



## Health Policy Briefing

November 25, 2013

### Congress Recesses With No Budget “Top-Line” Decision and Senate Goes “Nuclear”!

#### *Budget Conferees Leave Town and Appropriators in a Lurch*

The House has recessed until December 2, the date that appropriators had hoped to have a decision from budget conferees on the level of top-line spending for FY 2014 to allow their subcommittees to make final spending allocations for the remainder of the fiscal year. The Senate does not get back until December 9th. Given that it is increasingly unlikely that the conferees will reach a final agreement on the level of federal spending before the December 13th deadline, **House Speaker John Boehner (R-OH)** announced that he would direct House appropriators to develop a new continuing resolution (at the \$967 billion sequester level) to allow budget negotiations to continue.

**Senate Minority Leader Mitch McConnell (R-KY)** is said to also support the \$967 billion ceiling set under the Budget Control Act (BCA). The Speaker’s announcement may presage a move to allow budget negotiations to continue until at least January 15, 2014 when the current continuing resolution (CR) expires. Members continue to seek avenues by which the adverse effects of sequestration can be ameliorated (e.g. for sequestered medical device fees that would

otherwise be available for Food and Drug Administration (FDA) device approvals). The lack of a legislative vehicle this year on which to attach a long-term fix for the current Medicare physician payment sustainable growth rate (SGR) formula may force members to take one of two courses of action—that is, to either pass a stand-alone reform bill that includes an offset for the increased spending or to follow past patterns which have led to short-term relief from the Centers for Medicare and Medicaid Services (CMS) determined cuts (i.e. 24.4% for calendar year (CY) 2014).

**Rep. Michael Burgess (R-TX)**, the *continued on page 2*

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sponsor of the House Energy and Commerce Committee's bipartisan Medicare physician payment reform legislation (H.R. 2810), said he may oppose another short-term physician payment fix unless a long-term solution is "moving in the right direction" in December. In this regard, the Senate Finance Committee announced that a markup of the joint Finance/Ways-and-Means Medicare physician payment reform proposal (as well as other Medicare extenders) will be held on December 12th. The tax committees' proposal would freeze payments for five years, unlike the House Energy and Commerce Committee bill which includes a 0.5% per year increase. The Congressional Budget Office (CBO) has yet to provide a cost estimate of the tax committees' measure which does not currently include an offset for the increased spending under the proposal. However, Senator Jay Rockefeller (D-WV) is promoting his Medicare Part D drug rebate bill, S. 740 which would restore rebates for dual-eligibles, as the preferable means to offset the cost of physician payment reform.

### ***Senate Changes Rules On Executive/Judge Confirmations***

Senate Majority Leader Harry Reid (D-NV) decided it was time to overturn the time-honored ability of the minority to filibuster against executive and judicial branch nominees and forced a vote to change the Senate's rules to allow a 51 majority to give their "advise and consent" to President Obama's nominees. This tactic to invoke the so-called "nuclear option" was the tipping point for Republicans last week and they reciprocated by refusing to allow the Defense authorization bill to proceed before the Thanksgiving recess. The change to the filibuster rule may also create a more contentious situation when Congress returns to address critical budget/appropriations issues. Republicans are also unlikely to back down on opposing executive/judicial nominations, perhaps by delaying committee votes and extending the time of post-cloture debate on such nominations.

### ***Health Legislation in the Senate and the House***

The Senate passed and sent to the President for his signature the bill S. 1545 (PEPFAR Stewardship and Oversight Act of 2013), legislation that extends for five years the President's emergency plan for AIDS relief (PEPFAR). After Senate passage, the House passed and sent to the President for his signature the bill H.R. 3204 (the Drug Quality and Security Act), legislation designed to give the FDA authority to improve the safety of drug compounding and the drug supply chain (by means of federal track-and-trace provisions that preempt state laws). The House Energy and Commerce Subcommittee on Health also held hearings on the following bills: H.R. 610, legislation which establishes a tick-borne disease advisory committee; H.R. 2703, legislation that gives community health center health professionals federal liability protection; H.R. 669, legislation authorizing the Centers for Disease Control and Prevention (CDC) to provide grants to states to improve Sudden Unexpected Infant Death (SUID) and Sudden Unexplained Death in Childhood (SUDC) investigations; H.R. 1281, legislation reauthorizing grants related to newborn screening for genetic disorders; H.R. 1098, legislation reauthorizing CDC grants related to reducing traumatic brain injuries; H.R. 3527, legislation reauthorizing the national poison control hotline and related grants; and H.R. 3528, legislation reauthorizing the National All Schedules Prescription Electronic Reporting (NASPER) program that encourages states to adopt controlled drug monitoring systems.

## PPACA Health Reform Update

### *Punch and Counterpunch on PPACA*

In addition to this week's oversight hearings, House Republicans are ramping up their anti-Obamacare playbook to highlight the problems individuals are experiencing with the health law. Democrats have responded with their own message which cites Patient Protection and Affordable Care Act (PPACA) success stories. Republican members of the House Ways and Means Committee also sent a letter to U.S. Department of Health and Human Services (HHS) Secretary Kathleen Sebelius requesting information on whether the Secretary has "certified" under the PPACA that the subsidy verification process is working properly. They said they doubt this is the case and want to know when the Secretary will inform Congress either way. They said that eligible individuals need to know whether they will actually get their subsidies beginning on January 1, 2014. Also, ten Senate Republicans, including Senate Minority Leader Mitch McConnell (R-KY), introduced legislation to protect self-insured employers and plans from being kept from buying "stop-loss" insurance as a result of federal regulations. Senator John Thune (R-SD) also introduced legislation, S. 1724, which would prevent HHS from exempting Taft-Hartley union-negotiated multiemployer health plans from having to pay the PPACA's reinsurance fees (regulations indicated that such an exemption would be soon promulgated for self-insured, self-administered plans). Touting the positive effects of the PPACA, the White House Council of Economic Advisers released a report stating that the lower than average 1.3% increase in real per capital health spending over the last three years may be partially attributable to the provisions of the health law.

### HHS Announces Relief from PPACA Deadlines

Because of the problems individuals are having in accessing the HealthCare.gov website to enroll for health coverage, HHS announced that persons enrolling by December 23 (previously December 15) will have their coverage begin on January 1, 2014. The White House press spokesman also confirmed that the 2015 open enrollment period will be pushed back to November 15, 2014 from October 15, 2014 to give insurers more time to set their 2015 rates based on the claims experience of those enrolling as late as March 2014. Republicans were quick to point out that the new enrollment period will begin after the 2014 mid-term elections, thus delaying the disclosure of possible rate increases before the election. The move will also shorten open enrollment to two months. The HealthCare.gov consultant, Jeffrey Zients, also announced that the website's capacity should increase from 25,000 users to 50,000 by November 30th. CMS also said that HealthCare.gov has been improved to allow insurers to process their "834" eligibility verification forms faster. To better address potential enrollee needs to obtain health insurance coverage, CMS said that efforts are underway to allow health insurers to directly enroll participants through their own health plan websites. CMS also issued guidance that includes standard notice requirements for insurers who elect to continue offering non-PPACA compliant health plans pursuant to the President's transitional relief for individuals and small businesses receiving cancellation notices from their insurers. Insurers must tell policyholders what PPACA-mandated benefits are not included in their old plans and what other options are available through online marketplaces, including potential tax credits.

## PPACA Health Reform Update cont.

### *Republicans Skewer PPACA Website Functionality and Security*

**A**t a House Space, Science and Technology Committee hearing, when four information technology experts were asked whether they think the HealthCare.gov website is secure or will be by the Administration's self-imposed deadline for a complete fix (November 30th), they all said "no". Also, at a House E&C Subcommittee on Oversight and Investigations hearing, Chairman Tim Murphy (R-PA) said "Right now, healthcare.gov screams to crooks, 'If you like my health care info, you can steal it.'" Nonetheless Henry Chao, the CMS Deputy Chief Information Officer testified that the website is 60-70% complete and employs stringent privacy security controls to safeguard consumer data. He also admitted that personal information was released in a number of instances, but that the software problem allowing this has been fixed. He also said a full, system-wide security control assessment has not been concluded, but will be sometime in December. Republican members also highlighted a March report by McKinsey & Co. that warned HHS about thirteen serious risks to the website and the lack of a reliable decision-making structure within CMS to address the problems. Rep. Steve Scalise (R-LA) said that either the President didn't know about the website problems, which meant his staff was keeping information from him, or he did know and thus deliberately misled the public about the operability of the website. Curiously, Henry Chao testified that he had not seen the full report until the committee released it earlier in the week. In perhaps a forecast of future criticism of the law's implementation, Mr. Chao said "I think there's still a lot of moving parts and it wouldn't be prudent to give 100 percent guarantees to where we'll be at..." The Democrat Chair of the Senate Committee on Small Business and Entrepreneurship, Sen. Mary Landrieu (D-LA), tried to shift the blame on the federal exchange problems during a hearing on small business health issues. She said that Republican led states had every opportunity to set up an exchange for their small businesses, but they "defaulted" to let the federal government operate the exchanges in their states.

### PCORI Grants

**I**t was announced that the Patient Centered Outcomes Research Institute (PCORI) board of governors has approved more than \$1 billion in grants in 2014 and 2015 for comparative effectiveness research projects.

### Medicare/Medicaid/PHSA Corner

#### *CMS to Discuss Final CY 2014 Medicare Physician Payment Rule*

**A**lthough the Office of Management and Budget (OMB) is still reviewing the final Medicare physician fee schedule rule for 2014, CMS announced that two National Provider Calls will be used to discuss the rule. On December 3, the call will allow participants to discuss the phase-in of the physician value-based payment modifier; and the call on December 17 will include a CMS presentation on how eligible professionals and group practices can meet the criteria for the 2014 physician quality reporting system incentive, the 2016 Physician Quality Reporting System (PQRS) payment adjustment, program updates to the electronic health record incentive program and the physician compare program.

#### *Final 2014 Medicare Payment Rules for HHA's and Dialysis Facilities*

**C**MS issued final Medicare payment rules for home health agencies which will result in about a 1% reduction in 2014 payments over payments in 2013. The agency also issued a final rule stating that Medicare reimbursements for dialysis facilities will remain about the same in 2014 as in 2013. The end stage renal disease (ESRD) rule also provides for a multiyear phase-in of the American Taxpayer Relief Act's mandate to reduce payments to account for changes in the utilization of ESRD-related drugs and biologicals.

## Medicare/Medicaid/PHSA Corner cont.

### *ESRD Patients Can Get Payment Assistance*

In accordance with an advisory opinion issued by the HHS Office of the Inspector General (OIG), the OIG said it would not impose Stark law anti-kickback penalties against an insurer's payment of the costs of a patient's treatment for end-stage renal disease as long as the payments involve Medicare-eligible patients already receiving dialysis care for ESRD.

### *Proposed Expansion of Coverage for CHF*

CMS issued a proposed decision memorandum seeking comments on a possible expansion of Medicare coverage for cardiac rehabilitation services by including beneficiaries who have chronic heart failure (CHF). Comments are due by December 21, 2013.

### *FDA Approves Bird Flu Vaccine*

The FDA announced that it has approved a Glaxo SmithKline H5N1 influenza "bird flu" vaccine to supplement the national stockpile. The approval does not extend to commercial use of the vaccine, however.

## Upcoming Health-Related Hearings and Markups

**House Oversight and Government Reform Committee: will hold a field hearing titled "Obamacare Implementation: High Costs, Few Choices for Rural America." 10 a.m., Hall County Government Center, Gainesville, Ga.; Nov. 25.**

**Senate Finance Committee: Executive Session markup to consider legislation to *repeal the sustainable growth rate system (SGR) and to consider health care extenders*; 10:00 a.m., 215 Dirksen Bldg.; Dec. 12.**

## Health Legislation Recently Introduced

**H.R. 3504** (HEALTH INSURANCE COVERAGE), to provide improved consumer protection and rate review for health insurance coverage in the individual market, and for other purposes; SCHAKOWSKY; to the Committee on Energy and Commerce, Nov. 15.

**H.R. 3507** (VETERANS' HEALTH), to amend titles 10 and 38, U.S. Code, to expand the use of telehealth under the TRICARE Program and in the Department of Veterans Affairs, and for other purposes; PETERS of California; jointly, to the committees on Armed Services and Veterans' Affairs, Nov. 15.

**H.R. 3508** (VETERANS' HEALTH), to amend Title 38, U.S. Code, to clarify the qualifications of hearing aid specialists of the Veterans Health Administration of the Department of Veterans Affairs, and for other purposes; DUFFY; to the Committee on Veterans' Affairs, Nov. 15.

**H.R. 3512** (MEDICARE), to amend Title XVIII of the Social Security Act to facilitate the transition to Medicare for individuals enrolled in group health plans, to establish a three-month open enrollment period under Medicare Advantage, and for other purposes; HECK of Nevada; jointly, to the committees on Ways and Means and Energy and Commerce, Nov. 15.

**H.R. 3516** (MILITARY HEALTH), to improve health care furnished by the Department of Veterans Affairs and the Department of Defense by increasing access to complementary and alternative medicine and other approaches to wellness and preventive care, and for other purposes; RYAN of Ohio; jointly, to the committees on Veterans' Affairs and Armed Services, Nov. 15.

**H.R. 3517** (REFORM), to amend the Affordable Care Act to delay the individual health insurance mandate and any penalties for violating the individual mandate until after there is a certification that the HealthCare.gov or applicable state exchange website is fully operational, and for other purposes; SCHRADER; jointly, to the committees on Ways and Means and Energy and Commerce, Nov. 15.

## Health Legislation Recently Introduced cont.

**H.R. 3522** (REFORM), to authorize health insurance issuers to continue to offer for sale current group health insurance coverage in satisfaction of the minimum essential health insurance coverage requirement, and for other purposes; CASSIDY; jointly, to the committees on Energy and Commerce and Ways and Means, Nov. 18.

**H.R. 3525** (CHILDREN'S HEALTH), to amend the Foreign Assistance Act of 1961 to provide assistance for the treatment of hydrocephalus in children in developing countries, to train surgeons and other medical practitioners in innovative methods to treat and cure hydrocephalus, to fund related research, and for other purposes; SMITH of New Jersey; to the Committee on Foreign Affairs, Nov. 18.

**H.R. 3528** (CONTROLLED SUBSTANCES), to amend and reauthorize the controlled substance monitoring program under Section 399O of the Public Health Service Act; WHITFIELD; to the Committee on Energy and Commerce, Nov. 18.

**S. 1723** (REFORM), to clarify that the anti-kickback laws apply to qualified health plans, the federally facilitated marketplaces and other plans and programs under Title I of the Affordable Care Act, and for other purposes; VITTER; to the Committee on Health, Education, Labor and Pensions, Nov. 19.

**S. 1724** (REFORM), to provide that the reinsurance fee for the transitional reinsurance program under the Affordable Care Act be applied equally to all health insurance issuers and group health plans; THUNE; to the Committee on Health, Education, Labor and Pensions, Nov. 19.

**S. 1726** (REFORM), to prevent a taxpayer bailout of health insurance issuers; RUBIO; to the Committee on Health, Education, Labor and Pensions.

**S. 1729** (REFORM), to amend the Affordable Care Act to provide further options with respect to levels of coverage under qualified health plans; BEGICH; to the Committee on Health, Education, Labor and Pensions, Nov. 19.

**S. 1735** (HEALTH INSURANCE COVERAGE), to amend the Public Health Service Act, the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to exclude from the definition of health insurance coverage certain medical stop-loss insurance obtained by certain plan sponsors of group health plans; ALEXANDER; to the Committee on Health, Education, Labor and Pensions, Nov. 19.

**H.R. 3531** (MEDICARE), to amend Title XVIII of the Social Security Act to eliminate the three-day prior hospitalization requirement for Medicare coverage of skilled nursing facility services in qualified skilled nursing facilities, and for other purposes; to the Committee on Ways and Means, Nov. 19.

**H.R. 3537** (RESEARCH), to amend the Internal Revenue Code of 1986 to make permanent the credit for increasing research activities, to increase such credit for amounts paid or incurred for qualified research occurring in the U.S. and to increase the domestic production activities deduction for the manufacture of property substantially all of the research and development of which occurred in the U.S.; EDWARDS; to the Committee on Ways and Means, Nov. 19.

**H.R. 3540** (PATENTS), to amend Chapter 26 of Title 35, U.S. Code, to require the disclosure of information related to patent ownership, and for other purposes; POLIS; jointly, to the committees on the Judiciary and Energy and Commerce, Nov. 19.

**H.R. 3541** (REFORM), to prevent a taxpayer bailout of health insurance issuers; GRIFFIN of Arkansas; to the Committee on Energy and Commerce, Nov. 19.

**S. 1751** (VETERANS' HEALTH), to improve authorities for performance of medical disabilities examinations by contract physicians for benefits under laws administered by the secretary of veterans affairs, and for other purposes; HELLER; to the Committee on Veterans' Affairs, Nov. 20.

**H.R. 3548** (TRAUMA), to amend Title XII of the Public Health Service Act to expand the definition of trauma to include thermal, electrical, chemical, radioactive and other extrinsic agents; JOHNSON of Ohio; to the Committee on Energy and Commerce, Nov. 20.

## Health Legislation Recently Introduced cont.

**H.R. 3554** (VETERANS' HEALTH), to amend the Public Health Service Act to designate certain medical facilities of the Department of Veterans Affairs as health professional shortage areas, and for other purposes; BRALEY of Iowa; to the Committee on Energy and Commerce, Nov. 20.

**H.R. 3562** (REFORM), to clarify the application of all laws, including the Affordable Care Act, to the federal government and Congress, and for other purposes; KINGSTON; jointly, to the committees on Oversight and Government Reform, Energy and Commerce and House Administration, Nov. 20.

**H.R. 3567** (MEDICARE), to amend Title XVIII of the Social Security Act to provide for additional coverage options for beneficiaries under the original Medicare fee-for-service program through a Medicare Link program; SCHRADER; jointly, to the committees on Ways and Means and Energy and Commerce, Nov. 20.

**S. 1758** (MEDICARE), to amend Title XVIII of the Social Security Act to increase access to Medicare data; BALDWIN; to the Committee on Finance, Nov. 21.

**S. 1759** (TEACHING HEALTH CENTER PROGRAM), to reauthorize the teaching health center program; SANDERS; to the Committee on Health, Education, Labor and Pensions, Nov. 21.

**S. 1769** (MEDICAL MALPRACTICE/PRODUCT LIABILITY), limit the establishment of certain standards of care or duties of care owed by health-care providers to patients in any medical malpractice or medical product liability action or claim; TOOMEY; to the Committee on the Judiciary, Nov. 21.

**H.R. 3577** (HEALTH CARE SAVINGS), to establish the Commission on Health Care Savings through Innovative Wireless Technologies; PETERS of California; to the Committee on Energy and Commerce, Nov. 21.

**H.R. 3591** (DIABETES), to amend the Public Health Service Act to authorize grants to provide treatment for diabetes in minority communities; WATERS; to the Committee on Energy and Commerce, Nov. 21.

**H.R. 3595** (HEALTH INSURANCE COVERAGE), to require the disclosure of determinations with respect to which Congressional staff will be required to obtain health insurance coverage through an exchange; COTTON; to the Committee on House Administration, Nov. 21.

**H.R. 3596** (MEDICAID), to amend Title XIX of the Social Security Act to provide medical assistance to uninsured newborns under Medicaid, and for other purposes; DEGETTE; to the Committee on Energy and Commerce, Nov. 21.

**H.R. 3598** (REFORM), to amend the Affordable Care Act to permit insurers to offer catastrophic coverage plans to anyone, and for other purposes; FORTENBERRY; to the Committee on Energy and Commerce, Nov. 21.

**H.R. 3599** (MEDICARE), to amend Title XVIII of the Social Security Act with respect to payments to long-term care hospitals, and for other purposes; FORTENBERRY; to the Committee on Ways and Means, Nov. 21.

**H.R. 3601** (ABORTION), to provide for parental notification and intervention in the case of an un-emancipated minor seeking an abortion; GOHMERT; to the Committee on the Judiciary, Nov. 21.

**H.R. 3607** (REFORM), to enable states to opt out of certain provisions of the Affordable Care Act; MULVANEY; jointly, to the committees on Energy and Commerce and Ways and Means, Nov. 21.

**H.R. 3613** (MEDICARE), to amend Title XVIII of the Social Security Act to provide for a change in payment for certain hospitals under Medicare; RANGEL; to the Committee on Ways and Means, Nov. 21.

**H.R. 3616** (MEDICARE), to amend Title XVIII of the Social Security Act to distribute additional information to Medicare beneficiaries to prevent health-care fraud, and for other purposes; RUIZ; jointly, to the committees on Energy and Commerce and Ways and Means, Nov. 21.