



## Showdown over FY 2012 Spending & GOP Middle Class Tax Relief/Job Creation Act

### *Omnibus FY 2012 Appropriations Package*

House and Senate appropriators are finalizing negotiations on a \$900 billion omnibus FY 2012 spending bill which will use the Military Construction/VA appropriations measure, H.R. 2055, as the legislative vehicle. It appears that the perennial stalemate over the Labor/HHS/Education provisions may lead negotiators to include another temporary extension of current spending for these agencies. Pending agreement on the package, the House is expected to take up the measure this week, given that the current CR expires on December 18th. If negotiations stall, another week-long CR will likely be passed.

### *Showdown Over Legislation to End Congressional Session*

The Senate has repeatedly rejected several versions of the President's demand to extend unemployment benefits and the current 2% Social Security payroll tax cut, along with Democrat proposals to pay for the extensions by taxing high income earners. In response, on Monday the House Rules Committee will hear testimony on H.R. 3630, the Republican version of the end-of-year legislative wrap-up intended to give physicians a reprieve from the 27.4% reduction in 2012 Medicare payments and to extend unemployment benefits (but also gradually reducing the maximum weeks of benefits from 99 to 59 weeks) and the payroll tax cut for one year. The

“Middle Class Tax Relief and Job Creation Act of 2011” (see Appendix I for **Speaker Boehner's** partisan explanation) introduced by **House Ways and Means Chairman Dave Camp** would also:

- ◆ provide a two-year “doc fix” by increasing Medicare physician payments by 1% for each of 2012-13 (at a cost of \$38.9 billion over ten years);
- ◆ extend through 2012 the current floor used in calculating the portion of Medicare physician payments that takes into account the geographic areas where doctors practice (at a cost of \$500 million over ten years for 54 of 89 geographic regions);
- ◆ extend expiring Medicare payment provisions, including for hospitals, nursing homes and ambulance services (at a cost of \$2.8 billion over ten years);

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- ◆ extend the patient therapy caps exception process through 2013 and extend it to the hospital outpatient department setting (at a cost of \$1.7 billion over 10 years);
- ◆ allow physician-owned hospitals that were under construction but did not have Medicare provider numbers as of December 1, 2010 to open and operate under the whole hospital exemption to the Stark antitrust laws (at a cost of \$300 million over 10 years);
- ◆ accelerate a decision on the Keystone XL energy pipeline, requiring, within 60 days, for the permit to be granted unless the President determines the project is not in the national interest;
- ◆ extend 100% business expensing through 2012;
- ◆ implement the EPA Regulatory Relief Act (H.R. 2250) and provisions of the Jumpstarting Opportunity with Broadband Spectrum (JOBS) Act; and
- ◆ extend the \$16.5 billion TANF block grant at its current funding levels through FY 2012 along with several reforms.

The \$200 billion ten year cost of the legislation would be partially offset from savings under Medicare, Medicaid and the PPACA as follows:

- ◆ repeal \$8 billion in PPACA mandatory funding from the “prevention and public health fund”;
- ◆ require greater repayment of improper taxpayer-funded subsidies under the PPACA (\$13.4 billion in savings);
- ◆ gradually increase Medicare premiums for high-income beneficiaries beginning in 2017

- (\$31 billion in savings);
- ◆ reduce Medicare payments to hospital outpatient departments for evaluation and management services to the level paid for the services delivered in physician offices (\$6.8 billion in savings);
- ◆ reduce from 70% to 55% the amount of patient bad debt hospitals can be reimbursed by Medicare (\$10.6 billion in savings); and
- ◆ cut Medicaid disproportionate share hospital payments (\$4.1 billion in savings).

Other cost offsets include, among other things:

- ◆ extending the federal pay freeze and changing the co-pay structure for retirees;
- ◆ coordinating with states to prevent Social Security overpayments; and
- ◆ prohibiting millionaires from receiving unemployment and food stamps, among other things.

The President said he would not agree to legislation containing the provision which includes the Keystone XL energy pipeline mandate. Also, **Senate Majority Leader Harry Reid** was quick to discount the House move, stating that “If the House sends us their bill with Keystone in it, they are just wasting valuable time because it will not pass the Senate.” If this proves to be the case, **Speaker Boehner’s** plan to adjourn by December 16 or 18 will go by the wayside and extend the current session of Congress for another week or even beyond Christmas.

***Other Legislative Action***

Last week the House passed H.R. 2405, legislation to

reauthorize and revise provisions in the Pandemic and All-Hazards Preparedness Act and the Project BioShield Act of 2004 that provide those protections. Under the legislation, HHS would be able to utilize up to 30% of the funding allocated for the Project BioShield Special Reserve Fund for medical countermeasures in the event of the various threats. The bill would also allow the FDA to authorize the use of unapproved medical products to avoid public health emergencies and reauthorize additional public health preparedness programs, such as influenza vaccine tracking and the Medical Reserve Corps. In addition, the House passed H.R. 1254, the Synthetic Drug Control Act, which amends the Controlled Substances Act to add as schedule I controlled substances, among other things, any material, compound, mixture, or preparation which contains cannabimimetic agents. The House also passed H.R. 10, the Regulations From the Executive in Need of Scrutiny (REINS) Act of 2011, which would give Congress the final say on whether “major” regulations (with an economic impact over \$100 million) could go into effect. This week the House is expected to consider H.R. 1540, the National Defense Authorization Act for Fiscal Year 2012 which includes authorization provisions for military health programs.

## Final Regulations for CO-Ops

**C**MS released final rules implementing the PPACA Consumer Operated and Oriented Plan (CO-OP) program. Under the rules recipients of loans to set up the nonprofit cooperative insurance plans: will have two years instead of one to make the

transition to member-elected boards; clarifies that, in addition to pre-existing issuers and their agents, holding companies that control insurance issuers that existed before July 16, 2009, are ineligible for the \$3.8 billion in loans to set up the nonprofit health

plans; and allows a CO-OP sponsor or applicant to receive funding from state or local governments as long as the CO-OP is not controlled by a government entity and it does not receive more than 40% of its total funding from state or local governments.

## Issues Related to Challenges to PPACA in the U.S. Supreme Court

**T**he interest in the upcoming Supreme Court case challenging the constitutionality of the PPACA is heating up with the latest move being by **Senators Dick Durbin**

**and Charles Grassley** who have introduced legislation, S. 1945, which would require that open proceedings of the U.S. Supreme Court be televised. Also, the court set the schedule for briefs to

be filed ahead of oral arguments next spring in the Florida lawsuit challenging the federal health reform law.

## DOL Proposes New Rules for MEWAs

**T**he Department of Labor Employee Benefits Security Administration released two proposed rules establishing procedures for DOL to issue ex

parte cease-and-desist orders and summary seizure orders to alleged fraudulent or insolvent MEWAs (multiple employer welfare arrangements as defined under

ERISA) and would amend existing Form 5500 and M-1 reporting obligations for MEWAs.

### PPACA School-based Grants

**H**HS announced that it has awarded more than \$14.5 million in PPACA grants to 45 school-based health centers, allowing them to expand services to some 53,000 children in 29 states.

### Early Retiree Reinsurance Program to Shut Down

**C**MS announced that it will not accept claims for the PPACA's ERRP program that are incurred after year-end because it has already disbursed \$4.5 billion of the \$5 billion appropriated for the program.

## Final Regs on Use of Medicare Claims Data

**C**MS released a final rule that allows for the release and use of select extracts of Medicare claims data to measure the performance of providers and suppliers in ways that protect patient

privacy. Interested parties will have to pay for the cost. The regulations take effect on January 6, 2012.

## FDA Meetings

**T**he FDA provided notice that the agency will hold a public meeting on December 19th to take testimony on proposed new user fees that would provide the FDA with additional funding for the generic drug program in the amount of \$299 million per year, adjusted for inflation, for five years. The FDA also gave notice of a public meeting on December 16 to discuss the proposed recommendations for a biosimilars user fee program for FY 2013-17.

## Senate Judiciary Committee Cracks Down on Counterfeit Drugs

**L**ast week the Senate Judiciary Committee passed S. 1886, the Counterfeit Drug Penalty Enhancement Act, which would increase the penalties for the trafficking of counterfeit medications.

Penalties for an individual would be a \$4 million maximum fine and up to 20 years in prison while other entities could be fined \$10 million.

**H.R. 3542 (MEDICAID)**, to amend Section 5001 of Division B of the American Recovery and Reinvestment Act of 2009 to extend the temporary increase in Medicaid FMAP through the end of fiscal year 2012; GRIJALVA; to the Committee on Energy and Commerce, Dec. 1.

**H.R. 3547 (HIV/AIDS)**, to provide for an effective HIV/AIDS program in federal prisons; WATERS; to the Committee on the Judiciary, Dec. 1.

**H.R. 3554 (PHARMACEUTICALS)**, to prohibit the open-air cultivation of genetically engineered pharmaceutical and industrial crops; to prohibit the use of common human food or animal feed as the host plant for a genetically engineered pharmaceutical or industrial chemical; to establish a tracking system to regulate the growing, handling, transportation, and disposal of pharmaceutical and industrial crops and their byproducts to prevent human, animal, and general environmental exposure to genetically engineered pharmaceutical and industrial crops and their byproducts; to amend the Federal Food, Drug, and Cosmetic Act with respect to the safety of genetically engineered foods; and for other purposes; KUCINICH; jointly, to the committees on Agriculture and Energy and Commerce, Dec. 2.

**H.R. 3558 (TAXATION)**, to amend the Internal Revenue Code of 1986 to provide that the prohibition on suits to restrain

assessment or collection of tax does not apply to the tax provisions of the PPACA or the Health Care and Education Reconciliation Act of 2010; LANCE; to the Committee on Ways and Means, Dec. 2.

**H. RES. 481 (DISEASE AWARENESS)**, supporting the goals and ideals of “Crohn’s and Colitis Awareness Week”; ROSS of Florida; to the Committee on Energy and Commerce, Dec. 1.

**S. 1943 (MEDICAL DEVICES)**, to amend Section 513 of the Federal Food, Drug, and Cosmetic Act to expedite the process for requesting de novo classification of a device; BROWN of Massachusetts; to the Committee on Health, Education, Labor, and Pensions, Dec. 5.

**H.R. 3575 (FEDERAL BUDGET)**, to amend the Congressional Budget Act of 1974 to establish joint resolutions on the budget, and for other purposes; BLACK; jointly, to the committees on Rules and the Budget, Dec. 7.

**H.R. 3576 (FEDERAL BUDGET)**, to amend the Balanced Budget and Emergency Deficit Control Act of 1985 to establish spending limits and deficit control; CAMPBELL; jointly, to the committees on the Budget and Rules, Dec. 7.

**H.R. 3579 (FEDERAL PROGRAM SPENDING)**, to require greater accountability in spending in direct spending programs, and for other purposes; CHAFFETZ; to the Committee on the Budget, and in addition to the

Committees on Rules, Education and the Workforce, and the Judiciary, Dec. 7.

**H.R. 3586 (VOLUNTEER RESPONDERS)**, to amend the Public Health Service Act to limit the liability of health care professionals who volunteer to provide health care services in response to a disaster; STEARNS; jointly, to the committees on Energy and Commerce and the Judiciary, Dec. 7.

**H.R. 3587 (MEDICAID)**, to amend Title XIX of the Social Security Act to provide for the application of Medicaid prompt pay requirement to claims for payment for covered items and services furnished by any Medicaid health care entity; BILBRAY; to the Committee on Energy and Commerce, Dec. 7.

**S. 1967 (MEDICARE)**, to amend Title XVIII of the Social Security Act to provide for the treatment of certain physician pathology services under Medicare; JOHNSON of South Dakota; to the Committee on Finance, Dec. 8.

**S. 1969 (MEDICAID/CHIP)**, to amend Title IX of the Social Security Act to improve the quality, health outcomes, and value of maternity care under the Medicaid and CHIP programs by developing a maternity care quality measurement program, evaluating maternity care home models, and supporting maternity care quality collaboratives; STABENOW; to the Committee on Finance, Dec. 8.

**S. 1972 (FDA)**, to amend the

Food and Drug Administration's mission; COATS; to the Committee on Health, Education, Labor, and Pensions, Dec. 8.

**S. 1976 (MILITARY HEALTH)**, to authorize educational assistance under the Armed Forces Health Professions Scholarship program for pursuit of advanced degrees in physical therapy and occupational therapy; COLLINS; to the Committee on Armed Services, Dec. 8.

**H.R. 3613 (MEDICARE)**, to amend Title XVIII of the Social Security Act to allow for fair application of the exceptions process for drugs in tiers in formularies in prescription drug plans under Medicare Part D; JOHNSON of Georgia; jointly, to the committees on Energy and Commerce and Ways and Means, Dec. 8.

**H.R. 3620 (MEDICAID/CHIP)**, to amend Title IX of the Social Security Act to improve the quality, health outcomes, and value of maternity care under the Medicaid and CHIP programs by developing a maternity care quality measurement program, evaluating maternity care home models, and supporting maternity care quality collaboratives; ENGEL; to the Committee on Energy and Commerce, Dec. 8.

**H.R. 3622 (MEDICARE)**, to amend Title XVIII of the Social Security Act to provide comprehensive cancer patient treatment education under Medicare and to provide for research to improve cancer symptom management; ISRAEL; jointly, to the committees on Energy and Commerce and Ways and Means, Dec. 8.

**H.R. 3625 (DISEASE AWARENESS)**, to amend Title III of the Public Health Service Act to authorize and support the creation of cardiomyopathy education, awareness, and risk assessment materials and resources by the secretary of health and human services through the Centers for Disease Control and Prevention and the dissemination of such materials and resources by state educational agencies to identify more at-risk families; PALLONE; to the Committee on Energy and Commerce, Dec. 8.

## Appendix I

**Middle Class Tax Relief & Job Creation Act:** GOP Plan Extends Current Payroll Tax Relief, Protects Social Security, Reforms and Extends Unemployment Insurance & Includes Key Jobs Initiatives (Released by House Speaker John Boehner)

### Extends Current Payroll Tax Relief, Protects Social Security

The bill provides a one-year extension of the temporary payroll tax relief enacted in 2010 and allows Americans to keep more of their own money, rejecting the Democrats' plan to increase taxes on job creators. The measure protects the Social Security Trust Fund from being harmed by cutting government spending and directing those savings to replenish the trust fund. Specifically, the measure:

- Extends the current lower payroll tax rate for employees, which was reduced from 6.2 percent of wages to 4.2 percent, for one year.
- Ensures that taxes will stay lower for the nearly 170 million Americans who pay payroll taxes, with the average working family saving \$1,000 in 2012.
- Rejects the Democrats' proposed tax increase on job creators.

### Reforms UI Program & Extends Benefits for Americans Struggling in the Obama Economy

The bill permanently reforms the federal unemployment insurance (UI) program and extends benefits to those who are struggling in President Obama's economy. Recognizing that unemployment services should focus on helping Americans get back to work, the bill uses a two-step process to gradually reduce current maximum weeks of benefits from 99 to 59 weeks, a common-sense level that is in line with past recessions and economic downturns (President Obama's own plan recognizes that American taxpayers cannot subsidize benefits for an unprecedented, unending period of time by reducing the maximum weeks by 20 next year).

The measure permanently reforms unemployment insurance to reduce waste, cut costs, and increase state flexibility – consistent with the Jobs, Opportunities, Benefits & Services (JOBS) Act approved by the Ways & Means Committee in May. For example:

- The bill requires all state and federal UI recipients to, as a condition of eligibility, search for work, be in a GED program if they have not finished high school (with common-sense exceptions such as for older workers), and participate in reemployment services to help them get back to work.
- The measure increases state flexibility to test and evaluate innovative state-based solutions.
- The bill targets waste, fraud, and abuse by improving the accuracy and administration of UI benefits.
- The measure allows states, if they desire, to perform drug screening and testing as a condition of providing UI benefits in order to improve prospects for future employment.

### Job Creation Initiatives

As part of Republicans' continuing focus on jobs, including the GOP's Plan for America's Job Creators, the measure includes several key jobs initiatives:

- The bill accelerates a decision on the Keystone XL energy pipeline, requiring, within 60 days, for the permit to be granted unless the president determines the project is not in the national interest. The measure will create thousands of American jobs and increase America's energy security. Similar legislation passed the House with bipartisan support earlier this year.
- The measure extends 100 percent business expensing through 2012 to make it easier for employers, small and large, to invest now in new machinery and equipment, grow their businesses, and create jobs.
- The bill includes Rep. Morgan Griffith's (R-VA) EPA Regulatory Relief Act (H.R. 2250) to stop the onerous

new boiler rule and require the Obama administration to develop a more sensible alternative that balances the need to protect both jobs and the environment. The measure, which would protect more than 200,000 American jobs, was passed by the House on a bipartisan basis on October 13.

- The measure includes spectrum auctions to advance wireless broadband service, bring interoperable broadband communications to public safety officials, spur billions in private investment, and create thousands of jobs – consistent with Rep. Greg Walden’s (R-OR) Jumpstarting Opportunity with Broadband Spectrum (JOBS) Act.

### **Includes Two-Year “Doc Fix,” Further Defunds ObamaCare**

The bill provides a two-year “doc fix” and savings to offset the cost, including further defunding the President’s health care law. A two-year “doc fix” extension is the longest stretch of time in nearly a decade. Bringing this level of stability to physicians will pave the way for a permanent solution. Specifically, the bill:

- Extends certain Medicare payment policies, including a two-year “doc fix” to protect Medicare physicians from large reimbursement cuts scheduled to take place next year.
- Repeals \$8 billion in ObamaCare mandatory funding from the unaccountable “prevention and public health fund,” which the House voted to defund earlier this year (saves \$8 billion).
- Forces greater repayment of improper taxpayer-funded subsidies in ObamaCare to reduce waste, fraud and abuse in the Democrats’ health care law (reduces deficit by \$13.4 billion).
- Updates certain provider payment methodologies to reduce wasteful spending (saves \$21.5 billion).

### **Reforms & Extends Temporary Assistance for Needy Families Program**

The Temporary Assistance for Needy Families (TANF) program, which replaced the prior open-ended welfare entitlement with a fixed federal block grant as part of the 1996 welfare reform law, expires December 31, 2011. The bill extends the \$16.5 billion TANF block grant at its current funding levels through FY 2012, and makes two reforms to (1) improve program administration by standardizing data elements to improve integrity and collaboration; and (2) close the current “strip club loophole” to ensure that welfare funds cannot be accessed in strip clubs, liquor stores, and casinos by blocking welfare electronic benefit transfer (EBT) cards from working in ATMs there.

### **Spending Cuts – Not Tax Hikes on Job Creators – to Offset Payroll/UI Extension**

The bill includes spending cuts in government programs – not tax increases on job creators – to fully pay for extending current payroll tax relief and unemployment insurance benefits. This includes extending the current pay freeze for federal workers, including Members of Congress, eliminating government benefits for millionaires & billionaires, targeting fraud and abuse, and reforming entitlement programs – many ideas for which President Obama has already expressed support. Specifically, the bill:

- Extends the current pay freeze for federal workers (including Members of Congress) through FY 2013 (saves \$26 billion).
- Changes the co-pay structure for civilian federal retirees (saves \$36 billion).
- Raises Government Sponsored Enterprise (GSE) guarantee fees to better price the risks GSEs cover and reduce their unfair advantages over the private sector (saves \$38 billion).
- Includes spectrum auctions and other reforms to bring in significant revenues for taxpayers by making more efficient and effective use of the public’s airwaves (saves \$16 billion).
- Reforms the National Flood Insurance Program by eliminating the pre-mium subsidy for certain properties (saves \$4 billion).
- Better coordinates with states and localities to prevent Social Security overpayments (saves \$3 billion)
- Ensures that illegal immigrants who are not eligible to work in the U.S. do not get checks from the IRS (saves \$9.4 billion).
- Gradually increases Medicare premiums for high income beneficiaries (saves \$31 billion).
- Prohibits millionaires from receiving unemployment insurance and food stamp benefits (saves \$20 million).