



Two-week CR Sets Up Battle Over Remainder of FY 2011 Discretionary Spending

President Signs Two-Week FY 2011 CR

After some shouting from the Senate, but with little fanfare thereafter, last week the Senate adopted and sent to the President for his signature the House-passed continuing resolution, H.J. Res. 44, which cuts FY 2011 discretionary spending by about \$4 billion over the two weeks. The passage of the short-term CR only heightens the battle to come over spending cuts for the weeks to come through September 30.

Led by **Vice President Joe Biden**, a united Democrat party countered the House Republican's discretionary budget cuts of \$60 billion over current spending levels (less the \$4 billion over the next two weeks) with a statement that they would meet the House proposal "half-way" but which was quickly exposed as a ploy by the Washington Post "Fact Checker." When all the number juggling is over, the Democrat counteroffer amounts to a \$10.5 billion cut from current spending levels (also including the \$4 billion reductions in the two-week CR), \$49.5 billion short of the previous House-passed legislation. To give the Senate more negotiating leverage, this week **Senate Majority Leader Harry Reid** will bring to a vote the House-passed legislation as well as legislation advanced by the White House for an additional \$6.5 billion in cuts (from current spending levels). Presumably speaking for the Democrat leadership, **Senate**

Majority Whip Dick Durbin said that the latter is the maximum cut he can accept. When, as expected, both these measures fail to pass Senate muster, the House-Senate negotiations will take on a new urgency with a potential government shutdown looming March 18th. In anticipation of a stalemate, **House Speaker John Boehner** has said his next move might be to keep funding the government two weeks at a time while continuing to cut \$4 billion in each two-week CR. Facing this scenario, Senate Democrats may be forced to counteroffer with a four-week CR including the White House's \$6.5 billion in cuts over the same period. Either maneuver will only delay the inevitable, with a government shutdown or a negotiated compromise being the main options. House

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Republicans face a new obstacle when **Federal Reserve Chairman Ben Bernanke** testified last week that the House bill, if passed as is, could result in 200,000 new unemployed. Both parties could potentially avoid total gridlock if the White House agrees to a “summit” on spending, with the goal being to resolve remaining FY 2011 spending levels and a FY 2012 budget framework that would include entitlement reductions as well. House Republicans have already declared their intention to include in their FY 2012 budget entitlement reform spending goals, but without specifying specific program changes.

It might be noted that even the two-week CR will result in significant cuts in HHS health programs:

- ◆ \$397 million from HRSA; \$21 million from both the CDC and the Children and Families Services program; \$15 million from SAMHSA;
- ◆ \$6 million from the Administration on Aging; \$3 million from CMS program management; and
- ◆ \$1 million from the Child Care Development Block Grant.

Presaging future changes, even the President’s

FY 2012 budget includes health related cuts, including \$1.3 billion to community health centers and funding for the children’s hospital graduate medical education program. Republicans avoided a Senate stalemate this time by excluding the PPACA “defunding” measures included in the \$60 billion set of cuts. Taking further aim at the PPACA, the House Energy and Commerce Subcommittee on Health is slated this week to hold hearings on the issue of converting PPACA mandatory spending to discretionary spending (to give Congress greater control in the future over total entitlement spending for health care). The old “chicken and the egg” dialogue must also be resolved within four weeks or so when **Treasury Secretary Geithner** said the current \$14.3 trillion debt limit must be increased to avoid a potential default.

In looking for places to cut federal waste, both parties could do worse than considering the recent report released by the GAO, “Opportunities to Reduce Potential Duplication in Government Programs, Save Tax Dollars and Enhance Revenue,” which suggests that duplicative federal programs result in billions in spending that could be saved if programs were made more efficient. The report also found that payment errors made under the Medicare (\$34.3 billion), Medicaid (\$22.5 billion) and unemployment insurance programs amounted to about \$74 billion.

PPACA Staff Changes?

Last week **Senators Orrin Hatch** and **Mike Enzi** and 40 other Republican senators wrote to **President Obama** requesting that he withdraw the nomination of **Donald Berwick** as CMS Administrator. The 42 senators could prevent the nomination

from being approved in the full Senate. The White House also announced that the Office of Health Reform will be disbanded and its work assumed by the Domestic Policy Council. In addition **Jeanne Lambrew** will become deputy assistant to the president for health policy

under the Council; **Nancy-Ann DeParle** has been named White House deputy chief of staff; and **Liz Fowler** will become special assistant to the president for health care and economic policy under the White House National Economic Council.

President Obama Wants Dialogue with Governors on Medicaid

In speaking last week to the National Governors Association, **President Obama** attempted to appear responsive to the concerns of governors over rising Medicare costs, including the PPACA “maintenance of effort” provision, by endorsing the Wyden/Scott Brown/Landrieu “Empowering States to Innovate Act,” S. 248, which would give states new flexibility in 2014 to apply for waivers from certain PPACA mandates, including the individual coverage requirement, as long as key coverage and affordability goals are met. The Administration is expected to

propose regulations this spring to spell out how the PPACA waiver provision in 2017 would work and indicated that block grants for Medicaid would be opposed. Congressional Republicans were not impressed, with **Senator Orrin Hatch** expressing their sentiment by stating that “Despite the Administration’s claims, state flexibility in Obamacare does not exist, not now, not five years from now, not 10 years from now. Telling states that as long as they meet the law’s budget busting, onerous requirements they can opt out is not flexibility.” However, HHS is expected to convene a

working group with the NGA to discuss further flexibility issues, including how to: coordinate care, prevent hospital readmissions and keep beneficiaries out of nursing homes. Any legislative changes would likely be opposed in the House which continues it’s “repeal and replace” course on the PPACA. The cost to states of Medicaid expansions under the PPACA continue to be disputed, with House Energy and Commerce Republicans producing a state-by-state analysis concluding states would have to raise \$118 billion by 2023 versus the \$60 billion previously estimated by the CBO.

House Passes Repeal of PPACA Form 1099 Requirements

Last week the House voted 314-112 to pass H.R. 4, legislation to repeal the IRS Form 1099 reporting requirements under the PPACA (identical to H.R. 705), but with a provision offsetting the \$19+ billion cost.

Although the Senate may take up the House bill, most Senate Democrats are thought to oppose the particular offset which would raise the PPACA income thresholds requiring greater recapture of the overpayment of individual

premium subsidies. The White House is likely to work with both houses to obtain an agreement on an acceptable offset which would then make 1099 repeal a certainty.

CMS Innovation Center to Tackle Health Care Infection Costs

Last week **CMS Administrator Donald Berwick** said that the CMS innovation center will soon sponsor demonstration projects and other pilot programs to help reduce health care-associated infections in order to increase patient safety and improve quality. The agency is currently engaged in a 90-day strategic development period.

PPACA Payments under the Early Retiree Insurance Program

HHS released a report stating that more than \$535 million was paid to 253 employers to cover health benefits for nearly 61,000 people last year under the Early Retiree Reinsurance Program while a 5,452 organizations sponsoring health plans have now been accepted into the program.

DOL RFC on Claims Rules

Last week the Department of Labor issued a notice requesting comments on interim final rules regarding internal claims and external review procedures for health benefit plans that are not grandfathered under the PPACA. Comments are due by the end of this month.

Update on Court Challenges to PPACA

Last week the DOJ responded to the U.S. Court of Appeals for the Fourth Circuit in an appeal from the Eastern District of VA court decision that struck down the PPACA individual mandate as unconstitutional. In general, the DOJ said that the Constitution grants Congress the power to regulate conduct that substantially affects interstate commerce and that the means of paying for services in the interstate health

care market constitutes “economic activity that substantially affects interstate commerce” and, therefore, the individual mandate is a proper exercise of the commerce power. In a stunning decision, the Department of Justice’s motion in the Florida suit calling for a “clarification” of the court’s opinion on the immediate effect on states of the court’s opinion that the PPACA is unconstitutional, resulted in **District Judge Roger Vinson**

issuing a “stay” of his decision to halt the law’s implementation, but with the condition that the DOJ, within 7 days, file a notice of appeal to his ruling in an expedited manner in the U.S. Court of Appeals for the Eleventh Circuit. Judge Vinson said that the public has the right to have questions regarding the constitutionality of the PPACA resolved as quickly as practicable.

House/Senate Hearings on Health Program Fraud

Last week, during the House Ways and Means Subcommittee on Health hearing on health care fraud, CMS testified that an increased use of data analytics, including a new risk scoring system for Medicare claims, will help CMS reduce fraud in the future. The risk scoring system would use predictive modeling technology to assess individual claims and identify any suspicious patterns indicative of fraud.

CBO has estimated that PPACA anti-fraud provisions would only reduce expenditures by about \$5.8 billion. At a House Energy and Commerce Health Subcommittee hearing, GAO testified that CMS can take specific steps to help reduce fraud, by:

- ◆ implementing a physician profiling system;
- ◆ improving the management of payments for imaging services and other similar services; and

◆ applying payment changes that can reflect situations where different services are provided together.

In related news, **Senator Chuck Grassley** introduced legislation, “the Strengthening Program Integrity and Accountability in Health Care Act of 2011,” which would require HHS to issue regulations making Medicare claims and payment data available to the public in a manner similar to other disclosures on federal spending and requiring individuals and entities that participate in federal health programs to comply with congressional requests for documents, information or interviews. However, in a Senate Finance Committee hearing, **Senator Orrin Hatch** said that while anti-fraud efforts are essential, they must carefully distinguish between those seeking to game the system and errors that are the result of confusing rules and ambiguous regulations.

H.R. 831 (MEDICARE), to amend Title XVIII of the Social Security Act to provide for treatment of clinical psychologists as physicians for purposes of furnishing clinical psychologist services under Medicare; SCHAKOWSKY; jointly, to the committees on Energy and Commerce and Ways and Means, Feb. 28.

H.R. 844 (HEALTH CARE COVERAGE), to allow an earlier start for state health care coverage innovation waivers under the Patient Protection and Affordable Care Act; WELCH; jointly, to the committees on Energy and Commerce and Ways and Means, Feb. 28.

S. 424 (MEDICARE), to amend Title XVIII of the Social Security Act to preserve access to ambulance services under Medicare; SCHUMER; to the Committee on Finance, March 1.

S. 425 (PUBLIC HEALTH), to amend the Public Health Service Act to provide for the establishment of permanent national surveillance systems for multiple sclerosis, Parkinson's disease, and other neurological diseases and disorders; UDALL of Colorado; to the Committee on Health, Education, Labor, and Pensions, March 1.

H.R. 857 (MEDICAID), to amend Title XIX of the Social Security Act to provide 100 percent FMAP under Medicaid for medical assistance provided to Native Hawaiians by a Native Hawaiian health care system or a federally-

qualified health center; HIRONO; to the Committee on Energy and Commerce, March 1.

H.R. 859 (MEDICARE), to amend Part B of Title XVIII of the Social Security Act to provide coverage for the shingles vaccine under Medicare; HIRONO; jointly, to the committees on Energy and Commerce and Ways and Means, March 1.

S. 438 (WOMEN'S HEALTH), to amend the Public Health Service Act to improve women's health by prevention, diagnosis, and treatment of heart disease, stroke, and other cardiovascular diseases in women; STABENOW; to the Committee on Health, Education, Labor, and Pensions, March 2.

S. 454 (MEDICARE/MEDICAID/CHIP), to amend titles XVIII and XIX of the Social Security Act to prevent fraud, waste, and abuse under Medicare, Medicaid, and CHIP, and for other purposes; GRASSLEY; to the Committee on Finance, March 2.

H.R. 876 (MEDICARE), to amend Title XVIII of the Social Security Act to provide for patient protection by establishing safe nurse staffing levels at certain Medicare providers, and for other purposes; CAPPES; jointly, to the committees on Energy and Commerce and Ways and Means, March 2.

H.R. 880 (TAXATION), to amend the Internal Revenue Code of 1986 to make permanent the deduction for health insurance costs in computing self-employment taxes;

HERGER; to the Committee on Ways and Means, March 2.

H.R. 883 (NEUROLOGICAL DISEASES), to expand and enhance existing adult day programs for people with neurological diseases or conditions (such as multiple sclerosis, Parkinson's disease, traumatic brain injury, or other similar diseases or conditions) to support and improve access to respite services for family caregivers who are taking care of such people, and for other purposes; LEE of California; to the Committee on Energy and Commerce, March 2.

H. RES. 136 (NATIONAL MINORITY DONOR AWARENESS), supporting the goals and ideals of National Minority Donor Awareness Day; CLAY; to the Committee on Energy and Commerce, March 2.

H. RES. 138 (MULTIPLE SCLEROSIS), supporting the goals and ideals of Multiple Sclerosis Awareness Week; LEE of California; to the Committee on Energy and Commerce, March 2.