

Partisan Views Likely to Delay Final FY 2012 Spending Decisions until the New Year

FY 2012 Appropriations Omnibus or CR?

Although the House and Senate Appropriations Committees continue to negotiate the terms of an omnibus bill to fund federal agencies for the remainder of FY 2012 (including HHS/CMS/NIH), an agreement in the House remains speculative with many House Republican fiscal hawks still insisting on an additional \$20 billion in spending cuts beyond the amount specified under the Budget Control Act. Congressional leaders appear resigned to shifting the debate into next February by passing another continuing resolution. The current CR is likely to be extended from December 16 until December 23rd when Congress would like to wrap up the legislative year. Before they wrap up legislative business, House Republicans intend to fix the scheduled Medicare physician payment cut of 27.4% next year by attaching remedial legislation to a year-end “extenders” package. The most likely change will involve a freeze at current reimbursement rates which could last for one year, at a cost of \$21 billion over ten years, or for two years at a cost of \$38.6 billion. Scheduled cuts after such a one or two year freeze would then amount to 32% and 36%, accordingly. Regardless of the term of the temporary fix, a permanent solution to the SGR problem will become a topic of discussion as Congress proceeds next year to fashion a response

to the Budget Control Act’s mandated sequestration of \$1.2 trillion in federal defense and non-defense spending over ten years.

The Week in Congress

Last week the Senate took up legislation to extend the current FICA payroll tax exemption for another year, but could not agree on a means to finance the legislation. The debate will pick up this week over the means, if any, to pay for the extension. Some members would like to pay for the bill with benefit spending cuts. The House passed H.R. 3010, legislation that revamps the federal rule-making process by requiring agencies to consider new criteria when issuing regulations, including alternatives to any regulation proposal, the scope of the problem the regulation

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is meant to address and potential costs and benefits of the proposal and alternatives. The bill creates thresholds for “major” regulations (costing over \$100 million/year) and “high-impact” regulations

(costing more than \$1 billion/year) and additional procedural steps before their implementation, thus likely impacting significant Medicare, Medicaid and PPACA regulatory efforts. However, it is questionable that the Senate will pass the legislation. This week the

House is also scheduled to take up H.R. 1254, **Rep. Dent’s** “Synthetic Drug Control Act,” and H.R. 2405, **Rep. Rogers’** “Pandemic and All-Hazards Preparedness Reauthorization Act.”

House E&C Committee Moves to Repeal CLASS Act

Last week the House Energy and Commerce Committee voted 33-17 to pass H.R. 1173, legislation that would repeal the PPACA long-term care CLASS Act. House Republicans remain adamant to repeal the program to prevent the Administration from resurrecting the program at a future date. The bill was amended to make funding for the National Clearinghouse for Long Term Care voluntary in order to reverse the PPACA mandated spending.

Medical Loss Ratio Regulations

CMS issued regulations relating to the PPACA medical loss ratio (MLR) which clarify earlier proposals. An interim final rule describes the required distribution of rebates by insurers to beneficiaries when insurers do not meet the MLR requirements. Of note, under the earlier rule, rebates in the group market would have been subject to tax; however, under the revised rule insurers must provide rebates to the group policyholder (e.g. employer) through lower premiums or other non-taxable ways. A second final regulation makes changes of a technical nature as to MLR calculation and reporting. The regulations are effective January 1, 2012. The NAIC and health agents continue to press for legislation to exempt agent commissions from the definition of “administrative expense” for purposes of the MLR. Also, so-called mini-med plans will likely cease to exist when they become fully subject to the MLR in 2014.

EHR Easing

HHS announced that hospitals and providers that attest to Stage 1 of the “meaningful use” incentive program in 2011 will not have to meet Stage 2 criteria until 2014 (rather than 2013), thus giving more time for provider adoption of electronic health records.

More Grants for State Health Insurance Exchanges

HHS awarded almost \$220 million to thirteen states to create insurance exchanges under the PPACA. HHS also said that states which create their own internet-based exchange markets will have more options in determining eligibility for Medicaid coverage and exchange tax credits. In states that do not operate exchanges, the federally established state exchange will still use state Medicaid and SCHIP eligibility rules. Senator Orrin Hatch continues to maintain that the wording of the PPACA does not allow for HHS established exchanges to provide tax credits as IRS regulations propose.

CBO Estimates Cost of SGR Fix

In addition to the cost of freezing Medicare physician payment rates for another year or two as previously described, CBO has released additional estimates which would base future updates after a freeze on the physician cost-related Medicare

Economic Index (MEI). Under this measure the total cost of basing physician updates on the MEI would be \$352.7 billion through 2021. Under a so-called funding “cliff” option, the 27.4% cut in 2012 would be set aside and reimbursement rates would return

to the rates that would have been calculated in the year immediately following the override. The cliff option with a freeze in 2012-2014 would cost as much as \$11 billion in 2012, \$18.3 billion in 2013 and \$21.4 billion in 2014.

Congressional Oversight on Drug Shortages

The House Oversight and Government Reform Committee held hearings on the shortage of various drugs which the FDA says exceeds 200 in 2011. Witnesses said that the shortages, mainly injectable generic drugs used to treat cancer, are caused by many factors, including the Medicare reimbursement system for drugs. They said that the ASP plus 6% reimbursement formula is inadequate due to manufacturer-to-distributor prompt payment discounts included in the ASP calculation. It was also stated that the FDA current good manufacturing practice (cGMP) regulations should be made as efficient as possible, given that drug manufacturers have complained that these policies are outdated and inflexible.

Medicare Coverage for Obesity

CMS announced that coverage for screening and counseling services, performed by primary care providers, to reduce obesity will be covered under Medicare given that more than 30% of men and women in the Medicare population are estimated to be obese.

President Reallocates Funds to Ryan White

The President announced that HHS will redirect \$15 million of existing HHS funding to the Ryan White program for supporting HIV clinics and \$35 million to state AIDS drug assistance programs. The President also pledged U.S. support to get antiretroviral drugs to six million people in countries hardest hit by HIV/AIDS.

DME Competitive Bidding to Begin

CMS announced that durable medical equipment suppliers in 91 areas of the nation may begin registering for competitive bidding this Monday as part of a process that will allow them to continue serving Medicare beneficiaries. The 60-day period for Round Two bidding will begin January 30, 2012.

H.R. 3511 (DEFIBRILLATORS), to amend the Public Health Service Act to clarify liability protections regarding emergency use of automated external defibrillators; OLSON; to the Committee on Energy and Commerce, Nov. 29.

H.R. 3514 (ORGAN DONATION), to amend the Public Health Service Act to establish the National Organ and Tissue Donor Registry Resource Center, to authorize grants for state organ and tissue donor registries, and for other purposes; CLAY; to

the Committee on Energy and Commerce, Nov. 29.

H.R. 3516 (MEDICARE), to amend Title XVIII of the Social Security Act with respect to Medicare payment for long-term care hospital services; MURPHY of Connecticut; to the Committee on Ways and Means, Nov. 29.

H.R. 3519 (MEDICARE), to amend to exempt the Medicare program from fallback sequestration under the Budget Control Act of 2011; TOWNS; to

the Committee on the Budget, Nov. 29.

H. RES. 475 (REFORM), expressing the sense of the House of Representatives that the PPACA is unconstitutional; ROE of Tennessee; jointly, to the committees on Energy and Commerce, Education and the Workforce, the Judiciary, Natural Resources, House Administration, Rules, and Appropriations, Nov. 29.