



**CONGRESSIONAL DISTRIBUTION  
MEMORANDUM**

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**Subject: Analysis of § 1312(d)(3)(D) of Pub. L. No. 111-148, The Patient Protection and Affordable Care Act, and its Potential Impact on Members of Congress and Congressional Staff**

This memorandum provides an analysis of several legal and practical issues raised by the passage of § 1312(d)(3)(D) of Pub. L. No. 111-148, The Patient Protection and Affordable Care Act (PPACA), which relates to health plans for Members of Congress and congressional staff.<sup>1</sup> First, this memorandum will address questions related to the effective date of this specific provision. Second, this memorandum will discuss the absence of a named administrative or implementing authority for Members of Congress and covered congressional staff. Third, this memorandum will discuss potential statutory interpretations of the definition of the term “Member of Congress”<sup>2</sup> and whether it includes non-voting participants, such as Delegates, the Resident Commissioner of Puerto Rico, and their staff. Next, this memorandum will address how the definition of the term “congressional staff” could be interpreted with respect to personal staff, committee staff, leadership staff, and other employees of Congress. Finally, this memorandum will consider issues related to the availability of the Federal Employee Health Benefits Program (FEHBP) both with respect to current Members and covered congressional staff as well as Members and covered congressional staff that assume their positions after the effective date of the provision.

Although this memorandum includes a review of several legal and practical issues related to this provision, it is not intended to address all potential issues raised by the provision or to provide tailored legal or practical advice to any Member, staff member, or other congressional employee regarding the status of his/her personal health insurance coverage. Specific questions regarding the effect of this provision on personal insurance coverage or needs should be directed to the appropriate benefits office in either the House of Representatives or the Senate.

<sup>1</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, \_\_\_ Stat. \_\_\_ § 1312(d)(3)(D) (2009) [hereinafter PPACA].

<sup>2</sup> See *id.* at § 1312(d)(3)(D)(ii)(I).

Based on CRS' review of the statutory text and applicable canons of statutory construction, it is arguable that this specific provision took effect on the date of enactment. There exist, however, reasonable arguments that can be made that the provision should not be deemed in force until coverage via the state operated exchanges or other health plan is available.

Reviewing the statutory text, and applicable canons of statutory construction, it is arguable that the definition of "Member of Congress" as used in § 1312(d)(3)(D)(ii)(I) can be interpreted to exclude the Resident Commissioner of Puerto Rico, the Delegates of Guam, American Samoa, the U.S. Virgin Islands, the Northern Mariana Islands, the District of Columbia, as well as the staff employed by those offices. Rules, precedents, and financial practices, however, have increasingly treated Delegates and the Resident Commissioner as the equivalent of Members regarding their rights and privileges, with the exception of the right to vote on the floor.

Additionally, it appears possible to argue that the definition of "congressional staff" used by § 1312(d)(3)(D)(ii)(II) excludes any staff not directly affiliated with a Member's personal office. Should this interpretation be adopted by an implementing body or a court, it would appear that it would exclude committee staff, joint committee staff, some shared staff, as well as potentially those staff employed by leadership offices including, but not limited to, the Speaker of the House, Majority Leader of the Senate, Minority Leader of the House, Minority Leader of the Senate, as well as the Whip offices in both the House and Senate. Alternatively, it may be argued that Members are the hiring authority and are generally responsible for committee and leadership offices. Furthermore, staff in administrative, legal, and legislative support offices who work for officers and officials elected by the chamber or appointed by leadership are also accountable to the Members in the chamber in which they serve.

Finally, based on a review of the statutory text of § 1312 as well as other relevant provisions of PPACA, it remains unclear whether current participation in FEHBP will remain an option for Members and covered congressional staff. For new Members and covered staff, who assume positions after the effective date of this provision, however, it would appear that FEHBP is not available.

## Background

With respect to health insurance for Members of Congress and congressional staff, the Patient Protection and Affordable Care Act, § 1312(d)(3)(D)(i), specifically requires that:

the only health plans that the Federal Government may make available to Members of Congress and congressional staff with respect to their service as a Member of Congress or congressional staff shall be health plans that are--

(I) created under this Act (or an amendment made by this Act); or

(II) offered through an Exchange established under this Act (or an amendment made by this Act).<sup>3</sup>

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<sup>3</sup> See *id.* at § 1312(d)(3)(D)(i). The inclusion of Members and congressional staff in any health insurance exchange was also addressed in at least one related bill, the America's Healthy Future Act of 2009 (S. 1796, § 2231(3)(C), 111<sup>th</sup> Cong. (2009)), although this alternate language may also have been open to some statutory interpretation. S. 1796, as reported on October 19, 2009, defined "congressional employee," as "an employee whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives." This language was also offered as an amendment to H.R. 4872, the Health Care and Education Affordability Reconciliation Act of 2010 (*Congressional Record*, March 23, 2010, p. S1860). The Chief Administrative Officer, and not the Clerk of the House, however, has disbursed pay for the House of Representatives since the 104<sup>th</sup> Congress (1995-1996) (P.L. 104-186, Aug. 20, 1996, 110 Stat. 1718; and *Rules of the House of Representatives, One Hundred Eleventh* (continued...))

Section 1312(d)(3)(D)(ii) of the Act defines the term “Member of Congress” as “any member of the House of Representatives or the Senate.”<sup>4</sup> In addition, this section provides a definition for the term “congressional staff,” that includes “all full-time and part-time employees employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC.”<sup>5</sup>

As a general rule, when interpreting the meaning of legislative language, courts will often use methods of statutory construction commonly referred to as “canons,” or general principles for drawing inferences about language. Perhaps the most common “canon of construction” is the plain meaning rule, which assumes that the legislative body meant what it said when it adopted the language in the statute. Phrased another way, if the meaning of the statutory language is “plain,” the court will simply apply that meaning and end its inquiry.<sup>6</sup> As the United States Supreme Court stated in *Connecticut National Bank v. Germain*:

[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there .... When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.<sup>7</sup>

## Effective Date

Section 1312(d)(3)(D) specifies that the section becomes effective “after the effective date of this subtitle,” i.e., subtitle D of Title I of PPACA. However, given that there is no effective date applicable to the subtitle, uncertainty exists as to when § 1312(d)(3)(D) takes effect. While it seems that the requirement could be considered effective on the date of enactment of PPACA, i.e., March 23, 2010, plausible arguments could be made that the provision takes effect at a later date.

There are a number of instances in which courts typically subordinate the general, linguistic canons of statutory construction to certain overarching presumptions that, unless rebutted, favor particular substantive results. One area in which courts make these presumptions is with regard to the effective date of a statute. As the Supreme Court has articulated, “absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.”<sup>8</sup> While a legislature may dictate when a particular act takes effect, a leading treatise on statutory construction points out that “courts should not infer that the legislature intended a special effective date unless such implication is so clear as to allow no other reasonable interpretation.”<sup>9</sup> Thus, it appears possible to argue that reference to, but lack of, a specific effective date for this provision creates uncertainty, and thus no “clear direction” from Congress exists to

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*Congress*). H.R. 4982, which was introduced on March 25, 2010 also addresses this provision.

<sup>4</sup> *Id.* at § 1312(d)(3)(D)(ii)(I).

<sup>5</sup> *Id.* at § 1312(d)(3)(D)(ii)(II).

<sup>6</sup> See *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992); *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 300 (1989).

<sup>7</sup> *Connecticut National Bank*, 503 U.S. at 253–54 (citations and quotation marks omitted).

<sup>8</sup> *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). Ordinarily, and in the absence of special circumstances, the law does not recognize fractions of the day, so a law becomes effective “from the first moment” of the effective date. See *Lapeyre v. United States*, 17 Wall. 191, 198 (1872).

<sup>9</sup> SINGER & SINGER, STATUTES AND STATUTORY CONSTRUCTION (Sutherland Stat. Const.) (7th ed.), vol. 2, §§ 33.2 (2008) (citing *U.S. v. Robles-Pantoja*, 887 F.2d 1250 (5<sup>th</sup> Cir. 1989)).

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delay this provision from becoming effective. Although the language of § 1312(d)(3)(D) may seem to indicate that Congress contemplated a special effective date and then failed to provide this date – perhaps as part of drafting error – a court may not follow this line of reasoning. In general, when interpreting statutory language, courts often assume that Congress means what it says, and additions or omissions to a statute are purposeful.<sup>10</sup>

Alternatively, it seems possible to argue that § 1312(d)(3)(D) should not take effect on the date of enactment, based on the idea that it would frustrate congressional intent to have the provision effective before coverage options are available, at least to new Members of Congress and congressional staff.<sup>11</sup> Under subtitle D of Title I of PPACA, no later than January 1, 2014, each state must establish an American Health Benefit Exchange (“Exchange”) to provide health coverage to qualified individuals and/or employers.<sup>12</sup> PPACA also provides that for states that do not elect to establish an Exchange, or if the Secretary determines that a state will not have an operational Exchange by January 1, 2014 or has not taken certain actions, the Secretary must establish and operate an Exchange within the state.<sup>13</sup> Thus, while it may be possible that an Exchange may be available prior to 2014, there would be no requirement for Exchanges to exist prior to that date.

Assuming an exchange is not available in a state where a Member of Congress or congressional staffer resides, immediate coverage under § 1312(d)(3)(D) may turn on what plans are “created under this Act (or an amendment made by this Act).” While it is not entirely clear which health plans may be included under this provision, it does not appear that there is a health plan created by the Act or an amendment by the Act that would provide immediate coverage to all Members of Congress and covered congressional staff. Under one section that CRS has identified as effective upon enactment, PPACA requires the Secretary of HHS to establish a temporary high risk health insurance pool program to provide health insurance coverage for eligible individuals within 90 days of enactment.<sup>14</sup> Under § 1101(d) of the Act, eligibility for the coverage is limited to certain individuals who did not have certain types of health coverage, including FEHBP, during the 6-month period prior to the date on which an individual applies for coverage.<sup>15</sup> Further, eligible individuals must have a pre-existing condition, as determined in a manner consistent with guidance issued by the Secretary. Given that many staffers likely would not meet the eligibility standards of the high risk pool, it may be questioned what other coverage would be

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<sup>10</sup> See generally, *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding “no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances”); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (“Congress ... demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and ... the language used to define the remedies under RCRA does not provide that remedy.”); *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, “it has done so clearly and expressly”); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (Congress knows how to refer to an “owner” “in other than the formal sense,” and did not do so in the Foreign Sovereign Immunities Act’s definition of foreign state “instrumentality”); *Whitfield v. United States*, 543 U.S. 209, 216 (2005) (“Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so.”).

<sup>11</sup> It should be noted that it is unclear whether Members of Congress and congressional staff who are currently participating in FEHBP may be able to retain this coverage pursuant to section 1251 of PPACA. See discussion under the heading “Continued Availability of FEHBP as a ‘Grandfathered Plan’” below.

<sup>12</sup> PPACA, *supra* note 1 at § 1311(b).

<sup>13</sup> *Id.* at § 1321(c).

<sup>14</sup> It should be noted that while the federal government may “make available” health plans that are offered through a state exchange, §1312(f)(2) of PPACA provides that large employers of over 101 individuals may not be able to participate in a state’s exchange until 2017.

<sup>15</sup> § 1101(d)(2) of PPACA refers to those who did not have “creditable coverage” as defined under the Public Health Service Act. See 42 U.S.C. § 300gg(c)(1) (2006).

immediately available under the Act. If there were to be a lack of employment-based coverage for Members of Congress and congressional staff based on the effective date of § 1312(d)(3)(D), one may argue that this runs contrary to the intent of the legislation, as it has been stated that one of the purposes of PPACA is to expand the availability of coverage for Americans, not reduce it.<sup>16</sup>

## Implementing Authority

Current law, as discussed in more detail below, provides Members of Congress<sup>17</sup> and all congressional staff<sup>18</sup> with access to the FEHBP. FEHBP is administered and operated by the Office of Personnel Management (OPM), an executive branch entity.<sup>19</sup> As drafted, § 1312(d)(3)(D) appears to remove Members of Congress and congressional staff, as defined by the subsection, from FEHBP and, therefore, arguably from any health insurance provided under the rules, administration, and guidance of OPM.<sup>20</sup> Section 1312(d)(3)(D), however, does not provide for any specific entity to replace OPM for interpretation and/or implementation purposes. This omission, whether intentional or inadvertent, raises questions regarding interpretation and implementation that cannot be definitively resolved by CRS. The statute does not appear to be self-executing, but rather seems to require an administering or implementing authority that is not specifically provided for by the statutory text. Of the possible entities that might arguably be responsible, it is possible to include the Committee on House Administration, the Chief Administrative Officer of the House, the Secretary of the Senate, Senate Rules and Administration Committee, or some non-congressional entity such as OPM or the Department of Health and Human Services. Regardless of whether an entity assumes responsibility for interpretation and implementation, it remains possible that any interpretive and implementation decisions could be adopted via changes to the internal rules of each House of Congress respectively.<sup>21</sup>

For the purposes of this memorandum, CRS does not assume that any one specific entity will take responsibility for the implementation of this section. Thus, this memorandum will refer generically to an “implementing authority” which may be tasked with resolving some of the ambiguities and issues raised.

## Coverage of § 1312(d)(3)(D)

### “Member of Congress”

Applying the plain meaning canon to the definition of “Member of Congress,” which, as used in § 1312(d)(3)(D)(ii)(I), reads “any Member of the House of Representatives or the Senate,” it appears possible to argue that it is limited to those Members of the House of Representatives and Senate in the

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<sup>16</sup> See, e.g., Press Release, Senate Democrats Lead Historic Passage Of The Patient Protection And Affordable Care Act, (Dec. 24, 2009)(“Passage of this historic legislation is another critical step toward guaranteeing access to quality, affordable health care for all Americans.”)

<sup>17</sup> 5 U.S.C. § 8901(b) (2006).

<sup>18</sup> *Id.* at § 8901(c).

<sup>19</sup> *Id.* at § 8902(a).

<sup>20</sup> Further, while PPACA does not explicitly repeal the provision of the Federal Employees Health Benefits Act that allows Members and staff to be eligible for FEHBP, the two likely may be seen as conflicting. Typically, if two different federal statutes are “irreconcilably conflicting,” or “if the later act covers the whole subject of the earlier one and is clearly intended as a substitute,” courts will apply the rule that the later of the two prevails. *Watt v. Alaska*, 451 U.S. 259, 266 (1981); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

<sup>21</sup> See U.S. CONST. Art. I, § 5.

constitutional sense articulated in Article I of the Constitution, as amended by the Seventeenth Amendment.<sup>22</sup> All other participants in the House of Representatives, including the Resident Commissioner of Puerto Rico, the Delegates of Guam, American Samoa, the U.S. Virgin Islands, the Northern Mariana Islands, the District of Columbia are not considered Members for Article I purposes, as they are not elected by the people of a state and, therefore, it could be argued that under this interpretation they are not included by this definition.

Reading the definition in § 1312(d)(3)(D)(ii)(I) to exclude Delegates and the Resident Commissioner can be further supported by the fact that on numerous occasions Congress has specifically defined the term “Member of Congress” or “Member of the House of Representatives” to specifically include the Resident Commissioner of Puerto Rico, the Delegates of Guam, American Samoa, the U.S. Virgin Islands, the Northern Mariana Islands, and the District of Columbia. For example, in 18 U.S.C. § 202(d)(2), which defines “Member of Congress” for the purposes of the federal criminal bribery and conflict of interest statutes, the definition specifically includes “a Representative in, or a Delegate or Resident Commissioner to, the House of Representatives.”<sup>23</sup> Nearly identical language is used to define the term “Member of Congress” for purposes of Title 5 of the United States Code, as well as to define “Member of the House of Representatives” for purposes of other federal statutes.<sup>24</sup> The Supreme Court has recognized that the failure by Congress to use terms of art or specific statutory language that is normally used for certain purposes can be evidence that Congress intended a different result to apply.<sup>25</sup> In other words, the failure of Congress to specifically include the Delegates and Resident Commissioner in § 1312 may be interpreted by a reviewing court as evidence that Congress expressly intended to exclude those officials from the provision’s coverage.

On the other hand, however, the rules and precedents of the House have increasingly treated Delegates and the Resident Commissioner as the equivalent of Members regarding their rights and privileges, with the exception of the right to vote on the floor.<sup>26</sup> In all other respects, they are essentially equal under

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<sup>22</sup> See U.S. CONST. Art. I, § 2 (defining Member of the House of Representatives as persons “chosen every second year by the People of the several States”); see also U.S. CONST. Amend XVII (defining Senators as “two Senators from each State, elected by the people thereof”).

<sup>23</sup> 18 U.S.C. § 202(d)(3) (2006).

<sup>24</sup> See, e.g., 5 U.S.C. § 2106 (2006); 2 U.S.C. § 31(1)(A) (2006); 2 U.S.C. § 60a-2a(3) (2006); 2 U.S.C. § 92(c) (2006); 2 U.S.C. § 2086 (2006); 10 U.S.C. § 1034(i) (2006); 10 U.S.C. § 1563 (2006).

<sup>25</sup> See, e.g., *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994) (reasoning that although “Congress knew how to impose aiding and abetting liability when it chose to do so,” it did not use the words “aid” and “abet” in the statute, and hence did not impose aiding and abetting liability); *Franklin Nat’l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding “no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances”); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (stating that “Congress ... demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and ... the language used to define the remedies under RCRA does not provide that remedy.”); *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003) (holding that when Congress has intended to create exceptions to bankruptcy law requirements, “it has done so clearly and expressly”); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (indicating that Congress knows how to refer to an “owner” “in other than the formal sense,” and did not do so in the Foreign Sovereign Immunities Act’s definition of foreign state “instrumentality”); *Whitfield v. United States*, 543 U.S. 209, 216 (2005) (stating that “Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so.”); *But see Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (holding that Title IX’s prohibition on sex discrimination encompasses retaliation despite absence of an explicit prohibition on retaliation such as those contained in Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act); *Landgraf v. USI Film Products*, 511 U.S. 244, 263 (1994) (stating that “[t]he history of the 1991 [Civil Rights] Act conveys the impression that the legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct”).

<sup>26</sup> “The Delegates and the Resident Commissioner may not vote in or preside over the House,” although “Under Rule III and Rule XVIII, as adopted in the 111th Congress, when the House is sitting as the Committee of the Whole House on the State of the Union, the Delegates and Resident Commissioner have the same right to vote as Representatives, subject to immediate (continued...)”

House Rules as well as current laws related to pay and benefits. Additionally, while distinctions with respect to staffing allowances previously existed, they were eliminated at least 25 years ago.<sup>27</sup>

### “Congressional Staff”

Turning to the application of § 1312 to congressional staff members, it should first be noted that CRS has been unable to locate any previous use of the phrase “official office of a Member of Congress” in statute or appropriations laws. It should also be noted that Members of the House are provided with a Member’s Representational Allowance (MRA) to support their official and representational duties to the districts from which they were elected. Likewise, Senators receive an amount from the Senators’ Official Personnel and Office Expense Account (SOPOEA) to support their duties.<sup>28</sup> It appears possible to argue that the statute’s use of the phrase “official office of a Member of Congress” in the definition of “congressional staff” in § 1312(d)(3)(D)(ii)(II) refers to Member’s personal offices and, therefore, arguably excludes other employees that a Member may utilize for other purposes. In other words, employees who are solely paid for through MRA or SOPOEA appropriations would appear to be covered by this language.

The inclusion of committee staff, joint committee staff as well as potentially those staff employed by leadership offices including, but not limited to, the Speaker of the House, Majority Leader of the Senate, Minority Leader of the House, Minority Leader of the Senate, as well as the Whip offices in both the House and Senate appears to be less clear. While it is possible to argue that Members of Congress are the final hiring authority and certification from a Member is required for disbursement of funds in committee and leadership offices,<sup>29</sup> the phrase “official office” could be seen to only encompass employees in the personal offices of Members paid for through the appropriations account given to Senators and Representatives to operate their offices. For instance, although Members who serve as committee chairman or ranking members may have staff affiliated with their service on a given committee, and while the Member may have control over hiring, promotion, and termination, those staff are paid by the funds provided for committees and not for the MRA.

Alternatively, it may be argued that § 1312(d)(3)(D)(ii)(II) can be interpreted as encompassing more than a Member’s personal staff. If the implementing authority relies solely on who the hiring authority is, rather than on the source of the funding, it appears possible that committee staff and leadership staff could be included among the staff covered by the provision. For example, the *Senate Rules* have previously

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reconsideration in the House when their recorded votes ‘have been decisive’ in the Committee.” (CRS Report R40170, Parliamentary Rights of the Delegates and Resident Commissioner From Puerto Rico, by Christopher M. Davis). See also: CRS Report R40555, Delegates to the U.S. Congress: History and Current Status, by Betsy Palmer.”

<sup>27</sup> 63 Stat. 265, P.L. 121, ch. 238, Sec. 4 (June 23, 1949); P.L.92-271, 86 Stat 119 (April 10, 1972); P.L. 94-26, 89 Stat 94 (May 27, 1975); P.L. 95-556, 92 Stat 2078, sec. 5 (Oct. 31, 1978); and P.L. 97-357, 96 Stat 1711, Title IV, sec. 401 (Oct. 19, 1982). While potentially more significant from a practical rather than legal perspective, it should also be noted that the definition of Member included in § 1312(d)(3)(D)(ii)(I) was added in the Senate, which does not have non-voting members and may not have been as attuned to the implications or interpretation of this definition in the House.

<sup>28</sup> 2 U.S.C. § 57b (2006) (stating: “There is established for the House of Representatives a single allowance, to be known as the ‘Members’ Representational Allowance”, which shall be available to support the conduct of the official and representational duties of a Member of the House of Representatives with respect to the district from which the Member is elected.” Employees of Members are defined in 2 U.S.C. § 92. The Senators’ Official Personnel and Office Expense Account is established by 2 U.S.C. § 58c”).

<sup>29</sup> For example, the House states that “[t]he Committee Chair determines the terms and conditions of employment for committee staff” and the “appointment of committee employees requires the signature of the Committee Chair on the Payroll Authorization Form.” U.S. House of Representatives, *Committee Handbook*, available at <http://cha.house.gov/PDFs/CommitteeHandbook.pdf>.

been used to demonstrate the relationship or authority of Senators over staff outside of his or her office in at least one instance. Senate Rule XXXVII (relating to conflict of interest), states:

For purposes of this rule—

- (a) a Senator or the Vice President is the supervisor of his administrative, clerical, or other assistants;
- (b) a Senator who is the chairman of a committee is the supervisor of the professional, clerical, or other assistants to the committee except that minority staff members shall be under the supervision of the ranking minority Senator on the committee;
- (c) a Senator who is a chairman of a subcommittee which has its own staff and financial authorization is the supervisor of the professional, clerical, or other assistants to the subcommittee except that minority staff members shall be under the supervision of the ranking minority Senator on the subcommittee;
- (d) the President pro tempore is the supervisor of the Secretary of the Senate, Sergeant at Arms and Doorkeeper, the Chaplain, the Legislative Counsel, and the employees of the Office of the Legislative Counsel;
- (e) the Secretary of the Senate is the supervisor of the employees of his office;
- (f) the Sergeant at Arms and Doorkeeper is the supervisor of the employees of his office;
- (g) the Majority and Minority Leaders and the Majority and Minority Whips are the supervisors of the research, clerical, or other assistants assigned to their respective offices;
- (h) the Majority Leader is the supervisor of the Secretary for the Majority and the Secretary for the Majority is the supervisor of the employees of his office; and
- (i) the Minority Leader is the supervisor of the Secretary for the Minority and the Secretary for the Minority is the supervisor of the employees of his office.

Existing language regarding the role of the committee chair in both the House and Senate Rules and handbooks could also be instructive, since they indicate that the chair has authority over the committee budget, serves as the employing authority, and determines the terms and conditions of staff.

While not directly hired by Members, staff in other administrative, legal, and legislative support offices are also accountable to the membership in each chamber. For instance, pursuant to House Rule II, the Clerk, Sergeant-at-Arms, Chief Administrative Officer, and Chaplain are elected at the beginning of each Congress by the House and may be removed by the House or by the Speaker. In addition, other positions, including the Inspector General, Historian, director of the Office of Interparliamentary Affairs, Legislative Counsel, Parliamentarian, Law Revision Counsel, and General Counsel are appointed by the Speaker. Moreover, in the Senate, the Secretary of the Senate, Sergeant-at-Arms, and Chaplain are elected positions, while additional officials, including the Senate Legislative Counsel,<sup>30</sup> Senate Legal Counsel and Deputy Counsel<sup>31</sup> are appointed by the President pro tempore.

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<sup>30</sup> 2 U.S.C. § 271 (2006).

<sup>31</sup> 2. U.S.C. § 288 (2006).



In sum, the impact on congressional staff not directly affiliated with a Member's individual office appears unclear. The applicability may hinge on any determination regarding whether an employee in an official office is dependent on a source of appropriation, hiring authority, or accountability to the parent chamber.

## Shared Staff

In addition to potential questions of definition, any potential differences in benefits systems may present administrative challenges given the possibility of mobility among staff across these offices. A more narrow definition may also raise questions about whether certain categories of employees, described below, are covered under this provision.

For example, one potential issue with proposing different standards for employees paid through Member office accounts and employees paid through other House and Senate accounts arises from the use of shared staff. Although the House and Senate have different rules regarding shared staff, both chambers allow types of shared staffing arrangements that could result in an employee being both on the payroll of a Member office and another type of office.

In the Senate, 2 U.S.C. § 61-1a authorizes limited sharing of staff:

Notwithstanding any other provision of law, appropriated funds are available for payment to an individual of pay from more than one position, each of which is either in the office of a Senator and the pay of which is disbursed by the Secretary of the Senate or is in another office and the pay of which is disbursed by the Secretary of the Senate out of an appropriation under the heading "Salaries, Officers, and Employees", if the aggregate gross pay from those positions does not exceed the maximum rate specified in section 61-1(d)(3) of this title.

The *Senate Handbook* summarizes these laws, stating:<sup>32</sup>

An employee may be on the payroll of more than one Senator's office or on the payroll of a Senator's office and a leadership or administrative office, providing the aggregate pay received does not exceed the maximum annual salary for a Senator's office (2 U.S.C. [§] 61-1a). An employee can only be shared between offices which are funded through the appropriations, "Senators' Official Personnel and Office Expense Account" (Senators' personal staff), and "Salaries, Officers, and Employees".

The House *Member's Handbook*, as compiled by the Committee on House Administration, states the following about shared employees:<sup>33</sup>

The term shared employee means an employee who is paid by more than one employing authority of the House of Representatives.

Two or more employing authorities of the House may employ an individual.

Such shared employees must work out of the office of an employing authority, but are not required to work in the office of each employing authority. The pay from each employing authority shall reflect the duties actually performed for each employing authority. The name, title, and pay of such an individual will appear on each employing authority's Payroll Certification. Such employees may not receive pay totaling more than the highest rate of basic pay in the Speaker's Pay Order applicable to the positions they occupy.

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<sup>32</sup> U.S. Senate, Committee on Rules and Administration, *Senate Handbook*, version of Nov. 2006, IV-31.

<sup>33</sup> U.S. House of Representatives, *Member's Handbook*, available at <http://cha.house.gov/staff.aspx>.

Employees may not be shared between a Member or Committee office and the office of an Officer of the House if the employee, in the course of duties for an Officer, has access to the financial information, payroll information, equipment account information, or information systems of either Member, Committee, or Leadership offices.

Applying a narrow definition, it is possible that certain shared staff could be covered by the provision, while other shared staff, even in the same office, would not be covered. Because the statute does not propose a standard for determining coverage, it is potentially left to the implementing authority to establish such a standard. The implementing authority would appear to have discretion in setting such a standard. As a result, for example, an implementing authority could base determinations on the relative split between a shared staffer's time, duties, or payroll. Alternatively, the implementing authority could include all staffers in a covered office or exclude all staffers with employment in a non-covered office. It is important to note that these are only potential possibilities and that unless otherwise stated in law or House or Senate rules, it will remain within the discretion of the implementing authority to determine the applicable standard.

### **Contractors, Fellows, Annuitants, Detailees, and Consultants**

The applicability of this provision to staff who are employed under other arrangements may also be unclear. The potential applicability may be dependent on the source of funds providing for the staff assistance, the type of employing office, the nature of the duties performed, the duration of the affiliation, or other guidelines or rules established by the committees with jurisdiction over employment within the House and Senate (including the Committee on House Administration and the Senate Committee on Rules and Administration, respectively) or through an adoption of changes to the House and Senate Rules.

The Committee on House Administration has established guidelines for categories of employees who may serve on a temporary basis or be paid from a source other than the House of Representatives. Three of these types of employees (contractors,<sup>34</sup> fellows,<sup>35</sup> and annuitants<sup>36</sup>) may be employed by both Member and committee offices, while two (detailees<sup>37</sup> and consultants<sup>38</sup>) may only be hired by committees. The Senate may also enlist the assistance of detailees and fellows, subject to rules, applicable law, and guidelines established by the Senate Committee on Rules and Administration.

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<sup>34</sup> According to the *Handbooks* issued by the Committee on House Administration, House committees may “contract with firms or individuals only for general, non-legislative, office services” for specified periods of time and contractors are “are not employees of the House and are ineligible for Government-provided benefits.” Member offices may also hire contractors.

<sup>35</sup> According to the *Handbooks* issued by the Committee on House Administration, House committees may also receive services from fellows who receive the “usual compensation from his or her sponsoring employer” for temporary services. Member offices may also employ fellows.

<sup>36</sup> According to the *Handbooks* issued by the Committee on House Administration, both Members and committees and the House may employ Federal civil service annuitants.

<sup>37</sup> According to the *Handbooks* issued by the Committee on House Administration, Committees may retain the services of detailees from a government department or agency pursuant to 2 U.S.C. § 72a(f). While the *Committee Handbook* states that detailees “remain employees of the detailing department or agency, and are not employees of the House,” they may serve on a reimbursable or non-reimbursable basis. Member offices may not be assigned detailees.

<sup>38</sup> According to the *Handbooks* issued by the Committee on House Administration, “Pursuant to 2 U.S.C. § 72a(i) each committee is authorized, with the prior approval of the Committee on House Administration, to obtain temporary or intermittent services of individual consultants or organizations, to advise the committee with respect to matters within its jurisdiction.” Member offices may not hire consultants.

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## Other Considerations Regarding the Congressional Health Coverage Requirement

### Continued Availability of FEHBP as a “Grandfathered Plan”

FEHBP is the largest employer-sponsored health insurance program in the United States, covering over 8 million individuals.<sup>39</sup> Currently, those eligible to enroll in FEHBP include current federal employees, Members of Congress, congressional employees, the President, annuitants, and eligible family members.<sup>40</sup> One important question raised by § 1312(d)(3)(D) is whether Members of Congress and congressional staff may continue to participate in FEHBP as a “grandfathered plan” under the authority provided in § 1251 of PPACA.<sup>41</sup> Section 1251(a) states that:

[N]othing in this Act (or an amendment made by this Act) shall be construed to require that an individual terminate coverage under a group health plan or health insurance coverage in which such individual was enrolled on the date of enactment of this Act.

Based on the language of §1312(d)(3)(D) and § 1251(a), it is difficult to predict which provision a court would find controlling for individuals who are currently participating in FEHBP.

In examining the statutory language at issue, a court may apply the plain meaning canon to § 1251(a) of PPACA. As the section specifies, *nothing in this Act* (or an amendment made by this Act) must be construed to require that an individual terminate coverage under a group health plan or health insurance coverage. It appears that under a plain meaning interpretation, a court could find that by using the words “nothing in this Act,” Congress created no exception to this provision, even with the language included under § 1312(d)(3)(D). Further, under another canon of statutory construction, courts may assume the language Congress employs, including additions and omissions to a particular statute, is intentional.<sup>42</sup> Accordingly, if Congress had wanted to make an exception for § 1312(d)(3)(D) under § 1251, one may argue that Congress could have said so.

Conversely, as provided under § 1312(d)(3)(D), “*notwithstanding any other provision of law,*” the only health plans that may be made available to Members of Congress and congressional staff are the plans that are specified by the section. With regard to this phrase, the plain meaning seems a bit harder to ascertain. Congress sometimes seeks to underscore the primacy of a statutory directive by stating that it is

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<sup>39</sup> For a general discussion of FEHBP, see CRS Report RS21974, *Federal Employees Health Benefits Program: Available Health Insurance Options*, by Hinda Chaikind.

<sup>40</sup> 5 U.S.C. § 8901 (2006). It should be noted that for purposes of FEHBP, congressional employees include an employee of either House of Congress, of a committee of either House, or of a joint committee of the two Houses; an elected officer of either House who is not a Member of Congress; the Legislative Counsel of either House and an employee of his office; a member or employee of the Capitol Police; an employee of a Member of Congress if the pay of the employee is paid by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives; the Architect of the Capitol and an employee of the Architect of the Capitol; an employee of the Botanic Garden; and an employee of the Office of Congressional Accessibility Services. 5 U.S.C. § 2107 (2006).

<sup>41</sup> Here, CRS assumes that the FEHBP can be a grandfathered plan for purposes of § 1251. This assumption is based on the definitions of group health plan and health insurance coverage found in the PHSA and used in PPACA. See *infra* note 44 and accompanying text. Under these definitions, FEHBP would appear to be considered a group health plan, and FEHBP insurance carriers may be seen as providing health insurance coverage, and, therefore, it appears that FEHBP could be a grandfathered plan.

<sup>42</sup> See generally, *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”).

to apply “notwithstanding” the provisions of another, specified statute or class of statutes.<sup>43</sup> Courts take into account this expressed intent to override the provisions specified in a “notwithstanding” clause,<sup>44</sup> but when the clause purports to override “any other provision of law,” its preclusive scope often is unclear. One court, for example, ruled that a directive to proceed with timber sale contracts “notwithstanding any other provision of law” meant only “notwithstanding any provision of *environmental* law,” and did not relieve the Forest Service from complying with federal contracting law requirements governing such matters as non-discrimination, small business set-asides, and export restrictions.<sup>45</sup> As the Supreme Court articulated, “[w]e have repeatedly held that the phrase ‘notwithstanding any other law’ is not always construed literally ... and does not require the agency to disregard all otherwise applicable laws.”<sup>46</sup> Nevertheless, while there are cases that have given full measure to “any other provision of law,”<sup>47</sup> the provision may be ignored if there is a clear and unambiguous statement of an underlying directive. However, it is hard to say whether § 1251 provides such a statement.

It may be possible to make a reasonable argument that § 1312(d)(3)(D) would trump the application of § 1251. If a court were to evaluate § 1312(d)(3)(D) and § 1251(a) as conflicting, a court could rely on a canon of statutory construction that provides, in essence, that “where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible.”<sup>48</sup> However, “if there is any conflict the latter (more specialized) will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.”<sup>49</sup> Applying this canon, one could argue that § 1312(d)(3)(D) would override application of § 1251(a), as § 1312(d)(3)(D) deals specifically with available health coverage for Members of Congress and congressional staff. On the other hand, a court could also find that these statutes may be read in concert with each other, in that § 1312(d)(3)(D) only applies to new Members of Congress and congressional staff, and § 1251(a) would apply to existing ones participating in FEHBP.

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<sup>43</sup> This paragraph is a excerpt from CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig and Yule Kim.

<sup>44</sup> For example, several cases have given effect to the provision of the Mandatory Victims Restitution Act that states a restitution order can be enforced against any property of the person fined under the order, “[n]otwithstanding any other Federal law.” See, e.g., *United States v. Hyde*, 497 F.3d 103 (1<sup>st</sup> Cir. 2007) (superseding bankruptcy law); *United States v. Novak*, 476 F.3d 1041 (2007) (superseding ERISA).

<sup>45</sup> *Oregon Natural Resources Council v. Thomas*, 92 F.3d 792 (9<sup>th</sup> Cir. 1996). The court harmonized the “notwithstanding” phrase with other provisions of the act that pointed to the limiting construction.

<sup>46</sup> *Id.* at 796. The Three-Sisters Bridge saga offers another example. After a court decision had ordered a halt to construction of the bridge pending compliance with various requirements in D.C. law for public hearings, etc., the project was abandoned. Congress then directed that construction proceed on the bridge project and related highway projects “notwithstanding any other provision of law, or any court decision or administrative action to the contrary.” The same section, however, directed that “such construction ... shall be carried out in accordance with all applicable provisions of title 23 of the United States Code.” The federal appeals court held that, notwithstanding the “notwithstanding” language, compliance with federal highway law in title 23 (including requirements for an evidentiary hearing, and for a finding of no feasible and prudent alternative to use of parkland) was still mandated. *D.C. Fed’n of Civic Ass’ns v. Volpe*, 434 F.2d 436 (D.C. Cir. 1970). Then, following remand, the same court ruled that compliance with 16 U.S.C. § 470f, which requires consultation and consideration of effects of such federally funded projects on historic sites, was also still mandated. 459 F. 2d 1231, 1265 (1972).

<sup>47</sup> See, e.g., *Schneider v. United States*, 27 F.3d 1327, 1331 (8<sup>th</sup> Cir. 1994). The court there rejected an argument that language in the Military Claims Act (“[n]otwithstanding any other provision of law, the settlement of a claim under section 2733 ... of this title is final and conclusive”) does not preclude judicial review, but merely cuts off other administrative remedies. Noting different possible interpretations of “final,” “final and conclusive,” and the provision’s actual language, the court concluded that “[t]o interpret the section as precluding only further administrative review would be to render meaningless the phrase ‘notwithstanding any other provision of law.’”

<sup>48</sup> SINGER & SINGER, *STATUTES AND STATUTORY CONSTRUCTION* (Sutherland Stat. Const.) (7th ed.), vol. 2B, §§ 51.05 (2008).

<sup>49</sup> *Id.*

One may also argue that to allow Members and congressional staff to stay on FEHBP would frustrate congressional intent. While CRS was not able to find much discussion surrounding the intent of the provision, as noted by Senator Grassley, the idea behind offering a similar amendment that limited the health coverage available to Members and staff was “to require that Members of Congress and congressional staff get their employer-based health insurance through the same exchanges as ... constituents.”<sup>50</sup> Thus, allowing current Members of Congress and congressional staff to stay in FEHBP seems contrary to this idea. However, it should be noted that if a reviewing court finds that the language in § 1251 can be interpreted under the plain meaning rule, it may choose to disregard this statement of congressional intent.<sup>51</sup>

### **Applicability of FEHBP to New Members and Covered Congressional Staff**

The language of § 1312(d)(3)(D) specifies what “health plans” the federal government may make available to Members of Congress and congressional staff. The definition of health plan, as provided under § 1301(b)(1) of PPACA, means a group health plan or health insurance coverage as defined under § 2791 of the Public Health Service Act (PHSA). Under this section of the PHSA, it appears that FEHBP would likely be considered a “health plan.”<sup>52</sup> However, in light of the fact that FEHBP is an existing program established under the Federal Employee Health Benefits Act, the program was not created by PPACA or an amendment made by the Act, and FEHBP would not be an option in a state’s exchange; therefore, it would appear that, at least for new Members and staff, this provision does not allow the federal government to make FEHBP “available” to them.

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<sup>50</sup> 156 CONG. REC. S1821 (Mar. 23, 2010).

<sup>51</sup> See, e.g., *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (explaining that “we do not resort to legislative history to cloud a statutory text that is clear.”)

<sup>52</sup> A group health plan under section 2791 of the PHSA means an “employee welfare benefit plan,” as defined under the Employee Retirement Income Security Act (ERISA), to the extent that the plan provides medical care (and items and services paid for as medical care) to employees or their dependents directly or through insurance, reimbursement, or otherwise. In general, an “employee welfare benefit plan” is defined under ERISA as a plan, fund, or program established or maintained by an employer or by an employee organization that provides medical, surgical, hospital, or several other types of benefits for participants and beneficiaries. An “employer” is defined by ERISA as a person acting as an employer, or in the interest of an employer in relation to an employee benefit plan. Accordingly, there appears to be nothing that prevents the U.S. government from being an employer under this definition. Despite the fact that ERISA does not generally apply to governmental plans, based on these definitions, it seems that FEHBP could be considered a group health plan for purposes of ERISA, the PHSA, and PPACA. It also appears that FEHBP carriers are considered providers of health insurance coverage.