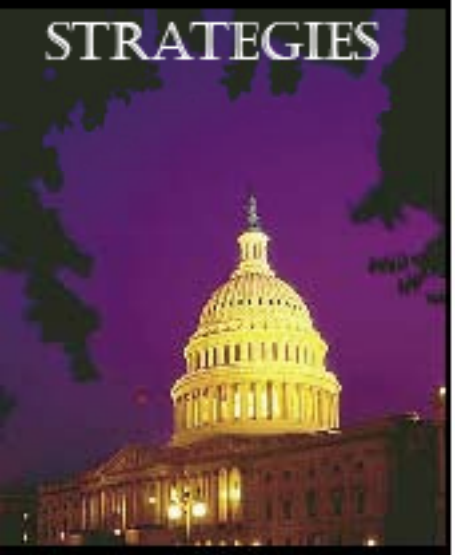
HART HEALTH STRATEGIES



Health Policy Briefing

April 11, 2011

House/Senate/Presidential Brinkmanship on FY 2011 CR Spending and Riders

FY 2011 Spending Impasse Overcome

After several meetings in the White House last week, in an attempt by **President Obama** to encourage **Senate Majority Leader Harry Reid** and **House Speaker John Boehner** to reach an accord to finalize a continuing resolution for the remainder of FY 2011, the budget showdown continued until the last minute Friday night, when spending under the last CR would end. Before the midnight deadline, **Speaker Boehner** said he and his Republican caucus had no intent to shut the government down and that is why the House on Thursday passed and sent to the Senate H.R. 1363, a new CR which would fund the military through September and the remainder of the government though April 15th. The bill also includes another $12 billion in spending cuts over the interim period. He said, while at that time there was no agreement on the final spending level, almost all of the decisions on policy rider issues had been resolved.

After Boehner's statement, however, **Senate Majority Leader Harry Reid** delivered his ultimatum from the Senate Democrat caucus that, while a final spending cut of $78 billion over the President's budget had been agreed to during a Thursday meeting in the White House, the Senate would make it crystal clear that a shutdown would be due to the refusal of House Republicans to jettison their rider defunding women's health clinics. **Senator Reid** also said the Senate would not agree to the new House CR which would also block federal and local abortion funding in the District of Columbia even though it would fund the military.

Left unsaid during the exchange of barbed comments was any statement of the existence of a final agreement on the particular program spending cuts that would flesh out the overall $78 billion target. Republicans were said to resist various mandatory spending cuts proposed by the Democrats, probably because the House would rather have the cuts come solely from discretionary spending levels in order to reduce the spending baseline to be used by CBO in evaluating the

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FY 2012 Ryan budget proposal. The White House said that initiatives to implement a partial federal shutdown would affect health agencies in various ways. While "essential" employees would have to report to work, most "non-essential" parts of HHS would close. For example:

♦clinical trials already underway in NIH would continue, but new patients would not be accepted;

♦Medicare provider payments would likely continue through May, subject to sufficient funds in the Medicare trust funds;

♦VA medical facilities would remain open; and

♦FDA review of new drugs would stop while FDA drug import inspections would continue.

HHS announced that PPACA implementation would continue, but that "non-essential" employees who may be involved in writing regulations could be furloughed. While stating he would veto the latest House CR, the President indicated he would sign a CR limited to the few days needed for the House and Senate to pass a CR which reflects a final agreement on federal spending through September. At the 11th hour that is what transpired. A few minutes after the deadline both houses agreed to another short-term CR until the end of this week to allow for the House and Senate to meet their internal procedural rules on passage of the final agreement. Reportedly, the total spending cuts under the final agreement will amount to about $38.5 billion, short of the $61 billion under H.R.1. Acceding to Senate Democrats and the President, the House agreed to $17.8 billion in mandatory spending cuts. The 340-70 vote on the one-week CR shows that there remains some displeasure over the compromise among Republican fiscal hawks.

House Budget Committee Republicans Pass Chairman Ryan's FY 2012 Budget

Even as House and Senate leaders traded charges last week on which party was at fault for stalling the FY 2011 CR deal, **House Budget Committee Chairman Paul Ryan** forged ahead with his FY 2012 budget plan to balance the budget by 2040. On a party-line vote the committee approved his 10-year budget framework which **Rep. Ryan** said would cuts spending by $6.2 trillion over the President's budget and $5.8 trillion over the CBO baseline. He said his plan would:

♦reduce the President's cumulative deficits by $4.4 trillion (although only $1.65 trillion using the CBO baseline).

♦Health spending would be reduced significantly over 10 years:

♦$30 billion would be saved under Medicare by eliminating fee-for-service and substituting "premium support" for those under age 55 to purchase health insurance under a mechanism similar to Part D;

♦$771 billion would be saved by transforming the defined benefit Medicaid program into state block grants that would rise only with demographic changes and general inflation; and gradually increase the Medicare eligibility age to 67 by 2027.

The plan was also said to include a permanent fix to the Medicare physician payment SGR problem. In general, the plan would trim annual discretionary spending and mandatory outlays other than Medicare, Medicaid and Social Security cash benefits to 6% of GDP by 2021 from 12% in 2010 with growth after 2022 then limited to the GDP price deflator. Although not specified, such limitations will necessarily affect HHS/NIH/FDA and other health spending programs. The plan also assumes the PPACA would be repealed. By 2050, discretionary and other mandatory spending would fall to 3.5% of GDP (currently such spending is about 8% of GDP). The details will be hashed out by means of the directives given to the House Ways and Means, Energy and Commerce and other committees of jurisdiction.

The plan also extends the Bush tax cuts and calls for tax reform which would trim marginal tax rates to a maximum of 25% for both individuals and corporations. **House Speaker John Boehner**, engaged in FY 2011 negotiations, issued a statement saying the committee's plan is "a budget worthy of the American people. I hope every American concerned

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about our country's future will take a look at it." Democrats decried the committee plan as including trillions in tax cuts over the 10 years and as destroying Medicare as currently constituted. For example, an unsuccessful amendment offered by **Rep. Allyson Schwartz** would have increased health spending by $771 billion with offsets from revenue increases which she said could come from trimming oil and gas tax breaks and tax cuts for millionaires. When the resolution is taken up this week in the House, the Republican Study Committee said it would offer an alternative to balance the budget by 2020 by: moving the Medicare premium support age to 59 and allowing anyone to join the new system in 2017; increasing Medicare eligibility to 67 by 2030; and limiting Medicaid spending to inflation (thus resulting in an additional $700 billion in spending cuts over 10 years). The Senate Budget Committee has yet to show its hand on FY 2012 spending, although Chairman Kent Conrad said he would proceed when the so-called "Gang of Six" completes their ongoing long-term deficit reduction negotiations.

Impending Vote Needed to Increase U.S. Statutory Debt Limit

Last week **Treasury Secretary Timothy Geithner** told Congress that the federal government will reach its current statutory borrowing limit of $14.3 trillion "no later than May 16." He indicated that if Congress does not raise the debt ceiling by May 16th, his department could delay default only until July 8th by resorting to various accounting maneuvers. A vote would have to take place before June 24, since the House is scheduled to go on recess the following week. This vote will become another challenge for **House Speaker John Boehner** given that a number of his House Republicans said they would vote against raising the debt limit, absent major long-term federal spending reforms.

Senate Sends Bill Repealing PACA Form 1099 Requirement to President

Last week the Senate voted 87-12 to approved the House-passed bill, H.R. 4, which will repeal the Form 1099 information reporting rules, as included under the PPACA. Although the President did not favor the PPACA provisions used as an offset to the $166 billion 10-year cost of the legislation, the White House said the President would sign the legislation into law. The offset amends the PPACA premium subsidy provision to recapture inaccurate payments. The amendment offered by Senator Robert Menendez to disallow the offset if HHS finds that it would reduce the number of insured individuals or raise insurance premiums was defeated. Some Republicans said the legislation was the first effort to chip away at the PPACA.

DOL Guidance on PPACA Grandfathered Plans

DOL has provided additional guidance on the conditions under which group health plans would retain their grandfathered status under the PPACA. The grandfather rules would remain when: an employee is transferred from a grandfathered plan to another plan for a bona fide employment-based reason, including when the plan's insurer leaves the market or discontinues the type of coverage; a plan's benefits package has low or decreasing participation which would make it impractical for a plan sponsor to continue to offer the package; a plan's cost-sharing level increases because the generic equivalent of a brand name drug comes onto the market; a plan increases the copayment for preventive services received in an in-network hospital, provided there is no change to the copayment in an in-network ambulatory surgery center. DOL said it will later issue guidance related to value-based insurance design and wellness programs after gathering further information.

House E&C Committee Sends PPACA Defunding to House Floor

Last week the full House Energy and Commerce Committee voted to send the set of five bills previously approved by its Health Subcommittee to the House floor for later consideration. The bills would: repeal mandatory funding for grants to states for establishing insurance exchanges (H.R. 1213); repeal mandatory funding for school-based health center construction (H.R. 1214); would convert direct funding for personal responsibility education programs, which address topics such as teen pregnancy and sexually transmitted infections, to an authorization of appropriations (H.R. 1215); convert funding for graduate medical education at teaching health centers from direct funding to an authorization of appropriations, meaning the program would go through the annual appropriations process (H.R. 1216); and repeal the Prevention and Public Health Fund (H.R. 1217). Democrats were unsuccessful in amending the legislation and lamented the Republican assault on the PPACA. In an E&C Health Subcommittee hearing on H.R. 5, the HELP Efficient, Accessible, Low-cost, Timely Healthcare Act, subcommittee Democrats also voiced their objections to the bill's medical malpractice reforms that would place a $250,000 cap on noneconomic damages. They said the bill would not provide the cost savings as advertised and would restrict patient rights to full compensation for medical errors.

Update on PPACA Constitutional Challenges

Last week the DOJ filed its brief in the Eleventh Circuit Court of Appeals in Atlanta to oppose the district court decision that the PPACA individual mandate is unconstitutional and that the entire law is therefore void. The Administration argued that the decision is adverse to the U.S. Supreme Court precedent which generally holds that courts should sever only the "problematic portions" of a constitutionally flawed statute and leave the "remainder intact." It might be noted that this DOJ argument would not be needed in the Virginia case, which severed the individual mandate without voiding the entire statute. On the other hand, in the Virginia case, the U.S. Chamber of Commerce filed a brief in the appeals court urging the court to strike down the entire Act if the mandate is found unconstitutional, arguing that without a fully insured market, insurance premiums will rise to unsupportable levels.

MedPAC on SGR/Imaging

Last week members of the Medicare Payment Advisory Commission suggested that, if Congress cannot agree on a permanent fix to the sustainable growth rate problem under the Medicare physician payment system, the SGR should be dropped and replaced by, perhaps, small payment increases known in advance or payment limits when the growth in certain treatment areas exceed fixed targets. The commission also voted to recommend that Medicare for the first time require prior authorization before providers use in-house medical imaging devices, among other limitations.

Medicare DMS Bidding Delayed

Last week CMS indicated that Round Two of the Medicare durable medical equipment competitive bidding system, adding 91 new areas to the program, will take place during a 60-day bidding window in the winter of 2012. Winning contract suppliers will be announced and the program implemented starting in the summer of 2013.

Final MA & Part D Rules

Last week CMS released a final rule implementing the PPACA changes to Medicare Advantage and Part D drug payments and bidding programs that are expected to save about $76 billion in FY 2011-2016. Using its discretionary authority, HHS would not be obligated to accept all plans, in particular those that propose significant increases in cost-sharing or decreases in benefits. Also, the final regulations implement the PPACA requirement for more uniform Part D exceptions and appeals processes. In related news, CMS also announced that Medicare Advantage plans will receive an average payment increase of 0.4%, a decrease from an earlier estimate of a 1.6% increase.

H.R. 1310 (TAXATION), to amend the Internal Revenue Code of 1986 to exempt certain emergency medical devices from the excise tax on medical devices, and for other purposes; TURNER; to the Committee on Ways and Means, April 1.

H.R. 1311 (MEDICAL NUTRITION), to provide for the coverage of medically necessary food under federal health programs and private health insurance; BALDWIN; jointly, to the committees on Energy and Commerce, Ways and Means, Armed Services, and Education and the Workforce, April 1.

H.R. 1316 (DRUGS), to direct the commissioner of food and drugs to modify the approval of any drug containing controlled-release oxycodone hydrochloride to limit such approval to use for the relief of severe-only instead of moderate-to-severe pain, and for other purposes; BONO-MACK; to the Committee on Energy and Commerce, April 1.

H.R. 1319 (REPRODUCTIVE HEALTH), to promote the sexual and reproductive health of individuals and couples in developing countries, and for other purposes; CLARKE of New York; to the Committee on Foreign Affairs, April 1.

H.R. 1322 (ERISA), to amend Title I of the Employee Retirement Income Security Act of 1974 to provide protection for company-provided retiree health benefits; TIERNEY; to the Committee on Education and the Workforce, April 1.

H.R. 1324 (REFORM), to eliminate sweetheart deals under the PPACA; BUCHANAN; jointly, to the committees on Energy and Commerce and Ways and Means, April 1.

H.R. 1328 (MEDICARE/FEHB), to amend Title XVIII of the Social Security Act to provide for coverage of qualified acupuncturist services under Part B of Medicare, and to amend Title 5, United States Code, to provide for coverage of such services under the Federal Employees Health Benefits Program; HINCHEY; jointly, to the committees on Energy and Commerce, Ways and Means, and Oversight and Government Reform, April 1.

S. 725 (MEDICARE), to amend Title XVIII of the Social Security Act to provide for coverage, as supplies associated with the injection of insulin, of containment, removal, decontamination and disposal of home-generated needles, syringes, and other sharps through a sharp container, decontamination/destruction device, or sharps-by-mail program or similar program under Part D of Medicare; ISAKSON; to the Committee on Finance, April 5.

S. 733 (MEDICARE), to amend Part B of Title XVIII of the Social Security Act to exclude customary prompt pay discounts from manufacturers to wholesalers from the average sales price for drugs and biologicals under Medicare; ROBERTS; to the Committee on Finance, April 5.

H.R. 1370 (REFORM), to repeal the annual fee on health insurance providers enacted by the PPACA; BOUSTANY; jointly, to the committees on Energy and Commerce and Ways and Means, April 5.

H.R. 1377 (PUBLIC HEALTH), to establish a grant program for automated external defibrillators in elementary and secondary schools; SUTTON; jointly, to the committees on Education and the Workforce and Energy and Commerce, April 5.

H. Res. 204 (DISEASE AWARENESS), supporting the goals and ideals of "National STD Awareness Month;" LEE of California; to the Committee on Energy and Commerce, April 5.

S. 738 (MEDICARE), to amend Title XVIII of the Social Security Act to provide for Medicare coverage of comprehensive Alzheimer's disease and related dementia diagnosis and services in order to improve care and outcomes for Americans living with Alzheimer's disease and related dementias by improving detection, diagnosis, and care planning; STABENOW; to the Committee on Finance, April 6.

S. 752 (LUNG CANCER), to establish a comprehensive interagency response to reduce lung cancer mortality in a timely manner; FEINSTEIN; to the Committee on Health, Education, Labor, and Pensions, April 6.

H.R. 1386 (MEDICARE), to amend Title XVIII of the Social Security Act to provide for Medicare coverage of

comprehensive Alzheimer's disease and related dementia diagnosis and services in order to improve care and outcomes for Americans living with Alzheimer's disease and related dementias by improving detection, diagnosis, and care planning; MARKEY; jointly, to the committees on Energy and Commerce and Ways and Means, April 6.

H.R. 1394 (LUNG CANCER), to establish a comprehensive interagency response to reduce lung cancer mortality in a timely manner; CHRISTENSEN; jointly, to the committees on Energy and Commerce, Armed Services, and Veterans' Affairs, April 6.

H.R. 1398 (MEDICARE), to amend Title XVIII of the Social Security Act to treat certain provider taxes as allowable costs for purposes of Medicare reimbursements to critical access hospitals; GRAVES of Missouri; to the Committee on Ways and Means, April 6.