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Incomplete Reform: How the Patient Protection and Affordable Care Act Fails to Achieve Trust Health Transformation

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ESSAYS

INCOMPLETE REFORM: HOW THE PATIENT PROTECTION AND AFFORDABLE CARE ACT FAILS TO ACHIEVE TRUE HEALTH TRANSFORMATION

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INTRODUCTION

The Patient Protection and Affordable Care Act (PPACA)[1] signed into law by President Obama on March 23, 2010,[2] constitutes some of the most sweeping legislation of any kind in the past forty years. The 2,700-plus-page law attempts to reform one-sixth of the U.S. economy,[3] or more than the entire gross domestic product of China.[4] While some aspects of the law set us on a road toward positive reform in the area of health care delivery, the vast majority of the legislation provides onerous barriers to true and needed transformation of the system. The vast government bureaucracy it creates (159 new federal commissions, committees, coordinators, and programs)[5] denies the necessary

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended in scattered sections of 25 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.) [hereinafter PPACA]. For ease of reference, PPACA as used here also includes amendments made to it by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

2. Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES, Mar. 23, 2010, at A19.

3. CONG. BUDGET OFFICE, THE LONG-TERM OUTLOOK FOR HEALTH CARE SPENDING (2007), http://www.cbo.gov/ftpdocs/87xx/doc8758/11-13-LT-Health.pdf.

4. *China GDP Growth Rate*, TRADING ECON., http://tradingeconomics.com/Economics/GDP-Growth.aspx?symbol=CNY (last visited Jan.17, 2011).

5. *New Federal Bureaucracies Created in Pelosi Health Care Bill*, GOP (Nov. 2, 2009), http://www.gop.gov/policy-news/09/11/02/newfederal-bureaucracies-

reliance on consumer- and market-driven reforms and seeks to move us toward a flawed government-run health care system. Despite the attempt at overhauling the current system, significant changes are still required in order to produce a twenty-first century modern health care system that saves lives and saves money while expanding coverage to all.

LOWER COSTS

One of the main goals of any type of health care reform should be to lower costs throughout the system. Unfortunately, the PPACA does nothing to defray costs and will even increase the price of health care according to the Congressional Budget Office.[6] The law heaps $500 billion of taxes on business owners, individuals, research-driven pharmaceutical companies, and many others.[7]

Increased taxes and fees are not the right way to bend the cost curve, which formulates the vast majority of PPACA's attempts. Instead, we should look to ideas such as reducing or eliminating fraud, waste, and abuse in the system (estimated at upwards of $100 billion annually)[8] and reforming medical malpractice laws such that doctors are not practicing defensive medicine that drives up insurance premiums. Numerous best

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created-in. *See also, e.g.*, Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, § 1005, 124 Stat. 1029, 1036 (2010) (establishing a Health Insurance Reform Implementation fund); PPACA § 10212, 124 Stat. at 932 (establishing a Pregnancy Assistance Fund).

6. CONG. BUDGET OFFICE, AN ANALYSIS OF HEALTH INSURANCE PREMIUMS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (2009), http://cbo.gov/ftpdocs/107xx/doc10781/11-30-Premiums.pdf. *But see Health Care*, CONG. BUDGET OFFICE, http://www.cbo.gov/publications/collections/health.cfm (last visited July 5, 2011) ("On March 20, 2010, CBO released its final cost estimate for the reconciliation act, which encompassed the effects of both pieces of legislation. . . . CBO and the staff of the Joint Committee on Taxation (JCT) estimate that enacting both pieces of legislation will produce a net reduction in federal deficits of $143 billion over the 2010–2019 period. About $124 billion of that savings stems from provisions dealing with health care and federal revenues; the other $19 billion results from the education provisions. Those figures do not include potential costs that would be funded through future appropriations (those are discussed on pages 10–11 of the cost estimate)."). These CBO reports show one thing: that no one is certain on what the final cost will be, but different accounting principles can be used to get the desired result, at least for the next 10 years. Importantly, both show that the bill is costly and discuss that there is no real guess for what PPACA will cost outside of the next 10 years.

7. *See* CURTIS S. DUBAY, HERITAGE FOUND., OBAMACARE: IMPACT ON TAXPAYERS (2010), *available at* http://report.heritage.org/bg2402.

8. *Healthcare Fraud*, CTR. FOR HEALTH TRANSFORMATION, http://www.healthtransformation.net/cs/healthcarefraud (last visited Jan. 17, 2011).

practice models exist that demonstrate how to bring down costs in the system without higher taxes that stifle innovation.

For instance, Blue Cross/Blue Shield of Minnesota instituted a smoking cessation program that included a comprehensive approach to reducing tobacco use and exposure to secondhand smoke.[9] The program incorporated policy and community support, along with clinical, worksite, and individual interventions. The innovative approach also included phone cessation assistance and led to a significant drop in the smoking rate. For all plan types, the cumulative savings over five years was $126.8 million in reduced health care costs, which included savings for nonsmokers as well.[10] The program illustrated how a private-sector approach significantly bent the cost curve in a positive direction without any level of government interaction. This example and many others show the important role of consumer-driven solutions that can help provide true transformation.

BETTER DELIVERY OF CARE

Another vital element of health care reform must be to increase the quality and delivery of care. Under the current model and even that set out by PPACA, little incentive exists for providers to provide the best possible care to patients. The fee-for-service model we presently employ encourages doctors to schedule more appointments and order more tests and procedures than might be necessary in order to maximize profit. Incorporating reforms into the system that reward positive health outcomes for the patient could significantly improve the quality of care and have been shown to also reduce the overall cost of care.[11]

One thing that certainly will not aid in bettering the delivery of care is the impending Medicaid expansion due to PPACA. Up to an estimated eighteen million additional individuals will flood state Medicaid rolls over the next several years.[12] Many states are

9. CTR. FOR HEALTH TRANSFORMATION, HEALTH CARE THAT WORKS: ANSWERING PRESIDENT OBAMA'S CHALLENGE OF FINDING WHAT WORKS 8 (2009), http://www.healthtransformation.net/galleries/default-file/Healthcare%20That%20Works.pdf.

10. *Id.*

11. *See* David Leonhardt, *Making Health Care Better*, N.Y. TIMES, Nov. 8, 2009, at MM31 (describing Intermountain Healthcare, a company that has developed a sophisticated, yet accessible model that rewards providers for improving health outcomes that appropriately compensate them, while at the same time markedly lowering costs for the patient and payer alike).

12. Memorandum of Richard S. Foster, Chief Actuary, Ctrs. For Medicare & Medicaid Servs., Dep't of Health & Human Servs., Estimated Financial Effects

currently swollen past capacity as is, and many providers are reducing or limiting their intake of Medicaid patients. The result would be a large strain on emergency rooms that would bottleneck delivery and lower the overall quality of care.

ACCESS TO CARE

The ability of all individuals to access care is a vital component of reforming our health care system and keeping people healthy. President Obama and his Democratic colleagues in Congress touted their health care reform package as a bill that stressed and increased coverage. While an increased number of individuals will be eligible for insurance coverage under the law, it still leaves around ten million Americans uninsured,[13] which does not account for the large estimates of employees, Medicare beneficiaries, and others who may lose their current plans. Washington must address the issue of Medicare reimbursement, where providers are reimbursed at unsustainably low rates for services they provide to Medicare beneficiaries.[14] This could easily lead to many providers no longer accepting Medicare patients, thus denying them access to needed care. The Medicare trust fund could be insolvent by as early as 2017 according to Centers for Medicare and Medicaid actuaries,[15] and cutting the program by a half trillion dollars without addressing the low payment Medicare providers receive could severely choke off critical access to care for many seniors. We believe that increasing private market-based coverage options as opposed to limiting choices to a few bloated government bureaucratic systems represents the proper way to increase the access to quality care for all individuals. Unfortunately, PPACA pushes us one step closer to a

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of the "Patient Protection and Affordable Care Act," as Amended, at 6 (Apr. 22, 2010), https://www.cms.gov/ActuarialStudies/Downloads/PPACA_2010-04-22.pdf.

13. *See* Letter from Douglas W. Elmendorf, Director, Cong. Budget Office, to Nancy Pelosi, Speaker of the House, U.S. House of Representative, at tbl.2 (Mar. 18, 2010), http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf (Preliminary Estimate of the Direct Spending and Revenue Effects of an Amendment in the Nature of a Substitute to H.R. 4872, the Reconciliation Act of 2010).

14. Early in 2010, the Mayo Clinic in Scottsdale, Arizona stopped accepting Medicare patients due to the low reimbursement levels and its inability to provide profitable medical services as a result. David Olmos, *Mayo Clinic in Arizona to Stop Treating Some Medicare Patients*, BLOOMBERG (Dec. 31, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aHoYSI84VdL0.

15. THE BDS. OF TRS. OF THE FED. HOSP. INS. AND FED. SUPPLEMENTARY MEDICAL INS. TRUST FUNDS, ANNUAL REPORT 70 (2010), http://www.cms.gov/ReportsTrustFunds/downloads/tr2010.pdf.

single-payer system that threatens choice and competitive pricing.

LEGAL CHALLENGES

States across the country have filed suit against the federal government in response to PPACA,[16] setting the stage for a legal battle that could produce a large ripple effect determining the reach of the legislation. Nearly twenty states joined together with two individuals and the National Federation of Independent Businesses claiming the individual mandate is unconstitutional and a violation of the Constitution's Commerce Clause and Tenth Amendment.[17] Several states amended their state Constitutions and other states passed laws prohibiting the federal government from compelling their citizens to purchase health insurance, which adds to the complexity of the cases.[18] A further complication is the lack of a severability clause in the law and the possibility that striking down the individual mandate would nullify the law's totality.

The lawsuit brought against Health and Human Services Secretary Kathleen Sebelius over PPACA by Virginia Attorney General Ken Cuccinelli warrants particular attention, as Circuit Court Judge Henry Hudson struck down the individual mandate portion of the law in December 2010.[19] This ruling was signifi-

16. *See, e.g.*, Virginia *ex. rel.* Cuccinelli v. Sebelius, 702 F. Supp. 2d 598 (E.D. Va. 2010); Florida *ex. rel.* McCollum v. U.S. Dep't of Health and Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010).

17. Amended Complaint, Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., No. 3:10-cv-91 (N.D. Fla. May 14, 2010), 2010 WL 2114067.

18. *See* ARIZ. CONST. art. XXVII, § 2; OKLA CONST. art. II, § 37; IDAHO CODE ANN. § 39-9003 (LexisNexis Supp. 2010); UTAH CODE ANN. § 63M-1-2505.5 (LexisNexis Supp. 2010); VA. CODE ANN. § 38.2-3430.1:1 (LexisNexis Supp. 2010); 2010 Mo. Legis. Serv. 1764 (West) (to be codified at MO. REV. STAT. §§ 1.330, 375.1175).

19. Virginia *ex. rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 782 (E.D. Va. 2010) ("Neither the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market. In doing so, . . . [PPACA] exceeds the Commerce Clause powers vested in Congress under Article I."). *See also* Florida ex rel. Bondi v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, *29 (N.D. Fla. Jan. 31, 2011) ("To now hold that Congress may regulate the so-called "economic decision" to not purchase a product or service in anticipation of future consumption is a 'bridge too far.' It is without logical limitation and far exceeds the existing legal boundaries established by Supreme Court precedent."). *But see* Liberty Univ., Inc. v. Geithner, No. 6:10-cv-00015-nkm, 2010 WL 4860299, *14 (W.D. Va. Nov. 30, 2010) ("[T]here is a rational basis for Congress to conclude that individuals' decisions about how and when to pay for health care are activities that in the aggregate substantially affect the interstate

cant not only because it marked the first instance of a declaration of unconstitutionality surrounding the law, but also because the individual mandate represents a primary funding source of the legislation. The legal battle surrounding the mandate will more than likely make its way to the Supreme Court, where agreement with Judge Hudson's decision could strike a death knell to the overall implementation of the law.

Regardless of how these cases are ultimately decided, however, the fact that they were filed immediately upon passage of the law illustrates the law's unprecedented unpopularity among individuals[20] and state governments around the country. The disconnect between policy makers in Washington and those involved with health care reform at the ground level is astonishing. Participants within the system recognize that proper reform is necessary in order to rein in costs and improve the overall quality of health care delivery. The repudiation of the law, as evidenced through popular opinion and even legal challenges, demonstrates the need for continued work at designing and implementing a proper twenty-first century intelligent health system.

VISION FOR THE FUTURE

Health care reform is not finished. Despite the incomplete legislation passed through backroom deals, which adds nearly 500 implementation deadlines that could eventually make the Health and Human Services Department larger than the Department of Defense,[21] much lies ahead. As we march toward crea-

health care market."); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 893–94 (E.D. Mich. 2010) ("There is a rational basis to conclude that, in the aggregate, . . . have clear and direct impacts on health care providers, taxpayers, and the insured population who ultimately pay for the care provided to those who go without insurance. There are the economic effects addressed by Congress . . . ."). The district court split shows the novelty of the question, one that will likely end up at the Supreme Court. It is because of the novelty of the question of whether the federal government even has this power that more debate should have been held on this issue rather than just assuming it was true.

20. Numerous polls since the law's passage have shown that a significant portion of Americans not only oppose the law but also favor its repeal. Fifty-five percent of those surveyed by Rasmussen Reports in late October 2010 supported the law's repeal. *Health Care Law: 51% Expect Health Care Plan to Increase Deficit*, RASMUSSEN REPORTS (Oct. 18, 2010), http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/october_2010/51_expect_health_care_plan_to_increase_deficit. Support for repeal crested at sixty-three percent in mid-May 2010. *Id.*

21. *See, e.g.*, PPACA, Pub. L. No. 111-148, §§ 3021, 4001, 124 Stat. 119, 389, 538 (2010). Further, it is not clear that PPACA will survive in its current

tion of the state insurance exchanges in 2014 and onerous penalties on some employers who fail to meet stringent coverage requirements,[22] the health care landscape will change dramatically. Many people will lose their current coverage due to overly-strict government requirements on grandfathered plans[23] (in direct opposition to President Obama's promise to the contrary),[24] other anti-free-market directives, and the $500 billion worth of Medicare cuts that threaten to restrict seniors' access to care.

Nevertheless, there is hope. We have seen many amazing examples of private sector ingenuity positively affecting the health care marketplace and have had the pleasure of working with them at the Center for Health Transformation. From the Personal Evaluation System developed by WorldDoc, Inc., which helps individuals track their own medical care electronically and thus reduce costs and improve individual health,[25] to the groundbreaking work being undertaken by General Electric and

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form. Besides court battles about the constitutionality of the individual mandate, there are also efforts in Congress to repeal and replace the legislation. *See* Repealing the Job-Killing Health Care Law Act, H.R. 2, 112th Cong. (2011).

22. PPACA § 1513, 124 Stat. at 253–56. *See also* HINDA CHAIKIND & CHRIS L. PETERSON, CONG. RESEARCH SERV., SUMMARY OF POTENTIAL EMPLOYER PENALTIES UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA) (2010), www.shrm.org/hrdisciplines/benefits/Documents/EmployerPenalties.pdf.

23. *See* Interim Final Rule and Proposed Rule for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34536 (proposed June 17, 2010) (to be codified at 26 C.F.R. pts. 54 & 602, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147). The report claims that as many as fifty-five percent of employers may have to relinquish their current health care coverage in 2012 and sixty-nine percent in 2013 due to the stringent requirements of the proposed rule, thus forcing many employers to drop coverage for their employees altogether.

24. President Barack Obama, Remarks by the President to a Joint Session of Congress on Health Care (Sept. 9, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/ ("[I]f you are among the hundreds of millions of Americans who already have health insurance . . . nothing in this plan will require you or your employer to change the coverage or the doctor you have. Let me repeat this: Nothing in our plan requires you to change what you have.").

25. *Personal Health Management System*, WORLDDOC, http://www.worlddoc.net/products/worlddoc247.asp (last visited Jan. 17, 2011) ("The core component of WorldDoc's Consumer Care Management[sm] systems is the web-based WorldDoc 24/7 personal health management system. WorldDoc 24/7 is an intuitive, interactive solution that empowers users to evaluate symptoms, understand their health issues, assess health risks and take steps to decrease those risks.").

its Healthymagination project,[26] private sector innovation is flourishing. At the Center, we will continue to advocate for private sector innovation to be incorporated into any legislative and market modifications that take place in the coming years. Whether it be more prolific adoption of health information technology in hospitals and doctors' offices, greater reliance on consumer-driven healthcare models, or increased funding for Alzheimer's research, the Center will continue to advocate for ideas that move us toward a twenty-first century model that values better care at a lower cost.

26. HEALTHYMAGINATION, http://www.healthymagination.com (last visited Jan. 17, 2011) (stating their mission of "creating better health for more people").