

**Congressional Scrutiny of Health Insurers Heating Up
Renewed Focus and Implications of Recent Requests for
Executive Compensation and Financial Practices**

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Congressional oversight committees have recently intensified their investigations into the business practices of the health insurance industry. Health insurers who have been targeted by oversight committees should be poised with a comprehensive Washington strategy that anticipates the possible fall-out and prepares for possible consequences, such as federal and state investigations, the emergence of potential whistleblowers, shareholder lawsuits, negative publicity, and the impact of all of the above on anticipated healthcare legislation.

Current committee activity includes:

- More than 50 health insurers have until September 4 to turn over data on executive compensation, costs of company retreats, and other financial information to Chairman Henry Waxman's House Committee on Energy and Commerce. Additional information is due by mid-September.
- Fifteen health insurers must respond to an additional request from Chairman John D. Rockefeller's Senate Committee on Commerce, Science and Transportation seeking detailed information regarding compensation and other business practices related to medical loss ratios, a topic that has been widely debated in connection with healthcare reform.
- In an additional letter issued this past Monday to six health insurers, Chairman Waxman requested information regarding "purging" or "the industry practice of rescinding health insurance coverage for individuals after they become sick or too expensive to insure."

These requests and the responses provided by health insurers will provide fodder for ongoing public scrutiny of what some are calling the next "bonus gate" and undoubtedly will be important to ongoing debates over healthcare reform.

Congressional attention on health insurers' fiscal practices and the issue of executive compensation is reminiscent of the intense media coverage of and public backlash against

executives in the financial services and automobile industries whose “exorbitant” compensation packages and retreat expenses were revealed as companies were seeking bailout relief from the U.S. Treasury’s Troubled Asset Relief Program (TARP). Although the requests are not exactly the same, the August 17 and August 24 letters cosigned by Chairman Waxman and Representative Bart Stupak, Chairman of the House Subcommittee on Oversight and Investigations, and the August 21 letter signed by Chairman Rockefeller, seek similar information related to executive compensation.

The impact of the resulting public and regulatory scrutiny for TARP funds recipients that were subjected to similar congressional inquiries starting in 2008 was substantial. In fact, a number of those companies came under investigation by the federal and state enforcement authorities such as the Securities and Exchange Commission (SEC) and the New York Attorney General’s Office, and faced additional examination by congressional members in connection with executive compensation reform.

In addition to focusing on compensation, the recent requests to health insurers target information related to medical loss ratios (i.e., the share expressed as a percentage of total premium revenue spent on medical claims, as opposed to administration or profit) and the disclosure of certain financial practices to current and prospective customers. Perceived excessive administrative costs and profits and other insurer practices will be used by some proponents of health care reform to justify legislation setting limits on executive compensation and profits that health insurers could see in the future.

To achieve this objective, some Members have already issued strong statements against the industry and are actively looking for wrongdoing to highlight as the debates continue this fall. A recent [washingtonpost.com](http://www.washingtonpost.com) “Capital Briefing” stated: “[President] Obama and Democratic leaders on the Hill have sharpened their rhetoric against the insurance industry as the reform debate has progressed. Speaker Nancy Pelosi (D-Calif.) advised members of her caucus to focus on insurance companies’ alleged misdeeds during the August recess, calling them ‘villains’ of the health-care system.”

The potential fallout of this tactic could impact not only future legislation such as healthcare reform—similar to executive compensation in connection with TARP and the impact of inquiries related to Medicare Part D pricing on recent amendments to the Health Care Reform bill—but also may present federal and state enforcement as well as shareholder and other litigation risk.

Although the current requests are “voluntary,” congressional committees possess subpoena power for documents and testimony and will most certainly use that power if cooperation is not forthcoming. Thus, a proactive and coordinated global legal, legislative, and public relations strategy will be critical to minimizing the risk of collateral investigations and litigation based upon the record compiled by the committees.

In the past, companies who have been the subject of similar congressional inquiries have also been the subject of:

- Follow-up congressional subpoenas of executives for testimony

- Shareholder litigation regarding excessive compensation and unjust enrichment of executives
- Increased scrutiny of insurers who participate in federal healthcare programs (e.g., Medicare and Medicaid) with respect to how federal payments are applied
- Examination and exposure of compensation consultant conflicts of interest
- Potential whistleblower issues/claims
- SEC investigations regarding the adequacy of a company’s disclosure of executive compensation or failure to maintain internal control over personal use of company assets
- Federal and state agency (including consumer protection agencies, financial regulatory agencies) subpoenas of documents and witnesses
- Biased and inaccurate blog discussions generating negative and irresponsible rumors

Companies prepared with a comprehensive strategy will be better positioned to guide their executives and Boards of Directors through the complex maze of current and future inquiries and their anticipated impact on broader company issues. As companies respond to the recent round of congressional inquiries, they should strike a delicate balance in being completely responsive, while avoiding the pitfalls inherent in being under the glare of the Washington spotlight and the possible threat of further investigations or follow-on litigation.

Considerations regarding the protection of privileged, confidential, or proprietary information, as well as the possible legal consequences to witnesses as a result of their testimony, will need to be carefully weighed. For example, in the past, Congress has not felt bound by the attorney-client privilege and work product protection. Companies will also need to be vigilant to inevitable whistleblower issues that can arise in these environments, and to address the unsanctioned disclosure of company documents to congressional staff or regulators investigating these matters.

In the current environment, the risk of being caught in an investigative vortex is enhanced, as is the need for a careful, seasoned strategy. Morgan Lewis is poised to assist insurers in preparing to meet the challenges outlined above. We have the experience to deal with each facet of these potential investigations and complex issues, and the skills and judgment required to formulate the strategies necessary to prepare for and respond to these inquiries.

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