



THE COMMITTEE ON ENERGY AND COMMERCE

MEMORANDUM

April 15, 2013

To: Members of the Health Subcommittee

From: Energy and Commerce Committee Majority Staff

Re: Markup of H.R. _____, Helping Sick Americans Now Act; H.R.____, a bill to affirm the policy of the United States regarding Internet governance; and H.R. 3, Northern Route Approval Act.

On Wednesday, April 17, 2013, at 9:00 a.m. in room 2123 of the Rayburn House Office Building, the Energy and Commerce Committee will meet in open markup session. A summary of the legislation to be considered is below.

I. BACKGROUND

A. H.R. _____, HELPING SICK AMERICANS NOW ACT

Section 1101 of the Patient Protection and Affordable Care Act (PPACA) established a \$5 billion program to provide health coverage for individuals with pre-existing conditions known as the Pre-Existing Condition Insurance Plan (PCIP). Under PCIP, U.S. citizens and legal residents who have a pre-existing condition and been uninsured for at least 6 months are eligible for the program.

Shortly after passage of PPACA, the Chief Actuary for the Centers for Medicare and Medicaid Services (CMS) estimated that the creation of PCIP would result in roughly 375,000 people gaining coverage.¹ The Chief Actuary also estimated that funding for the program would be exhausted within one or two years.

As of January 31, 2013, only 107,139 individuals were enrolled in PCIP.² On February 15, 2013, CMS announced to States that the agency was suspending enrollment in PCIP. This program was intended to help individuals with pre-existing conditions through January 1, 2014. Despite lower than expected enrollment, CMS announced that it would no longer enroll new individuals in the program and that it would bar States from accepting new applications because of financial constraints.

¹ [Centers for Medicare and Medicaid Services. *Estimated Financial Effects of the "Patient Protection and Affordable Care Act," as Amended \(April 22, 2010\).*](#)

² Centers for Medicare and Medicaid Services. State Enrollment in the Pre-Existing Condition Insurance Plan (January 31, 2013)..

H.R. _____, the “Helping Sick Americans Now Act,” would require the Secretary of Health and Human Services to transfer Fiscal Year 2013-2016 funding from the Prevention and Public Health Fund to PCIP. This transfer would allow CMS to enroll sick and chronically ill Americans who have been denied coverage because of the CMS February 15 PCIP suspension. The bill also would eliminate the statutory requirement that Americans remain uninsured for six months as a condition of eligibility.

Should you have any questions regarding H.R. _____, the “Helping Sick Americans Now Act,” please contact Paul Edattel or Katie Novaria at (202) 225-2927.

B. H.R.____, A BILL TO AFFIRM THE POLICY OF THE UNITED STATES REGARDING INTERNET GOVERNANCE

1. OVERVIEW

If Congress does not act, attempts to place the Internet under the jurisdiction of international regulatory bodies just might succeed. In 2012, the House and Senate unanimously passed resolutions opposing treaty proposals at the World Conference on International Telecommunications (WCIT-12) to subject the Internet to regulation at the hands of the International Telecommunication Union, a United Nations agency. The resolutions are credited with emboldening more than 50 nations to join the United States in refusing to sign the treaty. Unfortunately, 89 nations did sign the treaty, and this is likely the start, not end, of international efforts to regulate the Internet. That is why the Subcommittee on Communications and Technology, on April 11, 2013, passed by voice vote legislation taking the language of last year’s resolutions and making it the policy of the United States “to promote a global Internet free from government control and to preserve and advance the successful multi-stakeholder model that governs the Internet.”

Governments’ hands-off approach has enabled the Internet to grow at an astonishing pace and become perhaps the most powerful engine of social and economic freedom and job creation the world has ever known. Under the current multi-stakeholder governance model, non-regulatory institutions manage and operate the Internet by developing best practices with public and private-sector input. This allows the Internet to evolve quickly to meet the diverse needs of users around the world, and to keep governmental or non-governmental actors from controlling the design and operation of the network or the content it carries. By strengthening the 2012 resolution from language which opposed a particular treaty proposal to official policy of the United States, Congress will demonstrate its commitment to Internet freedom and push back on those nations that might subvert the Internet for their own purposes.

At the Subcommittee markup, Ranking Members Waxman and Eshoo expressed their belief that making it U.S. policy to promote a global Internet free from government control might conflict with domestic regulation on a number of issues, including network neutrality. While there was disagreement on this point, Subcommittee Chairman Walden agreed to instruct staff to try to reach a bipartisan agreement prior to the full Committee markup. As a result of those

discussions, the legislation has been revised to focus only on preserving and advancing the multi-stakeholder model.

2. BACKGROUND

Many representatives of the world's nations went to Dubai from December 3-14, 2012, for the WCIT-12. The purpose of the conference was to update the International Telecommunication Regulations (ITRs), a treaty adopted in 1988 to govern certain aspects of international telephone service. On the agenda were provisions regarding the interconnection of phone networks, charges for completing international calls, and roaming terms for wireless subscribers using their phones abroad.

Because the ITRs were designed to regulate international calling as it existed in the 1980s, modern Internet traffic and networks fell outside their scope. Drafted and agreed to in Melbourne, Australia, the ITRs were conceived in an era when most countries still had monopoly, government-owned telephone networks. They are not well suited for application to the Internet, and the organizers of the Dubai conference gave assurances that WCIT-12 would not address the Internet. In the lead-up to the conference, however, a number of member nations attempted to incorporate Internet-related issues.

Countries such as China, Russia, and Iran sought to add language governing unwanted messages (spam), miscellaneous "security" and "cybersecurity" issues, assignment of Internet domain names and addresses, and verification of users' online identities. Other proposals sought to expand application of the ITRs from "recognized operating agencies"—telephone companies offering international telephone service to the public—to "operating agencies." A proposal by the European Telecommunications Network Operators' Association (ETNO) would have mandated "sending party pays," a particular system of compensation for international Internet traffic, rather than allow parties to experiment with, negotiate over, and possibly compete based on different cost recovery and payment methodologies. Moreover, many member states objected when others sought, successfully, to add language to the ITRs preamble granting nations, not people, a right of access to international telecommunications services.

Some parties advocated regulation because they see a revenue opportunity through tariff-type rules to fund their own communications and non-communications objectives. Others advocated it because they want to control the flow of information. Although couched in terms of broadband deployment and cybersecurity, such proposals could be used by countries as excuses to impose economic regulation on the Internet, and possibly to censor speech their governments find threatening.

Many in the U.S. government voiced reservations that these issues were beyond the stated scope of the conference and would inappropriately expand the ITRs beyond traditional phone service into Internet regulation. To express its concerns, in the 112th Congress, the Energy and Commerce Committee had marked up H. Con. Res. 127, a concurrent resolution supporting the multi-stakeholder model and opposing international attempts to regulate the Internet. The House of Representatives passed H. Con. Res. 127 on August 2, 2012, by a vote of 414-0. The Senate passed a nearly identical measure, S. Con. Res. 50, on September 22, 2012,

by unanimous consent. The House agreed to the Senate version on December 5, 2012, by a vote of 397-0.

At the WCIT, the delegations were presented proposals that recognized an international regulatory role in the operation and governance of the Internet. While it did not include the ETNO proposal, it did include a version of the spam proposal as well as a new term of “authorized operating agencies”. The impact of these changes is not yet clear.

Consistent with Congress’s resolution, Ambassador Terry Kramer, head of the U.S. delegation, opposed the expansion of the ITRs to Internet issues, and the United States refused to sign the treaty. Fifty-four other countries—including Great Britain, Canada, Australia, New Zealand, Poland, Czech Republic, Italy, Switzerland, Sweden, Denmark, Finland, Netherlands, Greece, Japan, Kenya, Chile, Portugal, and Costa Rica—joined the United States either in outright refusing to sign the treaty or indicating they would need to consult with their governments. Eighty-nine countries did sign the new ITRs, which will take effect in January 2015.

The Subcommittee held a joint hearing with the Foreign Affairs Committee on February 5, 2013, that included discussion of draft legislation converting the 2012 unanimous resolutions into the policy of the United States. The draft legislation is virtually identical to those resolutions, with small changes to convert it from a resolution to a statement of U.S. policy and to revise the findings to reflect the results of the WCIT-12.

3. SECTION-BY-SECTION

Section 1: Findings

This section makes a number of findings related to the governance of the Internet and the Internet’s importance to society, including that:

- The Internet must remain stable, secure, and free from government control;
- The world deserves the access to knowledge and economic benefits that the Internet provides and that are the bedrock of democratic self-governance;
- The structure of Internet governance has profound implications for competition and trade, democratization, free expression, and access to information;
- Countries have obligations to protect human rights, whether exercised online or offline; and,
- Proposals to fundamentally alter the governance and operation of the Internet would diminish freedom of expression on the Internet in favor of government control over content.

Section 2. Policy Regarding Internet Governance

Section 2 states that “[i]t is the policy of the United States to preserve and advance the successful multistakeholder model that governs the Internet.”

Should you have any questions regarding H.R. ____, a bill to affirm the policy of the United States regarding Internet governance, please contact Neil Fried or David Redl at (202) 225-2927.

C. H.R. 3, NORTHERN ROUTE APPROVAL ACT

1. BACKGROUND

On September 19, 2008, Canada-based TransCanada Corporation submitted an application to the U.S. Department of State for a Presidential Permit for its Keystone XL pipeline project to cross the U.S.-Canada border. The first proposed pipeline project application included 1,384 miles of pipeline from two segments: the Gulf Coast segment and the Keystone XL segment.

The Secretary of State is delegated the President’s authority for applications for Presidential Permits under Executive Order 13337. Issuance of a Presidential Permit is dependent upon a finding that the project would serve the “national interest.” Also, pursuant to the National Environmental Policy Act (NEPA), an Environmental Impact Statement (EIS) must be prepared by the Department of State because of the determination that Keystone XL would constitute a major Federal action that may have a significant impact upon the environment. Through this determination process, the Department of State was required to coordinate with and/or receive views from several Federal agencies

The September 2008 application’s NEPA process resulted in a draft EIS that was issued on April 16, 2010, followed by a supplemental draft EIS that was issued on April 15, 2011, to address EPA’s concerns that the draft EIS was “inadequate,” and a final EIS that was issued August 26, 2011. Issuance of the final EIS started the 90-day public review period for the Department of State to gather information to inform its national interest determination. On November 10, 2011, the Department issued an announcement that additional information was needed to make a determination that may include the need for an additional supplemental EIS which would have further delayed a determination until 2013. A provision was included in the Temporary Payroll Tax Cut Continuation Act of 2011, which was signed into law in December 2011 and required the Secretary of State to issue a Presidential Permit for the project unless the President determined it was not in the national interest. On January 18, 2012, President Obama denied the application for Keystone XL’s Presidential Permit.

On May 4, 2012, TransCanada submitted a second application for a Presidential Permit for the Keystone XL pipeline project. This application triggered a new NEPA review process and national interest determination requirement. The new application was for 875 miles of pipeline for the Keystone XL project; the southern Gulf Coast segment which did not require a Presidential Permit had already begun construction and is currently 50 percent to 60 percent

complete. On March 1, 2013, the Department of State issued a draft supplemental EIS for the second Presidential Permit application.

According to the Department of Energy, the Keystone XL pipeline project, if fully completed, would be able to move 830,000 barrels of oil per day from the oil sands region of Alberta, and it also could accept U.S. crude from the Bakken oil fields.

TransCanada estimates that it would spend approximately \$7 billion to construct the full project and would directly create 20,000 jobs. In the draft supplemental EIS that was issued on March 1, 2013, the Department of State estimated approximately 42,100 direct and indirect jobs would be created over the project construction period, of which 3,900 would be directly involved with project construction.

2. SECTION-BY-SECTION

Section 1: Short Title

Section 1 provides the short title for the legislation, the “Northern Route Approval Act”.

Section 2: Findings

Section 2 offers seven separate Congressional findings regarding the need for energy infrastructure, the national security benefits of Canadian oil imports, the employment and economic benefits from the Keystone XL pipeline, the review and approval by the State of Nebraska of the Keystone XL pipeline, the length and breadth of the Federal review process, the safety and environmental benefits of transporting oil via pipeline, and of the action proposed to be taken by H.R. 3 to the action that was needed to approve the Alaska Pipeline in 1973.

Section 3: Keystone XL Permit Approval

Section 3 removes the requirement for a Presidential Permit for the Keystone XL pipeline described in the application filed by TransCanada on May 4, 2012, and that was supplemented to include the reroute approved by the Nebraska Governor. It deems the final EIS issued on August 26, 2011, and the Final Evaluation Report issued by the State of Nebraska to satisfy all requirements of NEPA and the National Historic Preservation Act (NHPA).

Section 4: Judicial Review

Section 4 vests, except for review by the Supreme Court, the U.S. Court of Appeal for the District of Columbia Circuit with sole jurisdiction over specifically listed legal challenges regarding Keystone XL pipeline. These are limited to the review of any final decisions by Federal agencies regarding the project, questions of constitutionality, and the adequacy of any analysis. Any claims must be brought within 60 days of a decision giving rise to a claim. Any action brought under this section shall receive expedited consideration.

Section 5: American Burying Beetle

Section 5 deems an incidental take permit to have been issued for the American burying beetle for the construction, operation, and maintenance of the Keystone XL pipeline.

Section 6: Right-of-Way and Temporary Use Permit

Section 6 deems a right-of-way and temporary use permit to have been issued according to terms set forth in an application filed with BLM.

Section 7: Permits for Activities in Navigable Waters

Section 7 states that no later than 90 days after an application is filed, the Secretary of the Army shall issue all permits necessary under section 404 of the Federal Water Pollution Control Act and section 10 of the Rivers and Harbors Appropriations Act. The application shall be based on the administrative record which shall be considered complete. The Secretary is given the authority to waive any procedural requirements and if the Secretary has not issued the permits in 90 days then the permits are deemed to have been issued. The Administrator of the Environmental Protection Agency (EPA) may not prohibit or restrict any activities in this section.

Should you have any questions regarding H.R. 3, Northern Route Approval Act, please contact Jason Knox or Tom Hassenboehler at (202) 225-2927.