the Senate Finance Committee in its Description of Policy Options, Financing Comprehensive Health Care Reform: Proposed Health System Savings and Revenue Options, the employer sponsored health care tax exclusion cost

Amendment). Tenth Amendment challenges to federal laws are the result of "commandeering," where the federal government commands state officials to implement federal laws, directly violating state sovereignty. Id. No commandeering element would be required for mandated health insurance, where a federal program would not require state implementation and Congress could preempt state insurance laws as done under ERISA. Hall, supra note 223, at 43-44. 226 Id. at 45-46. Hall discussed the implications of the Religious Freedom Restoration Act of 1993, which prohibits a statute that "substantially burden[s]" a person's exercise of religion. Id. at 44. Analyzing case law, Hall cautioned that a religious exemption would be necessary to avoid any serious constitutional challenge, but also noted that Congress is free to modify any statute. See id. at 44-45; Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (2008). Similarly, an analysis by the health law firm Epstein Becker & Green determined that an individual mandate to purchase health insurance would most probably pass Constitutional muster under the Commerce Clause and would likely survive due process and takings challenges. See generally Carrie Valiant, Congress's Constitutional Authority to Enact Individual Mandates to Purchase Health Insurance, EPSTEIN BECKER & GREEN, P.C. May 8, 2008 (on file with author). Under the Commerce Clause, while the "business of insurance" is without doubt within the scope of the Commerce Clause, federal courts have yet to address whether this definition of the "business of insurance" includes mandated purchase of insurance by individuals. Id. Congress, however, has over time stated that regulation of the insurance business is in the public interest. Id. In regard to the due process clause and takings, the issue arises as to whether the requirement unlawfully infringes on the individual rights of persons, interfering with private property, but the analysis notes that federal courts are unlikely to find federal programs as violating substantive law where the programs serve a "rational purpose." Id.


228 See Healthy Americans Act, H.R. 1321, 111th Cong. (2009) and accompanying text; Baucus supra note 33 and accompanying text; HOUSE TRI-COMMITTEE PROPOSAL, supra note 75; Ryan Homepage, supra note 101 and accompanying text.
the government $132 billion in 2008.\textsuperscript{229} This exclusion, combined with numerous other tax preferences for medical care, totaled $194.2 billion in 2008.\textsuperscript{230} By eliminating the exclusion, or at least limiting the exclusion, the federal government could gain billions of dollars to assist with financing health care reform. The exclusion could then be replaced with tax credits for individuals that could only be used to purchase health insurance coverage, such as in the Republican PCA.\textsuperscript{231}

If the entire exclusion were not eliminated, limits could be placed on the exclusion so that very high value plans or high incomes would not be excludible from gross income.\textsuperscript{232} For example, employees across the board could receive an exclusion from their gross income in an amount equal to the value of the Federal Employee Health Benefit Program ("FEHBP") standard option.\textsuperscript{233} Individuals who purchase benefits with a value over and above the FEHBP standard option would then be taxed on money used to purchase the extra coverage.\textsuperscript{234}

Another possibility would be to apply the limit to a threshold level of income rather than benefits.\textsuperscript{235} In this scenario, taxpayers with adjusted gross income over a certain amount may not get the benefit of the tax exclusion.\textsuperscript{236} A last option would be to combine the two previous options so that the exclusion would be limited based on both the value of employer-provided health insurance as well as the income of the


\textsuperscript{230} Id. Other tax preferences include: exclusion of Medicare benefits from income, deduction for medical expenses above 7.5\% of adjusted gross income, self-employed health insurance deduction, exclusion of medical care and TRICARE insurance for military dependents and retirees not enrolled in Medicare, exclusion of health insurance benefits for military retirees enrolled in Medicare, exclusion of subsidies to employers who maintain prescription drug plans, health savings accounts, and health coverage tax credit. Id.

\textsuperscript{231} See Ryan Homepage, supra note 101 and accompanying text.

\textsuperscript{232} See Senate Comm. on Finance, supra note 138, at 18.

\textsuperscript{233} See id.

\textsuperscript{234} See id.


\textsuperscript{236} See Senate Comm. on Finance, supra note 138, at 18. A limit on the exclusion could also be phased out for taxpayers whose income exceeds the threshold so it is never completely eliminated. Id.
Eliminating the tax exclusion for employers, whether partially or in full, will greatly assist in raising some of the necessary funds for health care reform. Other possible sources of revenue include: (1) modifying or repealing the itemized deduction for medical expenses, (2) repealing or modifying the special deduction and special unearned premium rule for Blue Cross and Blue Shield or other qualifying organizations, (3) modifying health savings accounts, (4) modifying or repealing the exclusion for employer-provided reimbursement of medical expenses under flexible spending arrangements and health reimbursement arrangements, (5) limiting the qualified medical expense definition, (6) modifying the FICA tax exemption, (7) extending Medicare payroll taxes to all state and local government employees, and (8) modifying the requirements for tax exempt hospitals.

D. Other Issues

It is worth mentioning that while the issues of whether to include a government-run public plan, what changes to make to the employer based system, and whether to mandate coverage for all adults are the larger of the concerns, there are other differences between the proposals as well. For example, the Healthy Americans' Act

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237 Id. The Senate Finance Committee gives the following example: “the value of a plan in excess of the actuarial value of the FEHBP could be includable in wages for taxpayers with AGI over $200,000 ($400,000 for joint filers).” Id.
238 See Ezra Klein, Health Reform for Beginners: The Employer Tax Exclusion, WASH. POST, May 21, 2009, available at http://voices.washingtonpost.com/ezra-klein/2009/05/health_reform_for_beginners_th.html (arguing in support of removing or capping exclusion). Eliminating the exclusion would raise more than $300 billion per year; more than necessary for health insurance. Id. Capping tax breaks based on income could provide the necessary funds for health care. Id. See also Van de Water, supra note 235, at 1.
239 See Van de Water, supra note 235, at 19-34 (outlining other possible health care related revenue raisers).
seeks to eliminate SCHIP and Medicaid in favor of private plans, whereas Senator Baucus and the House Democrats seek to expand eligibility for the programs.241

E. Sources of Agreement

Not surprisingly, many of the ideas included in each of the health reform proposals are the same or similar. All of the plans propose creating a public entity (Health Insurance Exchange) to manage the administration of privately run health insurance plans.242 In an effort to regulate price and quality competition, each of the proposed plans would implement standards to regulate benefits offered by plans.243 In addition, every plan makes prevention and disease management a priority in health care reform, and all seek to implement improvements in the delivery of care. Each plan guarantees eligibility to cover pre-existing conditions, and each has requirements that insurance be portable so individuals can keep their health insurance when they move jobs or become unemployed.244

Successful health care reform must also include improvements to patient safety and quality care. This is one of President Obama’s health care reform principles, and each of the proposals has included ideas for improvements in this area, but most especially that put forth by Senator Baucus.245 While Senator Wyden also includes improvements in the quality and performance of our health care system, his changes are not quite as comprehensive as Senator Baucus’s; many of Senator Wyden’s ideas are also included in Senator Baucus’s plan.246

241 Healthy Americans Act S. 391, 111th Cong. (2009). The HAA mandates all Americans purchase health insurance from private companies, eliminating the need to rely on government run programs. Id. The government will pay for the private insurance of those who are currently eligible for Medicare and SCHIP. Id. Senate Finance Committee’s American’s Healthy Future Act expands Medicaid to individuals within 133% of poverty line. Id. House democratic bills expands Medicaid to non-elderly individuals within 133% of poverty line. Id.
244 See supra notes 27-28 and accompanying text (discussing Healthy American’s Act).
245 See supra notes 51-55 and accompanying text.
246 See supra notes 22-26 and accompanying text.
IV. Conclusion

Any final health care reform measures implemented will ultimately be a combination of the various existing proposals. As President Obama himself has said, “Each of us must accept that none of us will get everything that we want, and that no proposal for reform will be perfect.” The question that remains is what components from each of the proposals should work their way into the final health care reform package. Those components that are part of all the proposals are almost certain to be included are the creation of some sort of National Health Exchange to help administer private plans; standards to ensure that benefits offered meet a minimum standard such as the benefits offered by the Federal Employee Benefit Health Plan; guaranteed eligibility, portability, a focus on prevention and disease management, and improvements to delivery of care. In addition, the final health care reform package should make coverage mandatory for all, include a government-run public plan and shift preferential tax treatment from corporations to individuals who purchase health insurance.

A key to successful health reform is mandatory coverage for all adults. The current health insurance system is voluntary—people can either choose to have insurance or to not have it—and it is based on an assessment of risk, both by the insurers and the insured. Those who are very young and healthy may decide that they do not need it, while those who are more at risk tend to have coverage. This raises the total cost of health care coverage, because providers are not able to spread risk as easily between the healthy and the sick, the young and the old. In addition, when individuals without health care coverage do become sick they tend to delay care until it is necessary to receive emergency treatment, which is more expensive. This drives up the total cost of health care even more.

To assist individuals in complying with the mandate to obtain health insurance coverage, final reform legislation should utilize the Republican Patients’ Choice Act.
system of auto-enrollment. Individuals should be given tax credits that could only be applied towards purchasing health insurance coverage. Under auto-enrollment, people could choose a plan and pay for it themselves. If they did not act, however, their tax credit would be automatically applied to a high deductible private plan. There would be no option to opt out.

It is not possible for everyone to have insurance, however, unless affordable insurance is available to all. While the National Health Exchanges proposed in all of the plans will work towards regulating premiums and controlling costs, it is necessary to have another check on the insurance market to ensure affordability for all. Final health care reform legislation should include the option of a public plan to compete with private insurers. A public, government-run plan would have much lower administrative costs than a private plan and would not seek to make a profit.\textsuperscript{250} A public plan would be able to offer lower premiums to individuals, thereby stimulating competition among private plans which are competing against it.\textsuperscript{251} Competition with a public plan would benefit the public by reducing premiums across the board—both premiums for the public plan, as well as premiums for private plans.\textsuperscript{252} This would assist in reaching the goal of universal health care coverage by providing affordable coverage to people who otherwise could not have afforded it. In addition, the public plan would work as a backup plan for individuals not covered through their employers or individuals looking for a change.

The best way to garner bipartisan support while still providing an incentive for private insurers to keep premiums at affordable levels would be to create a fallback government-run public plan that would only kick in if private insurers fail to make coverage more affordable and accessible. By threatening to institute a public plan as a fallback, the market would have an opportunity to control itself before being subjected to competition with a much cheaper public plan.\textsuperscript{253} However, a drawback to the

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\item \textsuperscript{250} Editorial, \textit{A Public Plan for Health Insurance?} N.Y. TIMES, Apr.7, 2009, at A29 (analyzing positive aspects of public plan, including benefits of competition with private insurance companies).
\item \textsuperscript{251} See id.
\item \textsuperscript{252} See id. (discussing benefit of public plan competing with private companies to lower prices across the market but indicating reluctance on the part of private insurers to compete with the government).
\item \textsuperscript{253} See John Holahan & Linda Blumberg, \textit{Can a Public Insurance Plan Increase Competition and Lower Costs of Health Reform?} URBAN INSTITUTE HEALTH POLICY CENTER 1, 2 (2008), http://www.urban.org/UploadedPDF/411762_public_insurance.pdf (implying that large purchasers, such as the government, can control costs by gaining efficiencies); see also Jacob S. Hacker, \textit{The Case for Public Plan Choice in National Health Reform}, INSTITUTE FOR AMERICA'S FUTURE 1 (2008), http://www.law.berkeley.edu/files/Hacker_-_Public_Plan_-_Final_1_21
fallback plan is that it would not guarantee the uninsured an affordable backup insurance plan, and it would be up to private insurers to make plans available to all.

Not surprisingly, one of the most important features of any health care reform legislation is that it must be fiscally sustainable. This has been a great source of debate recently, especially during the country's current economic crisis. One suggestion for financing health reform is to eliminate the tax exclusion so that employers must use after-tax dollars to pay for health insurance.\(^{254}\) One of President Obama's core principles for health care reform is that individuals should be able to have the choice of keeping their current employer-based health plans.\(^{255}\) While this does not necessarily mean that we have to retain the current employer-based system, it makes sense for employers to be able to continue offering coverage to employees if employees are going to have the option to retain that coverage. At the same time, individual employees rather than corporate employers should receive beneficial tax treatment in the form of a tax credit and should be responsible for choosing and paying for health care coverage. In line with Senators Baucus's and Kennedy's proposals, employers should be required to make a substantial contribution to the cost of health care coverage for employees or should be required to make payments to a fund to contribute to the cost of covering the uninsured.\(^{256}\)

In addition, under the current system, individuals with preexisting conditions are often ineligible for coverage of those conditions. In order to reform the health care system, those with preexisting conditions need to be able to obtain affordable insurance. It would not be fair, however, (nor would it be feasible) simply to require insurers to accept preexisting conditions without any other change to the system. In order to spread risk, if preexisting conditions are to be covered, it is necessary for everyone to

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\(^{254}\) See Editorial, *Paying for Health Reform: President Obama is Avoiding One of the Best Options*, WASH. POST, May 19, 2009, at A19 (discussing idea of generating revenue through eliminating tax exemption for employers contributing to health care); Noam L. Levey, *Health Care and Taxes: Congress Eyes Tax on Health-Care Benefits to Fund the Expansion of Coverage*, CHI. TRIB., Mar. 28, 2009, at 11 (explaining that Congress is open to the idea of taxing some benefits to generate revenue).


\(^{256}\) Baucus, *supra* note 33, at iii (proposal would require employers to contribute to a fund for insurance); Ceci Conolly, *Kennedy's Health-Care Measure To Require Employers to Chip In*, WASH. POST, May 29, 2009, at A3 (outlining Kennedy's proposal, explaining that employers would be required to contribute to cost of health insurance).
obtain insurance—even those who are young and healthy.

Comprehensive health care reform must make improvements in patient safety and the quality of care in our health care system, and final legislation should incorporate ideas from all of the plans. Senators Baucus’s and Kennedy’s proposals include detailed ideas for quality improvement and payment reform in Medicare that should be included. Likewise, Senator Wyden’s measures to improve chronic care disease management should also be part of final health care reform efforts, as should the creation of the Republicans’ Health Care Services Commission to improve quality, appropriateness, and effectiveness of health care services.

Once legislation is passed, it will take time to implement the required changes into the system. Final legislation should include Senator Baucus’s detailed plan for immediate steps to create prevention and wellness programs for the uninsured under the Right Choices program. As mentioned, Right Choices would be a temporary program that would immediately provide the uninsured with preventive services such as physical exams, immunizations, and age and gender appropriate cancer screenings.257

Despite all of the tension between the parties and proponents of the various health care reform proposals, there is a lot that we can learn from each of them. Final legislation should draw from each of the plans to craft an economically workable solution that will bring about the change this nation is hoping for.

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257 Baucus, supra note 33, at 28-29.