

**Legislative Bulletin.....February 4, 2009**

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**Senate Amendments to H.R. 2 – Children’s Health Insurance Program Reauthorization Act**

**Key Conservative Concerns**

*Take-Away Points*

- The bill increases spending on the program from the \$40 billion spent over the previous ten years to a total of \$60 billion over just the next four and a half years.
- The bill severely weakens current law requiring states to document the identity and citizenship status of applicants.
- The bill increases taxes by more than \$72.1 billion over ten years.
- The bill creates a middle-class entitlement program by allowing income disregards so that States can continue coverage up to 400% of the Federal Poverty Limit (FPL). According to the Census Bureau approximately 75% of all families are under 400% of FPL (\$84,800 for a family of 4 in 2008).
- removes the five year-year waiting period in current law that new legal permanent residents have before they are able to enroll in Medicaid or SCHIP
- According to a study by the Heritage Foundation, the 62 cent tobacco tax would require over 22 million new smokers in order to finance the expansion of SCHIP.
- Many conservatives may believe that the bill is a step away from private insurance and individual choice to a Washington-controlled healthcare system.

*For more details on these concerns, see below.*

**Senate Amendments to H.R. 2 - Children’s Health Insurance Program  
reauthorization Act of 2009 (Pallone, D-NJ)**

**Order of Business:** The bill is expected to be considered on Wednesday, February 4, under a closed rule that makes no amendments in order and denies Republicans a motion to recommit. The House passed H.R. 2 by a vote of 289 – 139 on January 14, 2009 and will now consider a slightly revised version, as amended by the Senate.

**Major Changes Since the Last Time This Legislation Was Before the House:** The Senate Amendments to H.R. 2 still does not include some of the earlier concession made to Republicans in the 110<sup>th</sup> Congress such as tighter income limits, citizenship documentation requirements, and more comprehensive crowd-out provisions. This bill still maintains income disregards, and an expansion of eligibility, while funding it through an unstable revenue source, a tobacco tax. Further, the legislation removes the five year-year waiting period in current law that new legal permanent residents have before they are able to enroll in Medicaid or SCHIP. Below are highlights of changes made in the Senate Amendments to H.R. 2:

- Does not contain a ban on physician owned hospitals which was previously used as a “pay-for”. According to the CBO, this “saved” \$400 million over 5 years or \$360 million over 4 ½ years.
- Further increases the tax on tobacco from 61 cents to 62 cents per pack in part to make up for the lost revenue from the removal of the physician hospital provision. The Senate amendment also increases the tax on small cigars to the same level as cigarettes immediately.
- Expands coverage of legal aliens by allowing “children” up to age 21 to participate in the program as opposed to age 19 (or higher age if the state has elected to do so through a state waiver) in the House passed version.
- Requires further documentation if the original legal residence paperwork is no longer valid and clarifies that the sponsor of a legal alien will not be held responsible for coverage costs. Currently, the law requires that a legal immigrant sponsor’s income and resources are taken into account in determining eligibility (if they have signed an affidavit of support) and for federally means tested programs the sponsor is financially responsible ensuring that they will not become a public charge.
- Hastens the transfer of non-pregnant childless adults off of SCHIP by shortening the time they can continue on the program at enhanced federal matching funds from September 30, 2010 to December 21, 2009.
- Weakens fraud protection by eliminating a requirement of a parental signature to enroll children through the “Express Lane” eligibility determination contingent. The Senate amendment also gives states the option to rely on an applicant’s reported income on state income tax records or returns.
- Provides an additional dental-only SCHIP option for children who are already enrolled in private coverage if states meet various requirements including having “the highest income eligibility standard permitted.”
- Removes language requiring a separate grant for outreach and enrollment to “overcome language and cultural barriers to program access by Native Americans”.
- Removes a GAO report on coverage and recommendations for territories.
- Establishes another permanent federal commission the Medicaid Payment and Access Commission (MACPAC), to review the Medicaid and SCHIP programs.

- Requires a GAO report on the actuarial soundness of Medicaid managed care payment rates.

**Summary:** H.R. 2 reauthorizes and significantly expands the State Children's Health Insurance Program (SCHIP) over four and a half years through increasing tobacco taxes. The legislation closely follows H.R. 976, which the President vetoed in the 110<sup>th</sup> Congress. *Highlights* of the bill are as follows:

**Cost to Taxpayers:** H.R. 2 provides \$39.8 billion over five years and \$73.8 billion over ten years in *new* mandatory spending. This spending is on top of the \$25 billion over five years that would result from a straight extension of the program. Conservatives may be concerned that half of the spending in the bill is for Medicaid spending not just the SCHIP reauthorization.

The new spending is offset by increasing taxes on tobacco products (see below). However, this CBO score overlooks a major gimmick which the bill employs to lower its costs. The bill dramatically lowers the SCHIP funding in the fifth year by 65%, from \$14.4 billion in the first six months, to \$3 billion for the last six months of that year, and then assumes the lower level for the duration of the program. In all likelihood, such a reduction would not actually take effect, which would make this an effort to generate unrealistic savings in order to comply with PAYGO rules. To that end, H.R. 2 is technically compliant with PAYGO.

**Performance Bonus Payments:** H.R. 2 establishes Performance Bonus Payments (\$3.225 billion in FY2009, plus unspent SCHIP funds in future years) to offset additional enrollment and retention efforts. **Conservatives may be concerned at the lack of payments tied to states meeting enrollment requirement of the poorest children first.**

**Block Grant:** Under current law, a federal block grant is awarded to states, and from the total annual appropriation, every state is allotted a portion for the year according to a statutory formula. The bill extends the SCHIP block grants from FY 2009-13. In addition, the bill creates a new Child Enrollment Contingency Fund capped at 20% of the total annual appropriation, for states that exhaust their allotment by expanding coverage, and Performance Bonus Payments.

**Encourages Spending:** H.R. 2 shortens from three to two years the amount of time a state has to spend its annual SCHIP allotment. Under current law, states are given three years to spend each year's original allotment, and at the end of the three-year period, any unused funds are redistributed to states that have exhausted their allotment or created a "shortfall," i.e. making commitments beyond the funding it has available. In addition, the bill establishes a process through which any unspent funds would be redistributed to any states with a shortfall. **Some conservatives may be concerned that this process provides incentives both for states to spend their allotment quickly and to extend their programs beyond their regular allotments into shortfall, so as to be relieved by the unspent funds of other states or the new Contingency Fund.**

**Expansion to Higher Incomes:** Under current law, states can cover families earning up to 200% of the Federal Poverty Level (FPL) or \$42,400 for a family of four in 2008 *or* those at 50% above Medicaid eligibility. However, states have been able to "disregard" income with regard to

eligibility for the program, meaning they can purposefully ignore various types of income in an effort to expand eligibility. For instance, New Jersey covers up to 350% of FPL by disregarding any income from 200-350%, allowing them to cover beyond 200% with the enhanced federal matching funds that SCHIP provides. H.R. 2 increases the eligibility limit to 300% of FPL or \$63,600 for a family of four but also continues the current authority for states to define and disregard income. States which extend coverage beyond 300% of FPL would receive the lower Medicaid match rate. The bill also grandfathers states with an approved state plan amendment (or a state about to submit such an amendment in compliance with state law) that already covers those above 300% of poverty. This provision is for New Jersey and New York (seeking to cover 400% of FPL or \$84,800 for a family of four). Practically speaking, H.R. 2 places no limit on SCHIP eligibility since states can always manipulate the definition of income to expand coverage, and the Centers for Medicare and Medicaid is limited in its ability to reject such determinations. Proponents of the bill may argue that this is not much different than current law, and that the bill merely increases the coverage limit from 200% of FPL to 300%. **However, some conservatives may be concerned that Congress is passing up an important opportunity to tailor and prioritize SCHIP for *low-income* children by continuing the current practice for income disregards.**

**Adult Coverage:** Under current law, some states cover *non-pregnant, childless adults*— these states have received waivers in the past in an effort to expand health insurance to uninsured populations, even though the program was intended for children. H.R. 2 would prohibit any further waivers, but would provide continued funding for existing coverage of such adults through FY 2009.

Current law allows states to choose whether or not to offer coverage to *pregnant women* (which results in coverage for both the baby and the mother), and currently, many do offer such coverage, after receiving waivers from CMS. H.R. 2 provides a new avenue for states to cover pregnant women through a state plan amendment *if* the state meets the following criteria:

- covers pregnant women under Medicaid up to 185% of FPL;
- covers children under SCHIP up to 200% of FPL;
- eligibility levels for pregnant women are not lower than state's Medicaid level (taking into consideration income disregards);
- covers lower income women before higher income women;
- does not deny benefits to a pregnant women due to pre-existing conditions;
- does not have a waiting list, enrollment cap or limitation on children's coverage; and
- Does not cover pregnant women at higher eligibility levels than children.

SCHIP coverage for a pregnant woman would be transferred to the child upon birth and the child would be *automatically* enrolled in SCHIP until age 1, assuming that the mother's eligibility is proof of infant's eligibility. In addition, this provision would allow states who currently provide coverage to pregnant women (either by a waiver or by regulation) to continue providing such coverage (including postpartum services up to 90 days). This bill also mandates that there be no cost-sharing for pregnancy-related benefits.

Similar to its treatment of non-pregnant childless adults, H.R.2 would prohibit any new waivers to cover the *parents of eligible children*, and there will be a two-year period in which states can transition parents into a separate block grant and current coverage will transition to the lower Medicaid match rate. Current coverage of parents will continue through FY2010, after which states can only continue coverage at the SCHIP match if they meet the following criteria:

- The state does not increase their income eligibility level for parents.
- The state falls into the bottom 1/3 of all states with regards to uninsured low-income children.
- The state proves that they have improved their outreach for eligible children.
- The state is eligible for a bonus for increased enrollment.

If a state does not meet these criteria, they will only receive the Medicaid match rate for currently covered parents.

**Private Insurance Crowd-Out:** According to CBO, under H.R. 2, 2.4 million children will shift from receiving private health insurance to government health insurance. This phenomenon takes place despite a provision in H.R. 2 to offer a premium assistance subsidy under SCHIP for employer-sponsored coverage. A qualifying employer-sponsored plan would have to contribute at least 40% of the cost of any premium toward coverage. This means that they may get worse health care service and become increasingly dependent on the federal government. The bill **removes** provisions included in previous SCHIP legislation aimed at reducing “crowd-out” including studies on how it occurs and best practices on how to reduce the number of occurrences. In addition, as H.R. 2 begins to reduce SCHIP funding in 2013 (if such a reduction is actually intended, see above), some have noted that states may shift these children made newly eligible for a government program into Medicaid. **Some Conservatives may be concerned that H.R. 2 is one more step in the direction away from private insurance and choice to a Washington controlled bureaucrat run single-payer system.**

**Legal Immigrants and Citizenship Certification:** H.R. 2 states that “nothing in this Act allows Federal payment for individuals who are not legal residents.” However, the bill weakens existing law by removing the documentation requests under the Deficit Reduction Act (DRA), specifically the burden that citizens and nationals provide documentation proving their citizenship in order to be covered under Medicaid and SCHIP. Instead, the bill would require that a name and Social Security number be provided as documentation of legal status to acquire coverage and that those names and Social Security numbers be submitted to the Secretary to be checked for validity. If a state is notified that a name and Social Security number do not match, the state must contact the individual and request that within 90 days the individual present satisfactory documentation to prove legal status. During this time, coverage for the individual continues. If the individual does not provide documentation within 90 days, he is “disenrolled” from the program but maintains coverage for another 30 days (after the 90 days given to come up with proper documentation), giving the individual up to four months of coverage on a false identity. **Some conservatives may be concerned that a Social Security number and name are not enough for a proof of citizenship and that more documents should be required to determine eligibility.** For instance, according to a letter from Social Security Administration Commissioner Michael Astrue, a Social Security number would *not*

keep someone from fraudulently receiving coverage under Medicaid or SCHIP (if they claimed they were someone they were not). In addition, this bill may allow illegal aliens the opportunity to enroll falsely in Medicaid or SCHIP and retain coverage for an undetermined amount of time before they are disenrolled for lack of proper identification.

**Elimination of the Five Year Waiting Period for Legal Aliens:** H.R. 2 would remove the five-year waiting period for legal aliens now in place under current law. This provision changes not only the treatment of non-citizens under SCHIP, but also in Medicaid, resulting in an additional \$3.9 billion over ten years according to the CBO. **There is nothing currently to prohibit states from using their own funds, without the federal match to expand coverage to aliens. Conservatives may be concerned that the bill expands coverage to non-citizens.**

**Tax Increase:** H.R. 2 increases the cigarette tax by 62 cents to \$1.01 per pack, and varying taxes on cigars, smokeless tobacco, papers, tubes and pipe products, *supposedly* generating \$38.7 billion over five years and \$72.1 billion over ten years. **Conservatives may have concerns about “the most regressive tax” in American history according to the Congressional Research Service (CRS), as it this is a substantial tax increase on low income individuals in order to pay for an expansion of SCHIP to higher income levels, which it was not initially designed for.** In addition, this revenue source is constantly declining as fewer and fewer individuals smoke, and since placing a tax on cigarettes will likely deter sales, some have questioned the efficacy of the offset. According to study by the Heritage Foundation, “To produce the revenues that Congress needs to fund SCHIP expansion through such a tax would require 22.4 million new smokers by 2017.” The bill also changes the timing for some corporate estimate tax payments.

**Outreach and Enrollment Activities:** From FY 2009 to FY 2013, H.R. 2 provides \$100 million in mandatory funding for grants to eligible institutions to conduct outreach and enrollment efforts for Medicaid and SCHIP. Within this amount, 10% of the funds are set aside for a national enrollment campaign and 10% of funds are set aside for outreach and enrollment efforts for Native American children. Among other things, the funds (\$10 million) set aside for a national enrollment campaign could be used for a “joint public awareness outreach initiatives with the Secretary of Education and the Secretary of Labor regarding the importance of health insurance to building strong communities and the economy.” The Bill creates additional grant programs and encourages states to take steps to increase the enrollment of Native Americans residing near or in reservations by exempting states from the 10% limit on administrative expenses to the extent the administrative expenses are used to increase enrollment of Native Americans in SCHIP and Medicaid. H.R. 2 also allows states to rely on a new Express Lane Agency option to determine eligibility standards for the Medicaid and SCHIP programs. This, among other things, allows states to make a determination for an individual’s eligibility in the Medicaid and SCHIP program based on the individual’s eligibility for TANF, food stamps, the McKinney Homeless Assistance Act, and other federal programs. **Conservatives may be concerned with the weak enforcement provisions and lack of timely verification found in “streamlining” agency option as it may unintentionally enroll non-citizens or income ineligible individuals.**

**Expanded Benefits:** H.R. 2 also expands the benefits that are mandated under SCHIP and Medicaid. For instance, Medicaid-eligible children would be entitled to dental benefits “necessary to prevent disease and promote oral health, restore oral structures to health and function, and treat emergency conditions.” In addition, if a state child health plan provides for mental health benefits, then the plan must ensure that the financial requirements and treatment limitations on mental health or substance abuse benefits are no more restrictive than what is applied to medical and surgical benefits covered by the plan.

**Other Provisions:**

- **Disregarding of Pension Contributions as Income.** The bill disregards “extraordinary employer pensions” as income. According to CMS, only one state would fall into this category—Michigan, due to the auto manufacturers. **Some conservatives may view this as an authorizing earmark.**
- **Medicaid Disproportionate Share Hospital (DSH) Allotment for TN and HI.** The bill extends the DSH allotments for Tennessee and Hawaii through part of 2012, as passed in the Medicare Improvements for Patients and Providers Act of 2008. **Some conservatives may view these provisions as authorizing earmarks.**

**Committee Action:** H.R. 2 was referred to the House Committees on Energy and Commerce and Ways and Means, but was never considered by the Committees and will be brought straight to the floor under a closed rule.

**Does the Bill Expand the Size and Scope of the Federal Government?:** Yes, the bill provides \$39.4 billion over five years and \$73.3 billion over ten years in *new* Mandatory spending – this spending is on top of the \$25 billion over five years that would result from a straight extension of the program. In general, the bill loosens the program’s eligibility requirements expanding the number of children on government programs.

**Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?:** A formal CBO cost estimate with such information is not yet available.

**Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?:** An earmarks/revenue benefits statement required under House Rule XXI, Clause 9(a) was not available at press time.

**Constitutional Authority:** No committee report citing constitutional authority is available.

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