



## Health Policy Briefing

November 10, 2014

### New GOP Majority Expected to Clear FY 2015 Spending Decks; Target PPACA Next Year

#### *Appropriators Push for Passage of FY 2015 Omnibus Spending Bill*

With House Republican’s expanding their majority by a minimum of twelve members and Senate Republican’s attaining a majority of at least 52 members (several House races remain unsettled, as well as the Louisiana and Alaska Senate seats), the current House and Senate leaders may decide that passing an omnibus spending bill will best serve the interest of both parties. House Appropriations Committee Chairman Harold Rogers (R-KY) said he is pushing for an omnibus approach to finish fiscal year (FY) 2015 in order to give the Republican majority a “clean slate” in the new congress to begin crafting a budget plan for FY 2016. If congressional leaders cannot achieve a consensus on this approach, another continuing resolution (CR) could be taken up to extend FY 2015 funding beyond the current December 11th deadline. How the \$6 billion request by the Administration to address the Ebola crisis will be dealt with in the House is also unclear. The Administration said that about \$4.5 billion would be used for immediate response needs, including testing multiple Ebola treatments simultaneously, and that \$1.5 billion would be assigned to a contingency fund. Overall the President told Congress that the additional Ebola funds would be used “to contain and end the outbreak at its source in Africa, enhance domestic preparedness, speed the procurement and testing of vaccines and therapeutics, and accelerate global capability to prevent the spread of future infectious diseases.”

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## ***Watchwords for 114th Congress: Gridlock, Confrontation or Compromise?***

Senator Mitch McConnell (R-KY), who is the presumptive Senate Majority Leader in the next congress, was resolute in stating that under his watch there would be no government shutdown or default on the national debt. However, in assessing the chances for the full repeal of the Patient Protection and Affordable Care Act (PPACA), he stated the obvious that this is not in the cards given the President's clear words that he would veto such a move and that the Republican votes would be insufficient to override a veto. Nonetheless, House Speaker John Boehner (R-OH) also made clear that he would push for another vote in the House on a repeal measure whether or not a vote could be brought up in the Senate. He said that Republicans should get what they can and that they should move to repeal the PPACA's individual mandate, medical device tax and the Independent Payment Advisory Board (IPAB). He said the new majority should also pass legislation to increase the law's definition of full-time employee from 30-hours/week to 40-hours/week to stem the tide underway by employers to reduce employee hours worked as a way to avoid having to offer and pay for health insurance coverage. In his post-election remarks, the President made clear that while he is open to making needed corrections, he would veto any changes that undermine the basic "structure" of the law. Republicans have also countered that, if necessary, they may invoke the budget reconciliation process, which imposes Senate rules for consideration requiring a 50 vote threshold instead of 60, to defund elements of the health care law and regulations that they consider to be unconstitutional or particularly egregious. Republicans will also be challenged, including by the House GOP Doctors Caucus, to pass legislation to repeal and replace the current sustainable growth rate (SGR) framework for setting Medicare physician reimbursement rates. However, finding the means to offset the cost of the legislation will remain the major hurdle for the bi-partisan/bi-cameral majority pushing for passage of the reform in anticipation of the March 31, 2015 expiration of the current temporary fix. As to the extension of funding in the lame-duck session for the Children's Health Insurance Program (CHIP) being pushed by retiring Senator Rockefeller (D-WV), House Energy and Commerce Committee Republicans appear resigned to pushing the decision and hearings on the matter into later next year, closer to when the program is set to expire. The same committee's bipartisan hearings, on the 21st Century Cures initiative, are also expected to result in the release of draft legislation in January which Health Subcommittee Joe Pitts (R-PA) said the committee would like to pass this summer. The goal of the legislation is to reform the Food and Drug Administration (FDA) process to speed up new treatments, drugs and new technologies. U.S. Department of Health and Human Services (HHS) Secretary Sylvia Mathews Burwell also indicated that one of her priorities is to assist states in expanding Medicaid.

## **PPACA Health Reform Update**

### ***Administration Tightens Net under Health Reform Law***

Even as congressional Republicans plot their upcoming legislative agenda to curtail the PPACA, the Administration is taking steps to constrain employer actions under the law. The Departments of Labor, HHS and Treasury issued guidance to employers instructing them that the following actions will be considered a violation of the market reforms under the law: if an employer reimburses an employee's expense for purchasing health insurance on an exchange; if an employer offers a high-claims-risk employee a cash subsidy to purchase health insurance outside the employer's own health plan; and if an employer eliminates group health insurance coverage and then reimburses employees for the purchase of individual coverage obtained elsewhere. In addition, the DoL issued a technical release clarifying that states can regulate the health insurance policies issued to group health plan sponsors regulated under the Employee Retirement Income Security Act (ERISA). The agency said that this authority also includes the ability of states to regulate so-called stop-loss insurance sold in connection with such group health plans. State insurance commissioners have criticized small employers for using stop-loss insurance to limit a plan's exposure to high-cost claims. The clarification amounts to an exception to ERISA's preemption of state insurance law in connection with self-insured group health plans and will allow states to regulate the limits of stop-loss coverage, particularly in connection with small employer plans. Another clarification issued by the Internal Revenue Service (IRS) will assist employers and health insurers in that the agency said that sponsors of self-insured group health plans and health insurance issuers can treat contributions under the PPACA's transitional reinsurance program as ordinary and necessary business expenses for tax purposes.

## PPACA Health Reform Update cont.

### ***Supreme Court to Review Legality of Certain Individual Tax Subsidies***

Last Friday the U.S. Supreme Court granted a petition for certiorari in the King v. Burwell case in which the U.S. Court of Appeals for the District of Columbia Circuit held that the IRS did not adhere to the black letter of the health care law when it ruled that individuals who buy health insurance on the federal HealthCare.gov exchange are eligible for tax credit subsidies even though they reside in states electing not to establish their own health insurance exchanges. The Supreme Court action preempts an en banc hearing in the D.C. Circuit Court that the Administration hoped would overturn the decision and prevent a conflict among the circuit courts, thus making the issue moot for Supreme Court review. The Administration was quick to tell the public that the law is working and that the individual tax credits in question will still be available for coverage obtained in the open season beginning November 15th. In another case, Sissel v. HHS, the Department of Justice (DOJ) argued that an en banc rehearing of the holding that the individual mandate does not violate the origination clause of the Constitution should not be taken up by the U.S. Court of Appeals for the District of Columbia Circuit. The DOJ said that the original decision was correct and did not conflict with any other decision by the Supreme Court or any other court. In a third case, Coons V. Lew, the plaintiffs petitioned the U.S. Supreme Court to review an appeals court decision that dismissed their challenge to the PPACA's provisions establishing the Independent Payment Advisory Board (IPAB). In that decision the U.S. Court of Appeals for the Ninth Circuit ruled that the issue was not ripe for judicial resolution because the Board has yet to be constituted and is prohibited from taking any action before January 1, 2019.

## Medicare/Medicaid/PHSA Corner

### ***MedPAC Considers Site-Neutral Payments and Primary MD Bonuses***

Anticipating votes in January on possible changes to Medicare payments to be recommended to Congress in a March report, the Medicare Payment Advisory Commission (MedPAC) met last week and apparently agreed on eliminating differences in Medicare payments in different Inpatient Rehabilitation Facility (IRF) and Skilled Nursing Facility (SNF) settings for the treatment of certain orthopedic, pulmonary, cardiac and infectious conditions. A decision on payment differences for stroke patients was deferred. The commissioners also discussed a potential policy change to the 10% bonus for primary care practitioners which would in the alternative provide for a payment of \$30 annually per beneficiary. Draft recommendations will be taken up in MedPAC's upcoming December 18-19 meeting.

### ***CMS Finalizes Dialysis Facility Compare Star Rating System***

The Centers for Medicare and Medicaid Services (CMS) released the final methodology the agency will use to rate dialysis facilities under the Dialysis Facility Compare (DFC) Star Rating program. Ratings will be posted in January and dialysis facilities will have 15 days to review their ratings and provide comment. The data used in the program will be updated next October.

### ***CMS Updates Open Payments Data***

CMS announced that it will release in December an additional 9,000 payment records that were previously in dispute under the Open Payments System website.

### ***HRSA Announces Grants for Mental Health Service Expansion***

The Health Resources and Services Administration (HRSA) announced the award of over \$51 million in grants to 210 health centers in 47 states, DC and Puerto Rico to establish and expand mental health and substance abuse behavioral health services.

## Upcoming Congressional Hearings and Markups

**Senate Appropriations Committee:** hearing to be held on *U.S. Government Response to the Ebola Outbreak*; 2:00 PM; SD-G50 Dirksen Senate Bldg.; November 12.

**House Veterans' Affairs Committee:** hearing to be held on *Assessing the Implementation of the Veterans Access, Choice, and Accountability Act of 2014*; 10:00 AM; 334 Cannon House Bldg.; November 13.

**House Foreign Affairs Committee:** hearing titled "*Combating Ebola in West Africa: The International Response.*" 10 a.m., 2172 Rayburn House Bldg.; November 13.

**House Veterans' Affairs Committee:** hearing to be held on *VA's Longstanding Information Security Weaknesses are Increasing Patient Wait Times and Allowing Extensive Data Manipulation*; 1:30 PM; 334 Cannon House Bldg.; November 18.

**House Veterans' Affairs Subcommittee on Health:** will hold a hearing on the following health bills: *H.R. 4720 (Medal of Honor Priority Care Act)*; *H.R. 4977 (COVER Act - related to mental health issues)*; *H.R. 5059 (Clay Hunt SAV Act - related to mental health and suicide prevention)*; *H.R. 5475 (to improve newborn care)*; and *H.R. 5484 (Toxic Exposure Research Act)*; 2:00 p.m., 334 Cannon House Bldg.; November 19.