

# THE NEW ENGLAND COUNCIL

*The Weekly Washington Report is organized by NEC committee category for weekly updates on specific issues relevant to our members, plus a report on general activity in Congress*

## WEEKLY WASHINGTON REPORT FRIDAY, APRIL 3, 2009

### NEXT WEEK IN CONGRESS

Congress will be in recess the next two weeks in recognition of Passover and Easter. The House and Senate are scheduled to return to session on (or about) April 20 to begin a five-week session leading up to Memorial Day. With the House and Senate passing respective budget proposals on Thursday, it is possible a conference committee can have a final version of a Fiscal Year 2010 budget ready for action in two weeks. In the coming weeks, the Administration is expected to release its detailed program-by-program FY10 budget proposal.

### BUDGET/APPROPRIATIONS

Yesterday, the House and Senate approved respective versions of a Fiscal Year 2010 budget resolution (H. Con. Res. 85, S. Con. Res. 13). Both are roughly \$3.5 trillion measures that essentially mirror (with minor reductions) the Obama Administration's overall spending requests. The measures include about \$1.1 trillion in domestic spending for FY10, about a 5% increase over FY09, but slightly less than the White House budget outline. The House passed its budget 233-196 (20 Democrats voting against) and the Senate followed suit late last night, 55-43 (two Democrats in opposition). Republicans in both chambers introduced alternative budget proposals, focusing mostly on reducing spending and modifications to entitlement programs such as Medicare, although neither came within shouting distance of being approved. The measure now heads to a conference committee (expected to materialize quickly on an informal basis) which has a number of critical decisions that could determine the final outcome of the FY10 blueprint when it emerges.

One of those decisions is whether or not to include reconciliation instructions in the final budget – essentially directing specific committees to produce specific legislation (protected against a Senate filibuster). The House budget includes reconciliation, which could be used to produce a health care reform bill, while the Senate's does not. The Senate amended its budget (65-33) to ensure any

energy/cap-and-trade bill that seeks to reduce greenhouse gas emissions will need 60 votes in the Senate, striking at the filibuster-protection of the reconciliation procedure. In addition, Senate rules prevent using reconciliation for policy issues not directly relating to budget matters, giving opponents means to strip a number of provisions from a reconciliation bill.

## HEALTHCARE

On Thursday, the House passed the Family Smoking Prevention and Tobacco Control Act (H.R. 1256) by a vote of 298 to 112. The bill allows the Food and Drug Administration (FDA) to regulate tobacco products, “through disclosure, annual registration, inspection, recordkeeping, and user fee requirements”. While the FDA is given authority to regulate the sale and distribution of tobacco products under this bill, it is prohibited from banning tobacco products or eliminating nicotine from tobacco products. Additionally, the bill prohibits certain methods designed to entice buyers (e.g. artificial or natural of cigarettes flavors, advertisements. etc.), raises the minimum age limit for tobacco buyers, and tightens the information required to be disclosed in warning labels. The Congressional Budget Office (CBO) estimates H.R. 1256 to cost \$200 million between 2010 and 2014, with \$300 million in increased revenue over the four-year period. To offset costs, the bill assesses fees on tobacco manufacturing and importation companies, and makes changes to the federal employee retirement program.

A statement of Administrative Policy released earlier this week indicated President Obama’s strong support for the measure, saying, “I am extremely pleased that a strong bipartisan majority of the House of Representatives has passed legislation empowering the Food & Drug Administration to regulate tobacco products. FDA regulation of cigarettes – the most lethal of all consumer products – is long overdue.”

House Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection held a hearing Tuesday to discuss H.R. 1706, a bill to stop brand-name pharmaceutical companies from paying generic companies to postpone the entrance of competing drugs into the market, known as a “pay-for-delay” settlement. Supporters noted at the hearing that 67 percent of prescriptions in the U.S. are filled with generic drugs, and this bill helps to protect the rights of generic drug companies. The Obama Administration and the Federal Trade Commission (FTC) both support the banning of pay-for-delay deals, and FTC Commissioner J. Thomas Rosch testified that these agreements benefits both brand-name and generic companies while negatively impacting consumers. The deals, he explained, allow the generic drug company who first challenges the patent to retain a market exclusivity lasting 180 days, while the brand-name drug company gets to delay the beginning of the 180 days and hold onto their exclusive patent rights for a longer period of time. Rosch also said that the rulings of federal courts allowing pay-for-delay settlements were interfering with

the efforts of antitrust authorities such as the FTC. “The problem is with the court decisions,” and he called on members of Congress to correct it.

Opponents of the bill question the benefits of limiting companies’ ability to settle out of court, arguing that without that option, litigation costs would rise steeply, lowering the incentive for generic companies to challenge brand-name patents for the right to produce cheaper generic medicines. Diane Bieri of the Pharmaceutical Research and Manufacturers of America said that drug patents are vital in order to allow innovating companies to recoup the significant expense of developing new medicines. “Research-based companies and their investors need to be confident that the law will respect and uphold the critical role of intellectual property,” she said. She also testified that restricting settlements would mean more costs spent on litigation, and because brand-name companies win more than half of cases challenging patents, this could mean fewer generic drugs entering the market.

On Thursday, the Senate Committee on Health, Education, Labor and Pensions (HELP) held a confirmation hearing for Health and Human Services (HHS) Secretary nominee Kansas Governor Kathleen Sebelius. Governor Sebelius fielded questions from HELP Committee members on her track record on health reform in her home state, and possible healthcare reform solutions for the nation. Sebelius said her experiences as a Governor, healthcare purchaser, and Insurance Commissioner put her in a unique position to be an effective leader in national health reform. Sebelius’ 20 years of experience in healthcare has yielded the state’s version of the Children’s Health Insurance Program (SCHIP), expanded programs for seniors and low income children under the state Medicaid program, and provided greater healthcare access to Kansans living in rural areas—which she explained were all examples of her commitment to improving the quality of care for Kansans and all Americans. “Inaction [on national healthcare reform] is not an option. The status quo is unacceptable, and unsustainable” she said. Sebelius also was clear her goal to improve programs under the Centers for Disease Control and Prevention, Food and Drug Administration, and the National Institutes of Health. HHS will “ensure that the agency [NIH] has the support to capture the opportunities of biomedical research that are core Department’s mission of improving the quality and length of our lives” she said. Sebelius is expected to be confirmed by the full Senate after the April recess.

## TECHNOLOGY

On Thursday, the Senate Judiciary Committee reported out the Patent Reform Act of 2009, 15-4. A hurdle to the bill’s approval was removed earlier in the week when an agreement was reached by several key Committee members on the issue of how judges may arrive at damage awards in patent infringement lawsuits. Members agreed to “gatekeeper” language which provides, “a greater role for the judge to identify the appropriate legal standards and relevant factual

contentions for the jury,” including balancing the value of the infringed device and the overall cost of the whole product. Among other changes made during Thursday’s mark-up was a clarification of where plaintiffs may file their patent cases to limit forum shopping. A companion bill (H.R. 1260) is awaiting action before the House Judiciary Committee.

The Chairman and Ranking Member of the Senate Commerce Committee this week introduced a bill (S. 778) to strengthen and expand our nation’s cybersecurity defenses, including expanding the federal government’s role over cybersecurity to the protection of critical national infrastructure controlled by the private sector. The measure creates the Office of the National Cybersecurity Advisor in the Executive Office of the President to coordinate and oversee all federal cybersecurity operations, whether they are carried out by Homeland Security, the National Security Agency, the Pentagon, or the Department of Commerce. In addition, S.778 takes strides to protect civil liberties and privacy matters involved in the expansion of any cyber-oversight as well as increase public awareness of the importance of the protection of cyber-infrastructure. U.S. Senator Olympia Snowe (R-ME), the Ranking Member on the Committee, stated, “Uniquely designed to establish a fully integrated public-private partnership to coordinate cyber security efforts, this legislation will ensure we have many of the tools to target, isolate and effectively combat cyber-attacks in America.”

### ENERGY/ENVIRONMENT

Key House Energy and Commerce Committee leaders, including Congressman Ed Markey (D-MA), this week rolled out draft climate change language that would create a nationwide cap-and-trade program to limit greenhouse gas emissions and promote the development of renewable energy. The American Clean Energy and Security Act is divided into four parts (including the cap-and-trade section) with sections devoted to clean energy, energy efficiency, and safety nets focused on the protection of businesses and consumers during the implementation of the bill. The renewable energy section includes an alternative energy mandate of 6% starting in 2012 and growing to 25% by 2025, as well as a focus on carbon capture, electric vehicle development, and improvements to our nation’s electric grid. The bill also promotes the development of “green jobs” by empowering the Department of Education to fund college curriculums and training to prepare its students for employment in alternative energy development.

The climate change section is aimed at companies that emit more than 25,000 tons of carbon dioxide annually. Using a cap-and-trade program where allowances are allocated to emitters of greenhouse gases (and possibly banked for future use or traded within the industry), the bill uses 2005 emissions levels as a baseline to reduce GHG emissions by 3% in 2012 and rising to 83% in 2050. The bill language does not specify how the allowances would be awarded.

The Committee aims to complete work on the legislation by Memorial Day, and

has scheduled hearings for the first week after the upcoming Congressional recess, with mark-ups following in late April and early May. In the 110<sup>th</sup> Congress, the Energy and Commerce Committee (under different leadership) failed to introduce a comprehensive climate change bill until late in 2008, beyond the point for reasonable expectation of action. Several emissions bills have also been referred to the House Ways and Means Committee presenting an alternative to a cap-and-trade proposal, instead proposing a tax on the emission of CO<sub>2</sub> (without the ability to trade or purchase allowances). The Senate was able to move a cap-and-trade bill to the floor last year where it was pulled after only a few days of debate. In its FY10 budget overview released in February, the Obama Administration included revenue estimates from an expected cap-and-trade bill beginning in FY12.

The Senate Energy and Natural Resources Committee began the process of codifying a comprehensive energy bill in a markup on Tuesday. Three smaller pieces of legislation will figure into the eventual energy package: the Energy and Water Integration Act (S. 531), the Appliance Standards Improvement Act (S. 598), and the Restoring America's Manufacturing Leadership through Energy Efficiency Act (S. 661). S. 531 is aimed at conserving water usage during energy production, while S. 598 and S. 661 would raise standards for energy efficiency in appliances and manufacturing, respectively. Committee members approved minor amendments to each bill by voice vote, but did not yet approve the bills despite general bipartisan agreement. Tuesday's session was the first of at least four planned markups according to Committee Chairman Jeff Bingaman, who hopes to have a comprehensive energy package ready by the end of the month. The legislation discussed is expected to be increasingly contentious, including measures to modernize the national power grid and require significant increases in the amount of renewable energy sources used to generate electricity. Legislation on the issue of nuclear power and waste storage has yet to be offered, and may pose a threat to bipartisan agreement on a comprehensive energy bill.

On Tuesday, the role of green jobs in the economic recovery was the subject of a hearing of the Workforce Protections Subcommittee of the Senate Committee on Education and Labor. While supporters celebrated that the economic stimulus bill made green jobs a significant priority (with \$500 million included for green job training), other members questioned the wisdom of public investment without a static and agreed-upon definition for "green jobs." In his testimony William Bogart, Professor of Economics at York College, agreed, saying proponents of the stimulus bill who point to its investment in the creation of green jobs as a means to combat the economic crisis fail to take into account certain key factors. While the high labor intensity of alternative energies may mean more jobs, Mr. Bogart said, the short-term benefit of increased employment is outweighed by the long-term inefficiency of requiring more labor in order to produce the same amount of energy for consumers. In addition, he cautioned that "many green jobs are substitutes for existing jobs" which will be lost during the conversation to

alternative energies. Kathy Krepcio of the John J. Heldrich Center for Workforce Development at Rutgers University countered that many of the green job openings available immediately will be in retrofitting buildings and homes for increased energy efficiency, and will be filled with conventional occupations such as electricians, mechanical engineers, and construction workers, some of which may require, “a new layer of ‘green’ skills.” She stressed that because the technology behind increased energy efficiency and renewable energy requires a significant capital investment, it is vital that public funds close the gap left by unwilling private investors in order to ensure a successful transition to a greener economy.

### FINANCIAL SERVICES

With 15 months until new Federal Reserve regulations governing certain practices of credit card companies take effect, two Congressional panels this week passed similar bills altering the disclosure, billing, and interest rate practices of the credit card industry. The Senate Banking Committee (S. 414) and a Subcommittee of the House Financial Services Committee (H.R. 627) this week passed bills limiting the basis for increases in interest rates and limiting the ability of companies to increase interest payments. Both measures also include (different) minimum age limits of borrowers to which companies can issue cards. In a bit of a surprise the House Subcommittee delayed implementation of the regulations from 90 days to 12 months (the Senate bill directs the reforms to be in place nine months after enactment). The House passed a similar measure last fall but the Senate failed to advance the bill. While generally favored by consumer advocacy groups, the measure is strongly opposed by the American Bankers Association which believes the measure will harm bank’s ability to extend needed credit to consumers and limiting that ability is, “very risky business and the Committee's action today will unfortunately make it harder - not easier - for banks to continue doing so. Credit card lenders of all sizes will likely have to pull back on providing reasonably-priced credit to a wide range of consumers and small businesses. It is hard to see how that makes good policy sense.” The bill cleared the House Subcommittee by voice vote and eked out of the Senate Banking Committee 12-11.

The National Insurance Consumer Protection Act was introduced this week (H.R. 1880), a measure that seeks to create, “a parallel, national system of regulation and supervision for insurers, insurance agencies, and insurance producers (agents and brokers).” The bill would create an Office of National Insurance within the Treasury Department and insurance companies would have the option to continue to be regulated on a state-by-state basis (the status quo) or chose to be licensed and chartered nationally. H.R. 1880 also includes provisions that state and national insurance commissioners would fall under the purview of the “systematic risk” regulator expected to be created in a forthcoming comprehensive overhaul of the financial services system.

On Wednesday, the Senate Small Business and Entrepreneurship Committee unanimously approved the nomination of a New Englander to head the Small Business Administration (SBA), approving Karen Gordon Mills of Brunswick, Maine to be the new SBA Administrator. In the late 1990's Ms. Mills, a graduate of Harvard University, founded a venture capital firm and has experience with a diverse range of businesses including Scotts Miracle-Gro, General Foods, and McKinsey & Co. She also served as the head of the Council on Competitiveness and the Economy under Maine Governor John Baldacci. The SBA will be responsible for implementing a significant portion of the recent economic stimulus bill as well as overseeing a recently-announced Treasury Department plan to use Troubled Asset Relief Program funding to back small business loans.

### EDUCATION

On Wednesday, the Department of Education (DOE) announced a \$44 billion federal grant opportunity for states and public schools created by the American Recovery and Reinvestment Act. The first round of funding will be available to qualifiers within two weeks of DOE approval, with the second round available later in the year. Proper spending will be strictly enforced. "Under the law passed by Congress, the top priority for these dollars is to do right by our schools and our kids. If states play games with these funds, the second round of stabilization funds could be in jeopardy and they could eliminate their state from competitive grant money. This money must be spent in the best interests of children," said DOE Secretary Arne Duncan in a statement. The application and guidelines can be found on the DOE's website at: <http://www.ed.gov/policy/gen/leg/recovery/index.html#apps>.

On Wednesday, the House enacted the Edward M. Kennedy Serve America Act (H.R. 1388) by a vote of 275-149, sending it to President Obama for his signature. The Serve America Act reauthorizes various national service programs under the National Community Service Act of 1990, and creates new programs designed to encourage community service and volunteerism. Among the newly created service programs are education initiatives which provide funding to elementary, secondary and post-secondary schools, and students in exchange for a commitment to serve their community and their nation by helping those in need. According to the Administration, President Obama "strongly supports" the national volunteer service bill and is expected to sign it into law.

### TRADE

Overturing the nearly 50-year old travel ban (not necessarily the trade embargo) preventing most U.S. citizens from visiting Cuba has received significant attention in the past few weeks. A Senate bill (S. 428) was introduced this week that directs the, "President may not regulate or prohibit, directly or indirectly, travel to or from Cuba by United States citizens or legal residents," unless, "the

United States is at war with Cuba, armed hostilities between the two countries are in progress, or there is imminent danger to the public health or the physical safety of United States travelers.” A similar bill, H.R. 874, has been introduced in the House by Congressman Bill Delahunt (D-MA)

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