DRAFT **Assessment—for Citizen Trade Policy Commission review**

Report to the Health Care Subcommittee of the Maine CTPC

I. Introduction

The Health Care Subcommittee of the Maine Citizens Trade Policy Commission has asked the Forum on Democracy & Trade to look at Maine's health insurance programs in relation to U.S. commitments under international trade agreements, and specifically to identify potential conflicts or issues regarding Maine's Dirigo Health Program with provisions of the WTO General Agreement on Trade in Services (GATS). This report is primarily based on analysis carried out by specialists at the Harrison Institute for Public Law, Georgetown University Law Center. These specialists note the complexity of the GATS commitments, particularly as it pertains to a multi-faceted public policy issue like "health care," since health care programs may fall into a number of categories in the United States' GATS schedule. Here we focus specifically on Dirigo and GATS in order to enable the Maine CTPC to:

- Understand potential trade conflicts serious enough to bring to the attention of U.S. trade negotiators and the Congress
- Raise questions about the meaning of vague GATS provisions on coverage and trade rules that could improve the quality of state-federal consultation on trade policy
- Identify potential safeguards for Dirigo and similar state-level health programs. Safeguards could take the form of:
  - avoiding implementation of new GATS disciplines on domestic regulation, or
  - avoiding coverage through limits on U.S. sector commitments in the GATS.

We note at the outset that there do not appear to be any foreign providers active in Maine's health insurance market today. As compared to other wealthy countries in the Organization for Economic Cooperation and Development (OECD), the United States is a "statistical outlier" with respect to the provision of health services for its population. According to the OECD, only 44% of total health expenditures in the United States comes from public sources, and the 35% share of total health costs accounted for by private health insurance programs is more than double the figure for that of the closest OECD country (Netherlands, at 15% provided by private suppliers).[1] Most OECD countries have aging populations, and health care is taking up a larger share of government spending. This has led to a proliferation of new supplementary health insurance products in the European Union in recent years. Will foreign suppliers seek to move aggressively into US markets? Here are the scenarios under which GATS and other trade rules become increasingly important with respect to state health care choices:

- Foreign firms might enter the market to take advantage of new government programs (subsidies and stable administrative payments).
- Domestic firms might change their corporate domicile to take advantage of evolving trade rules. This scenario might also involve countries that have Free Trade

[1] "Private Health Insurance in OECD Countries: The Benefits and Costs for Individuals and Health Systems," Francesca Colombo and Nicolas Topay, OECD Health Working Paper #15, 2004. The OECD average is 6% for total health expenditures paid by private health insurers.

> Agreements (FTAs) with the United States, which include chapters on services or investment that constrain government authority more than GATS.

These scenarios would depend on how much of a legal advantage the trade rules would provide to a foreign firm, as well as whether another country would threaten a trade dispute in order to support such a firm.

Domestic insurance and pharmaceutical companies have shown they are willing to spend resources to try and invalidate Dirigo in a domestic court. Standing alone, Maine is not likely to provoke an international trade dispute. But if Maine continues to be a leader in state-level innovation, and if other states begin to enter the insurance market, the threat of a trade dispute involving Maine's policy (along with others) would grow.

Another possible scenario is that the federal government might use its unilateral powers to enforce trade rules through preemption; or, perhaps more likely, exercising a coercive option such as withholding federal funds through the Medicaid waiver process in order to limit the options available to Maine in experimenting with different types of health care coverage.

Finally, the trade rules are changing. The most likely source of GATS conflict that was identified involves ***proposed disciplines on domestic regulation that are presently being negotiated at the WTO.*** The Maine CTPC has already communicated with services negotiators at the Office of the United States Trade Representative regarding the Working Party on Domestic Regulations, and indeed Chief Services Negotiator Chris Melly has appeared before the commission. It is recommended that the Maine CTPC continue to monitor the domestic regulation negotiations very carefully.

It was recently announced that services negotiations are starting up again at the WTO, after the five-month suspension following the collapse of the Doha Round. A recent article in the Washington trade press[2] notes that

> During a 'Friends of Services' meeting..., lead US negotiator Chris Melly pressed for a clear strategy – starting with ambassadors first and ministers later – that would get to the nitty-gritty of bargaining."

Mr. Melly's statement might be evaluated in light of two comments he made in front of the Maine CTPC at the commission's 18 September 2006 meeting: first, that USTR considered the Working Party on Domestic Regulation's Chairman's Text to be "horrible"; and second, that he doubted there would be any serious negotiations on services "before the end of the year. One would assume that the Chairman's Text is the basis for the "nitty-gritty of bargaining." Has Mr. Melly (and by extension USTR) shifted from the previous assertion that there would not be significant negotiations on services before the end of 2006?

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[2] "A 'Green Light' to Re-start DDA [Doha Development Agenda]," Washington Trade Daily, 17 November 2006.

Interestingly, one of the messages Mr. Melly brought to the Maine CTPC was that USTR was not willing to honor the Governor's letter/request carving the State of Maine out of new GATS commitments, stating that USTR did not see such carve-outs as necessary because Maine laws on roadside billboards or library services were unlikely to be challenged. Melly did *not* mention health care in his remarks before the Commission. And yet in the case of health care and pharmaceuticals, there have already been domestic lawsuits.

Further, the expansion and growth of private health care programs in Europe and other major trade-partner countries suggests that foreign suppliers may indeed seek to enter Maine's health insurance market in future. Under these conditions, the cautions noted by Maine CTPC, as well as Governor Baldacci in his 5 April 2006 letter, seem very reasonable**. Maine is fully justified in seeking further clarification from USTR with respect to that part of the U.S. GATS schedule where domestic legal challenges have already been brought by domestic actors; where Maine is clearly identified as a national leader in health care reform; and where the rapid growth of foreign service suppliers who may wish to enter the U.S. market makes a challenge to Maine law more likely.** We expand on this point in the third section following.

The remainder of this report follows the format and analysis provided by Harrison Institute for Public Law. It is divided into four parts:

- Part II provides an overview of the relevant Dirigo elements.
- Part III addresses general GATS coverage of Dirigo Health.
- Part IV outlines the risk of conflict between Dirigo and GATS.
- Part V presents the potential safeguards that CTPC could recommend to protect Dirigo from conflict.

II. Brief Introduction to Dirigo

Before detailing specific GATS questions, this section provides (1) an overview of Dirigo terms, (2) a summary of how the program operates, and (3) a mention of three specific Dirigo health insurance provisions most likely to conflict with GATS obligations.

a) *Dirigo Terms*

Three Dirigo terms could easily be confused if not explained. The relevant terms are:

- Dirigo Health Act (the "Act")—the actual statute that created Dirigo Health, which is codified at ME. REV. STAT. ANN. tit. 24-A, § 6901 et seq. (2006).

- Dirigo Health (the "Agency")—an independent executive agency created by the Act "to arrange for the provision of comprehensive, affordable health care coverage."[3] The Act creates the framework for the Agency to provide health insurance to Maine residents and minimize health care costs.

[3] ME. REV. STAT. ANN. tit. 24-A, § 6902.

- Dirigo Health Program (the "Program") and DirigoChoice—The Act authorizes the Agency to create and manage a specific kind of health insurance, which is the Dirigo Health Program. The Dirigo web site refers to the insurance as DirigoChoice.

DirigoChoice is available to:

- Small Business Employees (2-50 employees);
- Sole Proprietors (self employed / business of 1); and
- Individuals who:
  - Are unemployed
  - Work for a Small Business that does not offer insurance
  - Own a Small Business but cannot get enough employees to join a Small Group plan
  - Work less than 20 hours a week for any single employer
  - Are early retirees whose employer does not contribute to health benefits.[4]

Dirigo Health operates under a board of directors and an executive director.[5] The Act delegates rulemaking power to the Agency[6] and requires the Agency to arrange for the provision of Dirigo Health Program coverage.[7]

Section 6910 outlines requirements for Dirigo Health to create a new product on the health insurance market, DirigoChoice. In short, Dirigo Health contracts with insurance carriers to provide coverage and with eligible businesses to arrange for coverage under the Program. The Agency may also permit eligible individuals to purchase coverage for themselves and their dependents.[8]

The Act authorizes the Agency to establish subsidies for "eligible individuals or employees whose income is under 300% of the federal poverty level,"[9] The subsidies

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[4] *See Dirigo Fact Sheet: Agency Presentation to the Governor's Blue Ribbon Commission*, at 6 (2006) [hereinafter *Dirigo Fact Sheet*], *available at* http://www.dirigohealth.maine.gov/agency%20Fact%20Sheet%20Final%20091506.pdf.

[5] *See id.* §§ 6904, 6909.

[6] *See id.* § 6908.

[7] *See id.* § 6910. The Act authorized Dirigo Health to create a nonprofit health care plan if health insurance carriers did not apply to offer Program coverage. *See* ME. REV. STAT. ANN. tit. 24-A, § 6910(2). Anthem Blue Cross and Blue Shield prevented the nonprofit option by becoming the first company to negotiate for business under Dirigo Health. *See Healthcare Coverage; Survey shows businesses shunning state health plan*, HEALTH & MED. WK., Aug. 2, 2004, at 549. Anthem is the only provider offering Dirigo Health Program coverage and recently renewed its contract for one more year. *See Dirigo Health Agency Reaches Agreement with Anthem on DirigoChoice* (2006), on-line at: http://www.maine.gov/governor/baldacci/healthpolicy/news/9_22_06.htm.

[8] *See* ME. REV. STAT. ANN. tit. 24-A, § 6910(4).

[9] *Id.* § 6912.

are funded by savings offset payments, which are the amount saved by other insurance carriers and third-party administrators as a result of the operation of the Dirigo Health Program. The Act authorizes the Agency to calculate this amount and collect it from non-Dirigo carriers.[10]

The Act does not directly regulate the health insurance market in Maine; instead, it creates a new entrant to the market and subsidizes its consumers. The Act does not require insurance carriers in Maine to comply with any separate provisions, and it does not place any restrictions on the type or amount of health insurance that may be offered by non-Dirigo carriers. The Act still has direct effects on the insurance market because the Act requires carriers pay back any savings gained because of the existence of the new market entrant and the shifts customers to the Dirigo supplier.

b) Specific Dirigo Provisions

This section highlights the specific health insurance provisions that are most likely to risk conflict with GATS:

1. Savings Offset Payments

The Act authorizes Dirigo Health to analyze the total savings in the health insurance market attributable to the presence of the Program and seek to recover these savings from non-Dirigo carriers.[11] This is the most direct effect that the Act has on health insurance carriers in Maine.

In authorizing the Agency to determine the total savings to non-Dirigo providers, the Act provides standards but also arguably delegates the authority to the Agency to determine standards not listed in the statute. A Maine trial court recently upheld this statutory delegation to the Agency as not being unconstitutionally vague.[12]

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[10] The constitutionality of the savings offset payments of the Act and the validity of the methodology employed to determine savings in 2005 were recently upheld by the Cumberland County Superior Court. *See Maine Assoc. of Health Plans v. State*, No. Civ.A. AP-05-090, 2006 WL 2959744 (Me. Super. Ct. Aug. 4, 2006); *Dirigo Health Wins Court Case: Savings Confirmed* (2006), *at* http://www.maine.gov/governor/baldacci/healthpolicy/news/8_7_06.htm. Nevertheless, the Dirigo Health board recently voted to table any action to assess the savings during year two of Dirigo, instead charging the Governor's new Blue Ribbon Commission to find an alternative source of funding for the Dirigo Health Program. *See Governor Applauds Decision to Table Dirigo Savings Offset Payment*, on-line at: http://www.maine.gov/governor/baldacci/healthpolicy/news/8_8_06.htm.

[11] *See* ME. REV. STAT. ANN. tit. 24-A, § 6913.

[12] *See Maine Assoc. of Health Plans*, 2006 WL 2959744, at *3 n.4.

While the statute is silent, the DirigoChoice carrier is not required to make the savings offset payment.[13] The Dirigo board recently voted to table the savings offset payment, charging the Governor's Blue Ribbon Commission with the responsibility of finding an alternative source of funding for the Dirigo Health Program.[14]

2. Subsidies

The Agency arranges for subsidies for those "eligible individuals or employees whose income is under 300% of the federal poverty level."[15] The Act either brings new consumers to the market—those who might not otherwise consume health insurance—or pulls those on the margin over to the Dirigo supplier. The subsidies increase the base of possible consumers for Dirigo Health Program coverage—and decrease consumers of non-Dirigo services.

Approximately 40% of DirigoChoice members were uninsured prior to enrolling,[16] which means that 60% of DirigoChoice consumers were insured with a different insurance company before switching to Dirigo coverage. DirigoChoice is attracting more than half of its consumers away from other health insurance providers in the market. With 19,352 members in enrolled in DirigoChoice in August 2006, DirigoChoice attracted 11,000 health insurance consumers away other service suppliers.[17]

3. Contracting Authority (Qualification Requirements)

The Act outlines the manner in which Dirigo Health may exercise its contracting authority and powers to administer Dirigo Health Insurance. The contracting authority provisions include the qualification requirements for carriers who wish to offer Dirigo coverage.[18] Some relevant provisions are:

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[13] The Act also exempts certain other carriers from making the payments. The relevant portion of the Act states:

> The board shall determine annually a savings offset amount to be paid by health insurance carriers, employee benefit excess insurance carriers and 3rd-party administrators, not including carriers and 3rd-party administrators with respect to accidental injury, specified disease, hospital indemnity, dental, vision, disability income, long-term care, Medicare supplement or other limited benefit health insurance.

ME. REV. STAT. ANN. tit. 24-A, § 6913(2).

[14] *See supra* note 10.

[15] *Id.* § 6912.

[16] *See Agency Fact Sheet*, *supra* note 4, at 14.

[17] *See id.* at 12.

[18] The Contracting Authority provisions cover contracts with insurance carriers, contracts with eligible businesses to cover employees, and authority to permit individuals to purchase DirigoChoice for themselves and their dependents. *See* ME. REV. STAT. ANN. tit. 24-A, § 6910(4)(A)–(C).

- Dirigo Health may include cost-containment provisions in contracts with insurance carriers[19];
- Dirigo Health may set the allowable rates for administration and underwriting gains for the Program[20];
- Dirigo Health may limit the number of eligible individuals who enroll in the Program.[21]

III. General GATS Coverage of Dirigo Health

The Dirigo Health program is covered by GATS. Under Article I, GATS covers measures that affect trade in services. Clearly, Dirigo affects trade in health insurance services. The one exclusion from general GATS coverage is for "a service supplied in the exercise of government authority." This "government authority" exclusion takes a measure *out* of GATS coverage *only if both* of two tests are satisfied. The measure must be (a) not supplied on a commercial basis and (b) not in competition with one or more service suppliers.[22]

As noted below, over 60% of Dirigo consumers are drawn from unsubsidized competitors of Dirigo. While it may seem obvious to us that Dirigo provides a commercial product and competes with commercial providers of health insurance, we raise a question about GATS coverage for one important reason. U.S. trade negotiators have stated in conversations with state officials that any government service is excluded as an exercise of government authority.

Indeed, a 13 April 2005 letter from Assistant USTR for Congressional Affairs Matt Niemeyer to Senator Susan M. Collins suggests that USTR does not understand how Dirigo works. In response to questions raised by Senator Collins, Niemeyer writes:

> Based on the description of Maine's Dirigo Health Plan, we understand that the plan operates under the auspices of the Maine government and receives some state funding for the first year as well as public funds through Medicaid. We understand that the plan has several objectives, including working with insurance companies and hospitals to find voluntary means of reducing the cost of insurance and health care and ensuring that poor citizens are able to obtain insurance. ***Dirigo appears to have a unique governmental role and is not intended to compete directly with private sector suppliers of insurance*** and related services or health care services (emphasis added).

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[19] *Id.* § 6910(4)(A)(2).

[20] *Id.* § 6910(4)(A)(5).

[21] *Id.* § 6910(4)(C)(6).

[22] General Agreement on Trade in Services art. I:3(c), Apr. 15, 1994, 33 I.L.M. 44 (1994) [hereinafter GATS], on-line at: http://www.wto.org/English/docs_e/legal_e/legal_e.htm#services.

Our analysis suggests that Dirigo is in competition with private insurance suppliers, and indeed, some degree of competition is unavoidable given Dirigo's objectives. The Maine CTPC may therefore wish to pursue further this issue with USTR. Knowing whether or not USTR simply misunderstood, or deliberately misrepresented, the purposes of Dirigo in its letter to Senator Collins is less important than obtaining a written clarification of USTR's understanding of general GATS coverage of state-initiative health care programs, with respect to this question: ***Does USTR believe that GATS does not cover a government-subsidized insurance program, even when it takes customers away from commercial companies?***

IV. Dirigo's Risk of GATS Conflict

For each measure, this section comments on potential conflicts and raises questions about interpretation of GATS. Any potential conflict assumes the existence of a foreign service supplier in the market: either a domestic supplier incorporating abroad, or a foreign supplier attempting to enter the market.

a) *Savings Offset Payments*

The Act only requires non-Dirigo providers to make the savings offset payments and leaves calculation of the payments to the discretion of the Agency. These provisions implicate the domestic regulation and national treatment obligations.

1. National Treatment

In service sectors a Member has specifically scheduled, the national treatment obligation requires the Member to treat domestic and foreign service suppliers equally.[23] A measure conflicts with the obligation if it "modifies the conditions of competition in favour of services or service suppliers" of domestic firms compared to foreign firms.[24] Nevertheless, the national treatment obligation is limited in that equal treatment only needs to be extended to "like" services and services suppliers; thus, if suppliers are not "like," a measure treating them differently does not violate national treatment.

A "likeness" test has yet to be fully flushed out by WTO dispute resolution, though two panels have taken the general approach that service suppliers that offer the same services are "like."[25] More complex service sectors or situations may require comparison of a

[23] *See* GATS art. XVII:1(a) ("In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.")

[24] *See id.* art. XVII:3.

[25] *See European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Panel Report, WT/DS27/R/USA ¶7.322 (May 22, 1997) (declining to find banana distributors with different origins of the bananas to be different service suppliers and stating "to the extent that entities provide these like services, they are like service suppliers"); *Canada – Autos*, Panel Report, WT/DS142/R ¶10.248 (Feb. 11, 2000) (same).

number of relevant criteria and "greater attention may need to be paid to external factors such as competitive relationships and the circumstances in which services are being supplied."[26]

? **Likeness.** *What is the meaning of "likeness" in this Dirigo insurance market? Are non-Dirigo insurance providers "like" Anthem, the sole Dirigo insurance provider?*

Following the test from one WTO decision, the Dirigo and non-Dirigo providers could be "like" to the extent that they all offer the same service: health insurance. However, looking at the circumstances in which the services are offered illuminates external factors that distinguishe the two providers. A dispute panel determining likeness will probably ask:

- Is a Dirigo provider different because it offers services to a low-income population?
- Is a Dirigo provider different because it is directly accountable to a government agency?
- Is a Dirigo provider different because it actually saves the market money and is subsidized by those savings?

If non-Dirigo suppliers do not supply a "like" service as Dirigo suppliers, or if the two are not "like suppliers," then the two provisions may be safe from conflict with national treatment.

? **National Treatment Obligations.** *Does a measure violate national treatment if it creates equal conditions for most domestic and foreign service suppliers but carves out more favorable conditions for one domestic supplier?*

If the savings offset payments are not required of Anthem, then Dirigo effectively creates less favorable conditions for all non-Dirigo providers—domestic and foreign—as compared with the sole Dirigo provider. The national treatment obligation prohibits less favorable treatment between foreign suppliers and a Member's own like *suppliers*, plural. Does this mean equal treatment among all service suppliers? Can national treatment be satisfied through equal treatment with all but one domestic supplier?

2. Domestic Regulation

There may also be a risk of conflict between the savings offset payments provisions and the requirements of the domestic regulation obligation. GATS requires measures that relate to "qualification requirements and procedures, technical standards and licensing requirements" to be "based on objective and transparent criteria . . . [and] . . . not more burdensome than necessary to ensure the quality of the service"[27]

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[26] Eric H. Leroux, *From Periodicals to Gambling: A Review of Systemic Issues Addressed by WTO Adjudicatory Bodies under the GATS*, at 29 (Paper presented at the World Trade Forum 2006, Bern, Switzerland).

[27] GATS art. VI:5(a)(i).

A Maine trial court recently rejected an argument that the savings offset payment was unconstitutionally vague.[28] The plaintiffs—the Maine Association of Health Plans, the Maine Automobile Dealers, and the Maine State Chamber of Commerce—argued that the Act did not provide clear direction for the Agency to determine the savings offset amount and that the Agency measured savings using factors not enumerated in the statute. The Act requires that:

> [T]he board shall determine annually . . . the aggregate measurable cost savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in this state as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004.[29]

The plaintiffs argued that defining cost savings with the term "including" was ambiguous, allowing the Agency to limit the factors to those stated or alternatively adding factors not enumerated in the statute. The Agency board of directors originally calculated $136.8 million in cost savings, though the superintendent reduced that amount to $43.7 million, disapproving several factors used by the board.[30] The plaintiffs challenged the superintendent's calculation, but the trial court upheld the $43.7 million, stating "that the Superintendent's determination is supported by substantial evidence in the record."[31]

While dismissing the argument because it had not been originally raised at the agency level, the trial court also rejected its merits, stating that "[a]lthough, the legislative scheme is complex, a person of general intelligence would understand that a number of factors determine these kind of savings, such as hospital savings, uninsured savings, health care provider fee savings, certificate of need and capital investment fund savings, and insurance carrier savings."[32]

Domestic causes of action are often analogous to GATS claims. A trade conflict could arise if the domestic regulation requirement used in the GATS is stricter than the one applied under Maine law. That is to say:

- if the application of non-statutory standards by the agency may not be "objective and transparent" as required by GATS;
- the use of the payments may not be the least "burdensome" means to ensure the quality of Dirigo insurance; and

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[28] *See Maine Assoc. of Health Plans*, 2006 WL 2959744, at *3 n.4.

[29] ME. REV. STAT. ANN. tit. 24-A, § 6913(1)(A) (emphasis added).

[30] *See Maine Assoc. of Health Plans*, 2006 WL 2959744, at *4.

[31] *Id.*

[32] *Id.* at *3 n.4.

- if there is a less burdensome alternative to fund the program—for instance, through the general tax base—

then the saving payments could violate the domestic regulation obligation in the GATS. Consequently, two domestic regulation questions arise:

? **Transparent and Objective Delegation**. *How strict is the transparent and objective requirement of domestic regulation? Can statutory delegation to an administrative agency be considered objective? In the "domestic regulation" negotiations, will USTR argue for a softer standard, one that is more in line with the kind of analysis used by the Maine trial court?*

The domestic insurance industry has already shown that it is willing to spend resources to litigate against Dirigo, making the argument that the Dirigo Act is unconstitutional because it vaguely delegated authority to the Agency to determine how to calculate the savings payments. The industry argued the statute was ambiguous because the Agency was able to consider factors not enumerated in the statute in making its calculation. The Maine trial court determined the statute was not void for vagueness because "a person of general intelligence would understand that a number of factors determine these kind of savings."[33] In conclusion, then: would the GATS standard be as lenient as the Maine trial court's "general intelligence" test? Or, will the GATS require more specificity in the terms of the authority/cost calculation powers delegated to an administrative agency?

? **Transparent and Objective Regulations.** *If the agency promulgates clear regulations, do those regulations cure any objectivity problem with the statute?*

One further issue should be raised with respect to the Savings Offset Payments. The Maine trial court described the savings offset payment as a *licensing fee* rather than a tax.[34] However, in the WTO negotiations on domestic regulation, several nations have proposed a new discipline to ensure that licensing fees are *not more burdensome than necessary to pay for costs of administering licensing requirements*.[35] In fact, the Dirigo statute excludes the cost of administration from the savings offset, and charges licensed carriers the much larger cost of calculation of savings generated by the existence of Dirigo Health.

? **Burdensomeness of licensing fees.** *Would the Dirigo savings offset be a licensing fee under GATS? If so, would it violate proposed disciplines that limit fees to the costs of administration?*

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[33] *See id.*

[34] *Id.* at *3.

[35] Most recently, the chair of those negotiations proposed:

> 11. Each Member shall ensure that any licensing fees have regard to the administrative costs involved and do not in themselves represent an impediment to engaging in the relevant activity. This shall not preclude the recovery of any additional costs of administering licensing requirements and any other administrative activities related to the regulation of the relevant services.

WTO, Note by the Chairman, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4 Consolidated Working Paper*, Working Party on Domestic Regulation, JOB(06)/225 ¶11 (July 2006).

b) Subsidies

Subject to the same "likeness" and national treatment test described above, the subsidy provisions also risk conflict with the national treatment obligation. If a subsidy for Dirigo consumers "modifies the conditions of competition" in favor of the domestic Dirigo provider—and subject to the same "likeness" analysis above—there may be a risk of conflict between the subsidies provisions and the national treatment obligation.

It is clear that the Maine legislature clearly intended for Dirigo subsidies to change the conditions of competition, at least for Dirigo consumers. These consumers are either people without health insurance before Dirigo, or consumers on the margins who are pulled away from non-Dirigo insurance providers because Dirigo is now offered at a lower price. These subsidy questions are implicitly tied to which firms have access to this new subsidized market, which leads to the question of who can meet the requirements to qualify as a Dirigo provider.

c) Qualification Requirements

Disciplines developed in the GATS intend to limit the ability of governments to use qualification requirements for service suppliers intending to enter a market. The risk of conflict between the qualification requirements for Dirigo and GATS obligations is less clear, depending on whether or not the qualification requirements under Dirigo are deemed to be explicit.[36] The requirements could conflict:

- with **Domestic Regulation** rules if the requirements are "more burdensome that necessary";
- with **Market Access** if there is a limit on the number of Dirigo providers, or
- with **National Treatment** if foreign health insurance providers are not eligible to become Dirigo providers.

V. Potential Safeguards

In addition to asking for clarification on the GATS questions posed above, the Maine CTPC could request several potential safeguards to protect Dirigo from any possible GATS conflict. These safeguards relate to two parts of the GATS and current GATS negotiations:

- the still pending negotiations on *domestic regulation disciplines*; and
- *coverage* of Dirigo under GATS and the U.S. *GATS schedule*.

Letters from the Maine CTPC and the Governor to the Office of the United States Trade Representative have already addressed aspects of each. The following ideas could be discussed with respect to the CTPC's 2007 workplan:

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[36] *See* ME. REV. STAT. ANN. tit. 24-A, § 6910(4)(a). Under the Act, the only explicit requirements of providers who wish to qualify to be Dirigo providers are that they licensed to sell health insurance in Maine and that they qualify as health plans in Medicaid. *See id.* § 6910(3),(4). There may be other requirements contained in the Request for Proposals issued by the Dirigo Health agency on May 7, 2004. *See* Dirigo Health, *Timelines & Milestones*, http://www.dirigohealth.maine.gov/dhsp01c.html.

a) *Domestic Regulation*

☑ **Domestic Regulation.** New disciplines are currently being negotiated and less restrictive alternatives have been offered and supported to replace the "objective and transparent" and "no more burdensome than necessary" requirements One potential safeguard is to avoid implementation of the objectivity and necessity tests in favor a less restrictive domestic regulation discipline.

b) *Coverage*

☑ **Clarify that certain public health services, such as insurance, are not covered.** This would necessitate a shared interpretation at the WTO, and in particular within the GATS Council, of the scope of the "government authority exclusion." The government authority exclusion would be interpreted to exclude publicly funded insurance programs.[37]

☑ **Withdraw coverage.** Convince USTR to withdraw the U.S. commitment on health insurance services. Article XXI of GATS allows a Member to modify its schedule. Of course, any Member affected by the modification may request compensation in exchange for the modification. However, if there currently there are no foreign insurance suppliers in the health insurance market in Maine, then there would be no affected Member. This could allow USTR to withdraw the commitment without objection.

☑ **Limit Coverage.** Limit the U.S. commitment on health insurance services in the revised schedule USTR has proposed in current GATS negotiations. This can be done in two ways. First, and less preferable, limit the health insurance commitment by specifically carving out Dirigo. Second, and most preferable, horizontally carve out publicly funded programs for essential services across all service sectors. Several other states have already expressed an interest in obtaining a horizontal carve-out of publicly funded programs for essential health services.

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[37] Readers interested in this question are referred to a recent article, "What is a 'Service Supplied in the Exercise of Government Authority' Under Article 1:3(b) and (c) of the General Agreement on Trade in Services?", by Eric H. Leroux; **Journal of World Trade**, 40(3): 345-385, 2006. Leroux's analytical framework is to examine whether the "modalities" of particular public services "place them outside the realm of the marketplace." Using his standards for determining what is inside or outside the market, it appears likely that Dirigo would be judged as being "inside" the realm of the marketplace, as would a plain-language reading of Article 1:3(b) and (c) of the GATS. Apparently there have been on-going discussions at the WTO GATS Council regarding the scope of the government authority exclusion, and the Maine CTPC may wish to learn more about those discussions.