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NAIFA To Work with Bill Sponsors on Proposed Changes to Rules for Qualifying as Independent Contractor

Issue: Independent Contractor Status of Registered Representatives and Financial Advisors

Date: September 8, 2009

Action Taken: On July 30, Rep. Jim McDermott (D-WA), a senior member of the House Ways & Means Committee, introduced [H.R.3408](#), a bill that would narrow the existing "safe harbor" which permits workers to be classified as independent contractors. There are six cosponsors, including two other Ways & Means members—Reps. Richard Neal (D-MA) and Linda Sanchez (D-CA).

A close reading of the legislation has raised a question about whether the unique situation involving independent securities broker-dealers and their registered representatives and financial advisers is affected by the changes [H.R.3408](#) proposes to make to current law's independent contractor safe harbor.

NAIFA has reached out to selected sponsors of [H.R.3408](#). All have expressed an interest in remedying the concerns NAIFA has expressed about the questions the bill has raised. The bill sponsors have invited NAIFA to work with them to be sure the bill is clarified—if required—to address the NAIFA's concerns. This work will commence this week with Congress' return to Washington from its August District work period.

Background: Generally, NAIFA members work as either employees, statutory employees (a special classification available to life insurance agents), or independent contractors. Which classification applies to any specific NAIFA member is a function of the employment agreement between the NAIFA member and the entity for which he/she works. Tax consequences flow from the classification—e.g., employees pay only half of their Social Security and Medicare taxes (their employer pays the other half); and employees qualify for employer-provided benefits (which must be allocated, in most cases, under strict discrimination rules). Independent contractors, on the other hand, pay 100 percent of their Social Security and Medicare tax obligation, and must provide their own benefits (some of which qualify for tax advantages and some do not). They do not count in the calculation the payor must make under the discrimination rules applicable to such employer-provided benefits as qualified pension plans.

Generally, whether a worker is classified as an independent contractor (which is usually less costly to the employer) is determined by reference to a 20-point test, which looks at such factors as the degree to which the payor controls the method, place and time worked by the worker the number of payors that pay the worker, general industry practices, etc. Application of the test can be a significant administrative burden for payors. There is a "safe harbor" in the law that eliminates the need to apply the 20 point test to a payor's work force. [H.R.3408](#) would narrow the scope of that safe harbor by making the safe harbor available only when the payor has obtained a determination by the IRS, or an IRS ruling specific to its facts and circumstances, that its workers are independent contractors. Under the current safe harbor payors may also rely on standard industry practice in claiming independent contractor status for their workers.

Broker-dealers and their registered reps and financial advisers are subject to considerable regulatory requirements that result in a certain degree of control by the broker-dealer over the reps' securities marketing and sales activities. These

requirements are designed to protect consumers and advisers.

In order for workers to qualify as independent contractors under the 20 point test, a payor is not permitted to exert “too much” control over its workers. It is possible that the level of SEC/FINRA-mandated control discussed above would not “tip the balance” against being able to claim independent contractor status under the 20 point test. But this is a question that has not yet been addressed, and therefore it raises the potential for an expensive and disruptive issue with respect to broker-dealers that classify their reps and advisers as independent contractors.

In general, the determination of whether a worker is an employee or an independent contractor is a hotly controversial, long-standing issue on Capitol Hill. H.R.3408 is an effort to address some of the concerns raised by the classification issue. However, its authors say they that when they were drafting the bill, they were not considering the unique circumstances applicable to broker-dealers and their reps and financial advisers, who must comply with specific SEC and FINRA mandated rules regarding the reps and advisers activities. They are sympathetic to the potential for an administrative burden in having to seek an IRS determination—either via a determination letter or a specific classification finding—if the provisions of H.R.3408 were to apply to broker-dealers and their reps and advisers. They have expressed their interest in working with NAIFA to address any concerns that arise from their bill.

Next Steps: [H.R.3408](#) is not expected to find its way into any legislative initiative for the rest of this year. However, NAIFA will work with the bill sponsors in September and thereafter to make sure that when and if the bill does come up, it will do so in a form that addresses the concerns raised by NAIFA that have arisen from the bill as it is currently drafted.

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Heavy Lift on Health Care/Insurance Reform

Issue: Health Care/Insurance Reform

Date: September 8, 2009

Action Taken: Congress reconvenes today after its month long August District Work Period. This Work Period was hardly the stereotypical "vacation" that a cynical public often associates with Congressional recesses. Most members conducted numerous, often contentious, Town Hall meetings designed to take constituents' temperature on the hottest of hot topics—healthcare/insurance reform.

Members of Congress will bring their collective "Town Hall" experiences with them back to Washington in preparation for the fall's main legislative attraction—healthcare/insurance reform. President Obama will address a joint session of Congress on Wednesday, September 9 to lay out his essential ideas for achieving his health care "reform" goals. Meanwhile the "Gang of Six" Senators (Democrats and Republicans led by Sen. Max Baucus (D), chair of the Senate Finance Committee) is searching for the middle ground plan around which Congress can coalesce. An outline of a proposed "Gang of Six" plan has surfaced.

[Click here to view the Baucus Health Reform Proposal](#)

NAIFA legislative consultants Raffaniello and Associates have analyzed the post August state of play in the healthcare/insurance reform debate. [Click here to view the analysis](#)

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President Calls on Congress to Pass Health Reform

"Now is when we must bring the best ideas of both parties together, and show the American people that we can still do what we were sent here to do.

Now is the time to deliver on health care."

-President Barack Obama
September 9, 2009

Issue: Health Care Reform

Date: September 10, 2009

During his [September 9th joint session address](#), President Obama called upon Congress to pass health reform. As expected, the President, reiterated his support for a government-run plan, but did **not** state that he would veto legislation void of a new government plan.

The President did suggest he would not sign legislation that adds to the deficit. He offered that most of the plan can be paid for by finding savings within the existing health care system. While the President references a "fee" for expensive policies, a plan under discussion in the Senate would impose a 35 percent excise tax on insurance companies and insurance administrators for any health insurance plan that is valued at more than \$8,000 for singles and \$21,000 for families.

While short on specifics, the President named three basic goals: more security and stability to those who have health insurance; provide insurance to those who don't; and slow the growth of health care costs. His plan would require individuals to have basic health insurance and would require employers either to offer workers health care or "chip in to help cover the cost of their workers."

New to the President's list of reforms, but a long standing NAIFA reform principle, is medical malpractice reform. The President mentioned the use of demonstration projects in individual states to test these issues and directed the Secretary of Health and Human Services to move forward on this initiative.

The President stated he will continue to seek common ground from both Democrats and Republicans in the weeks ahead. Congressman Charles Boustany (R-LA), a cardiothoracic surgeon from Louisiana, delivered the [Republican response](#) suggesting we can do better than the bill passed by the House committees.

NAIFA looks forward to working with the President and Congress on your behalf to ensure that access to choice, affordability, quality, competition, and professional service through agents and brokers are included in any health care reform legislation.

Other Related News: Sen. Christopher Dodd (D-CT) has decided to stay in his current post as chairman of the Banking, Housing and Urban Affairs Committee rather than chair the Senate Health, Education, Labor and Pensions (HELP) Committee (formerly chaired by Sen. Kennedy). Sen. Tom Harkin (D-IA) will take over the chairmanship of the HELP Committee, giving up the helm at the Agriculture, Nutrition and Forestry Committee. Sen. Blanche Lincoln (D-AR) will chair that panel.

Senate Finance Committee Chairman Max Baucus (D-MT) said that he plans to begin marking up a health care reform bill the week of September 21st, with or without a bipartisan agreement. However, bipartisan discussions continue with the "Gang of Six" as they work toward a consensus mark by September 15th.

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Senate Finance Committee Unveils Health Care Reform Proposal

Issue: Health Care/Tax

Date: September 16, 2009

Today Senator Max Baucus (D-MT), chairman of the Senate Finance Committee, released the highly anticipated systemic health reform "mark". A mark is the document from which the Finance Committee will work as it approves a blueprint to send to the Senate floor for a vote. [Click here](#) to read a two-page summary of the provisions of the proposal that are of most import to NAIFA and AHIA members. [Click here](#) to read the entire 220-page mark as prepared by the Finance Committee staff.

Generally, the plan represents significant "wins" for NAIFA and AHIA.

- It does not include a government plan (instead it provides for self-sustaining, non-profit cooperatives)
- It avoids taxing employees and mostly avoids taxing employers on employer-provided health benefits
- It contains a role for licensed insurance agents in selling health insurance in the reformed system. The NAIC is given the responsibility to establish marketing standards, within one year of the date of enactment of the new health insurance reform law.
- It rejects the Obama revenue-raising proposals that would have taxed life insurance and annuities (the dividends received deduction and company owned life insurance pro rate interest disallowance rule proposals). As a result, this \$856 billion health reform plan does not raise any offsetting revenue from life insurance or annuity inside buildup.

Background: A small group of three Democratic and three Republican Senators who serve on the Finance Committee have been negotiating for months to craft a bipartisan, consensus health reform plan. Last week, President Obama announced his "bottom line" for health reform—and his basic requirements closely track those in the Finance Committee mark. Currently, no Republican (including the three who negotiated the plan) has endorsed it, but Sen. Baucus says he anticipates significant GOP support after the Finance Committee completes its mark-up, likely prior to the end of September. The Finance Committee is the last of the Congressional committees to act on health reform.

Next Steps: The Finance Committee is scheduled to begin mark-up next week (on or around September 22). Mark-up is expected to be lengthy—Committee Senators have promised they'll be offering numerous amendments, ranging from liberal Democrats attempting to insert a government plan option into the plan to conservative Republicans trying to add caps on damages and/or attorneys' fees to medical malpractice reform proposals (and everything you can imagine in between). After Finance completes its work, the bill will be combined with the measure approved on July 15 by the Senate's Health, Education, Labor & Pensions (HELP) Committee prior to going to the Senate floor, where insiders anticipate yet more amendments and another extensive debate.

NAIFA Staff Contact: [Diane Boyle](#), Executive Vice President, AHIA; [Michael Kerley](#), Senior Vice President, Federal Government Relations

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