



Health Policy Briefing

November 4, 2013

Hearings Only Fuel Fire Against Obamacare; Doc-Fix Proposed by Tax Committees

Budget Issues: House Passes Resolution of Disapproval on Extending Debt Ceiling

An element of the Continuing Appropriations Act for fiscal year (FY) 2014 allowed for Congress to take up a resolution disapproving of the debt limit extension until February 7, 2014 as enacted in the CR. Last week the House passed the resolution of disapproval, H.J.Res. 99, on a vote of 222 to 191. The vote is of no legislative consequence because the Senate is not expected to pass a similar measure (the President would veto the resolution, even if it were to pass). Conferees on the budget bill also met this week to scope out their priorities. If an agreement is to be reached on a short-term spending cap for the remainder of this fiscal year, the House would have to agree to a cap exceeding the FY 2013 \$986 billion level extended until January 15th and the Senate would have to come down from that chamber's \$1.058 billion demand. The hope for an amelioration of sequestration, expressed by **House Appropriations Chairman Hal Rogers (R-KY)** and Senate budget conferees, particularly for the Department of Defense (DOD), may help drive a conference agreement before the December 13th deadline. However, in their opening statements the conferees

expressed their desires for longer-term deficit reduction goals. **Rep. Tom Cole (R-OK)** expressed Republican leadership views that the conferees could shift sequester savings from the discretionary side of the budget to the non-discretionary side (with **House Budget Committee Chairman Paul Ryan (R-WI)** previously outlining Medicare reforms as a centerpiece of entitlement reform). However, **Senator Jeff Sessions (R-AL)** said he opposes using savings from Social Security and Medicare reform to finance new federal spending. Also, Rep. Ryan has ruled out tax rate increases, thus setting up a confrontation with **Senate**

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Budget Committee Chair, Patty Murray (D-WA), who said revenue increases would have to be part of any agreement. Although **Senate Finance Committee Chairman Max Baucus (D-MT)** said there will not be a markup of tax reform in his committee this year, **Senator Rob Portman (R-OH)** expressed support for including instructions for tax reform framework in the agreement. To expedite the agreement, **Rep. Hal Rogers** expressed hope that all twelve appropriations bills for FY 2014 would be wrapped up into an omnibus measure. Budget negotiations may continue this week, although the House recessed until November 12th.

Senate HELP Committee Approves GME Funding and Older Americans Act

The Senate Health, Education, Labor and Pensions (HELP) Committee unanimously approved S. 1557, the Children's Hospital GME Support Reauthorization Act of 2013, which would reauthorize graduate medical education (GME) funding up to \$300 million annually over five years. The Committee also reported out a reauthorization of the Older Americans Act, bipartisan legislation first passed more than 40 years ago in 1965 for the delivery of nutrition and social services for seniors.

Senate Passes NIH Research Bill

The Senate passed S. 1561, legislation providing the National Institutes of Health (NIH) with the authority to significantly reduce the number of chimpanzees it uses in biomedical research and to retire most of the animals it now owns or supports. Earlier the Senate HELP Committee unanimously reported the bill.

PPACA Health Reform Update

Obamacare Hearings Highlight Law's Shortcomings

Last week President Obama defended the Patient Protection and Affordable Care Act (PPACA) and its early problems in enrolling eligible individuals by equating HealthCare.gov's results to the similar slow start experienced in 2006 under Massachusetts's "RomneyCare" state law. Despite the President's defense, his Centers of Medicare and Medicaid Services (CMS) Administrator, Marilyn Tavenner and Department of Health and Human Services (HHS) Secretary Kathleen Sebelius came under intense fire for the law's early missteps during hearings last week held by the House Committees on Ways and Means and Energy and Commerce. In this connection, the President said "If they put as much energy into making this law work as they do into attacking the law, Americans would be better off..." During Tuesday's hearing, CMS Administrator Marilyn Tavenner testified that the extent of the website problems were unanticipated, were the result of the overwhelming number of individuals accessing the site and more stress and load testing should have taken place before the October 1st opening day. Later in the week, the House Oversight and Government Affairs Committee released a document showing that at least one contractor warned CMS about the potential failure of the website if it was put into operation on October 1st. After CMS held to a November 15th date for full disclosure of the website's enrollment numbers, House Ways and Means Committee Chairman Dave Camp (R-MI) threatened to subpoena the agency to turn over all enrollment figures to date and for each day thereafter. However, House Oversight and Government Reform Committee Chairman Darrell Issa (R-CA) did obtain notes from CMS/HHS meetings with contractors that showed only six individuals had actually purchased coverage on October 1st and a total of 248 had completed the process after three days. Concerning the website's operational problems, CMS and HHS Secretary Kathleen Sebelius said the website should be fully tested and operational by the end of November. The Secretary also fixed the blame on CMS Administrator Tavenner for making the decision to initially turn off the "anonymous shopper" feature on the website which contributed to its inoperability. Jeffrey Zients, the former acting director of the Office of Management and Budget (OMB) who was chosen to take charge of the enrollment site's repair, said that contract experts have been hired--including QSSI, Google, Red Hat and Oracle--to help the Administration reach the end-of-the-month deadline. Republican members were unsatisfied with answers from CMS/HHS about who was responsible for the problems and the decision to launch the website on October 1st even though testimony from

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PPACA Health Reform Update cont.

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contractors indicated the website had not been fully tested, especially as to an “end-to-end” security analysis. Rep. Mike Rogers (R-MI) grilled Secretary Sebelius about whether she could confirm that the day-to-day “patches” of the website’s code were accompanied by such adequate security testing. He did not get a direct yes or no answer, leaving members with no assurance that the website and the personal information collected is secure from hacking and identity theft. Despite HHS Secretary Kathleen Sebelius’ mea culpa taking full responsibility for the website’s troubles, House Republicans did not hold back in their criticism of the federal exchange and other aspects of the law. Rep. Dave Reichert (R-WA) rebuffed Democrat statements that the law needed only “sanding around the edges” and shot back “I think that most people feel right now it’s not time for any sanding to take place, but the chainsaw needs to come out.” Rep. Camp and others accused the Administration of misleading the public in declaring, even before the law’s enactment, that “if you like your health coverage and doctor, you can keep them”. He referenced the growing number of insurer cancellation notices to currently covered individuals which cited PPACA rules as the reason for the cancellations. Democrats and the White House spokesman responded that the individual market policies being cancelled were not “true insurance” and lacked the protections required under the PPACA. Others criticized the delay in the availability for small businesses to enroll in exchange “SHOP” plans until the end of the month. While HHS estimated that about 700,000 individuals have applied for coverage in both state and federal exchanges, Republicans were critical that almost 80% of such individuals would instead qualify for Medicaid. If the enrollment website’s problems continue, there will be increasing calls among Republicans and Democrats for a delay in the individual mandate (e.g. Senator Joe Manchin (D-WV) and Rep. Joe Barton (R-TX) are readying legislation to delay the individual mandate), the related penalties or for an extension of the open-enrollment period (e.g. Senators Shaheen (D-NH) and nine other Senate Democrats). CMS has already responded to the website troubles by releasing guidance to the effect that any person signing up for coverage in the exchanges through the March open-enrollment period will not be subject to the penalty for failure to maintain coverage for the required number of months in 2014). Republicans intend to continue (1) to scrutinize (e.g. the House Oversight and Government Reform Committee’s subpoena to force HHS/CMS to disclose the source of the website’s technical problems and a request by Senate Finance Committee Republicans for information on security and privacy issues), and (2) to change the law (e.g. Senator Lamar Alexander’s (R-TN) unanimous consent request to require PPACA progress reports was turned back in the Senate; and Senator Ron Johnson’s (R-WI) bill to restore coverage, S. 1617, “If You Like Your Health Plan, You Can Keep It Act”). The House Energy and Commerce Committee will again call on HHS Secretary Sebelius to testify during the first week of December.

Exchange Plans Not Subject to Stark Law

In response to a letter from Rep. Jim McDermott (D-WA), Secretary Kathleen Sebelius said that HHS consulted with the Department of Justice in deciding that the Stark anti-kickback law does not apply to qualified health plans purchased on state and federal health insurance exchanges because they are not “federal health care programs”.

Medicare/Medicaid/PHSA Corner

Tax Committee Chairmen Release “Doc Fix” Proposal

Indicating the potential that a bicameral, bipartisan legislative effort to reform the Medicare Physician Payment System can take place this year, Senate Finance Committee Chairman Max Baucus (D-MT) and House Ways and Means Committee Chairman Dave Camp (R-MI) released a proposal to replace the sustainable growth rate (SGR) with a value-based performance payment system. Whether the “discussion draft” will advance legislatively as part of the budget legislation or move on its own remains to be seen. In general, the proposal is similar to the one reported by the House Energy and Commerce Committee and would: repeal the SGR; freeze guaranteed annual physician payment updates for ten years, but provide for performance adjustments to physician payments beginning in 2017; include performance measures based on--the Physician Quality Reporting System (PQRS) which would continue to impose a 2% payment penalty on physicians who fail to report on quality measures, the Value-Based Modifier, and the Electronic Health Record Meaningful Use program; provide that penalties for failure to perform under the foregoing, estimated at about \$10 billion over 2017-2023, be used to fund the performance incentive payments; provide for 5% bonus payments until 2022 for the significant use of alternative payment models (i.e. shared savings programs, bundled payments and medical homes); and require physicians to consult appropriate use criteria when ordering tests for advanced imaging or electrocardiogram services. The Congressional Budget Office (CBO) has not provided a cost estimate for the proposal, but sponsors estimate it will increase spending by less than the bill reported by the House Energy and Commerce Committee (\$175 billion over ten years). Comments are due by November 12th and may be submitted to sgrcomments@finance.senate.gov and sgrwhitepaper@mail.house.gov.

Medicare Part A and B Premiums/ Deductibles for 2014

CMS provided notice that the Medicare Part B “standard” premium for 2014 will remain at the \$104.90/month level imposed in 2013. The \$147 Part B deductible will also remain unchanged. CMS also said the Part A premium will decrease by \$15 in 2014 to \$426. However, the Medicare Part A deductible will increase by \$32 to \$1,216 in 2014.

DME Medicare Contracts Announced

CMS announced that it has entered into almost 300 contracts with medical equipment suppliers under the durable medical equipment (DME) competitive bidding program.

Medicare Participation Rules for CMHCs

Medicare issued a final rule setting forth the conditions of participation that community mental health centers (CMHC) have to meet in order to be reimbursed under Medicare. Under the rule, CMS will survey CMHCs for health and safety compliance related to certain requirements, including a comprehensive assessment and discharge/transfer plan; use of a treatment plan and team; and use of outcome and satisfaction data to identify program needs and to improve the quality of care, etc.

Medicare Coverage for VADs

CMS issued a national coverage decision providing for the payment of the use of ventricular assist devices (VADs) in certain bridge-to-transplant (BTT) and destination therapy (DT) patients. The NCD did not expand the decision to cover bridge-to-candidacy patients.

FDA Plan to Prevent Drug Shortages

The Food and Drug Administration (FDA) announced two measures designed to help prevent prescription drug shortages. The first sets forth a “Strategic Plan for Preventing and Mitigating Drug Shortages” and the second requires manufacturers of certain “medically important” drugs/biologics to notify the FDA within six months of a permanent discontinuance or a temporary interruption of manufacturing that is likely to disrupt their supply.

IRS Ruling on Flexible Spending Accounts

The Internal Revenue Service (IRS) released Notice 2013-71 in which the service said that employer-based Flexible Spending Accounts (FSAs) can be amended to allow for up to \$500 of unused credits to be carried over into the next year. Employers can amend their plans to allow the carry-over for 2013 plan years.

Upcoming Health-Related Hearings and Markups

Senate HELP Committee: hearing titled “The Online Federal Health Insurance Marketplace: Enrollment Challenges and the Path Forward;” 10:00 a.m. 430 Dirksen Bldg.; Nov. 5.

Senate Finance Committee: hearing on the health insurance exchanges created within the Affordable Care Act; 10:00 a.m., 215 Dirksen Bldg.; Nov. 6.

Postponed--Senate Finance Committee: hearing titled “Transforming Medicare Post-Acute Care: Issues and Options”

Postponed--House Energy and Commerce Subcommittee on Health: hearing titled “Reviewing FDA’s Implementation of FDASIA”

Health Legislation Recently Introduced

H.R. 3338 (REFORM), to amend the Affordable Care Act to provide, because of problems relating to the operation of exchanges, for a hardship exemption from the individual mandate for months of non-coverage, and for other purposes; ELLMERS; to the Committee on Ways and Means, Oct. 24.

H.R. 3342 (REFORM), to amend the Affordable Care Act to provide for health insurance coverage for the president through an exchange in the same manner as for members of Congress; KINGSTON; jointly, to the committees on Oversight and Government Reform and Energy and Commerce, Oct. 24.

S. 1578 (VETERANS HEALTH), to authorize the secretary of veterans affairs to cover the costs associated with the care of veterans at medical foster homes; SANDERS; to the Committee on Veterans’ Affairs, Oct. 28.

S. 1586 (VETERANS HEALTH), to amend Title 38, U.S. Code, to improve dental health care for veterans, and for other purposes; SANDERS; to the Committee on Veterans’ Affairs, Oct. 28.

S. 1588 (VETERANS HEALTH), to amend Title 38, U.S. Code, to expand eligibility for reimbursement for emergency medical treatment to certain veterans that were unable to receive care from the Department of Veterans Affairs in the 24-month period preceding the furnishing of such emergency treatment; HIRONO; to the Committee on Veterans’ Affairs, Oct. 28.

Health Legislation Recently Introduced cont.

S. 1589 (VETERANS HEALTH), to amend Title 38, U.S. Code, to require the secretary of veterans affairs to ensure the Department of Veterans Affairs has an up-to-date policy on reporting of cases of infectious diseases, to require an independent assessment of the veterans integrated service networks and medical centers of the department and for other purposes; BURR; to the Committee on Veterans' Affairs, Oct. 28.

S. 1592 (REFORM), to provide for a delay of the individual mandate under the Affordable Care Act until the insurance marketplace is functioning properly; RUBIO; read the first time, Oct. 28.

S.J. RES. 26 (APPROPRIATIONS), relating to the disapproval of the president's exercise of authority to suspend the debt limit, as submitted under Section 1002(b) of the Continuing Appropriations Act, 2014 on Oct. 17, 2013; placed on the calendar, Oct. 28.

H.R. 3348 (REFORM), to amend the Internal Revenue Code of 1986 to make the individual health insurance mandate voluntary in 2014, and for other purposes; BARTON; to the Committee on Ways and Means, Oct. 28.

H.R. 3350 (HEALTH INSURANCE COVERAGE), to authorize health insurance issuers to continue to offer for sale current individual health insurance coverage in satisfaction of the minimum essential health insurance coverage requirement, and for other purposes; UPTON; jointly, to the committees on Energy and Commerce and Ways and Means, Oct. 28.

H.R. 3358 (REFORM), to provide for an exemption from the individual mandate under the Affordable Care Act for individuals in states in which the exchange websites are not fully functional, and for other purposes; MESSER; jointly, to the committees on Energy and Commerce and Ways and Means, Oct. 28.

H.R. 3359 (REFORM), to provide for a delay of the individual mandate under the Affordable Care Act until the marketplace is functioning properly; RADEL; jointly, to the committees on Ways and Means and Energy and Commerce, Oct. 28.

H.J. RES. 99 (APPROPRIATIONS), relating to the disapproval of the president's exercise of authority to suspend the debt limit, as submitted under Section 1002(b) of the Continuing Appropriations Act, 2014 on Oct. 17, 2013; YOUNG of Indiana; to the Committee on Ways and Means, Oct. 28.

S. 1598 (FEDERAL BUDGET), to provide a process for ensuring the U.S. does not default on its obligations; BOXER; to the Committee on Finance, Oct. 29.

S. 1602 (VETERANS HEALTH), to establish in the Department of Veterans Affairs a national center for the diagnosis, treatment and research of health conditions of the descendants of veterans exposed to toxic substances during service in the armed forces, to provide certain services to those descendants, to establish an advisory board on exposure to toxic substances and for other purposes; BLUMENTHAL; to the Committee on Veterans' Affairs, Oct. 29.

S. 1604 (VETERANS HEALTH), to amend Title 38, U.S. Code, to expand and enhance eligibility for health care and services through the Department of Veterans Affairs, and for other purposes; SANDERS; to the Committee on Veterans' Affairs, Oct. 29.

H.R. 3362 (REFORM), to amend the Affordable Care Act to require transparency in the operation of American Health Benefit Exchanges; TERRY; jointly, to the committees on Energy and Commerce and Ways and Means, Oct. 29.

H.R. 3365 (MEDICARE), to exempt certain long-term care hospitals operating in a single-hospital MSA from the Medicare threshold payment adjustment policy for long-term care hospitals, and for other purposes; WALBERG; to the Committee on Ways and Means, Oct. 29.

H.R. 3367 (REFORM), to amend Section 9010 of the PPACA to delay the application of the health insurance provider annual fee until 2016 and to provide a process to return to consumers any amounts attributable to the expected application of the annual fee to 2014 or 2015; BOUSTANY; jointly, to the committees on Ways and Means and Energy and Commerce, Oct. 29.

H.R. 3372 (FEDERAL BUDGET), to provide a process for ensuring the U.S. does not default on its obligations; HONDA; jointly, to the committees on Ways and Means and Rules, Oct. 29.

Health Legislation Recently Introduced cont.

H.R. 3372 (REFORM), to prohibit incurring further obligations with respect to the HealthCare.gov website without offsetting savings; JOHNSON of Ohio; to the Committee on Energy and Commerce, Oct. 29.

H.R. 3376 (REFORM), to provide a 12-month exemption from the health insurance mandate for individuals whose employer-sponsored health plan coverage or individual health insurance coverage is terminated for a plan year beginning during 2014, and for other purposes; LONG; to the Committee on Ways and Means, Oct. 29.

S. 1617 (REFORM), to amend the Affordable Care Act to ensure that individuals can keep their health insurance coverage; JOHNSON of Wisconsin; to the Committee on Health, Education, Labor and Pensions, Oct. 30.

H.R. 3383 (VETERANS' HEALTH), to amend Title 38, U.S. Code, to extend to all veterans with a serious service-connected injury eligibility to participate in the family caregiver services program; ESTY; to the Committee on Veterans' Affairs, Oct. 30.

H.R. 3387 (VETERANS' HEALTH), to amend Title 38, U.S. Code, to improve the mental health treatment provided by the Secretary of Veterans Affairs to veterans who served in classified missions; SINEMA; to the Committee on Veterans' Affairs, Oct. 30.

H.R. 3391 (TAXATION), to amend the Internal Revenue Code of 1986 to exclude from gross income payments under the Indian Health Service Loan Repayment Program and certain amounts received under the Indian Health Professions Scholarships Program; VALADAO; to the Committee on Ways and Means, Oct. 30.

H.R. 3392 (MEDICARE), to amend Title XVIII of the Social Security Act to provide for a PDP safety program to prevent fraud and abuse in the dispensing of controlled substances under Part D of Medicare, and for other purposes; BILIRAKIS; jointly, to the committees on Energy and Commerce and Ways and Means, Oct. 30.

H.R. 3404 (MAMMOGRAPHY), to require that every mammography summary delivered to a patient after a mammography examination, as required by Section 354 of the Public Health Service Act (commonly referred to as the "Mammography Quality Standards Act of 1992"), contain information regarding the patient's breast density and language communicating that individuals with more dense breasts may benefit from supplemental screening tests, and for other purposes; DELAURO; to the Committee on Energy and Commerce, Oct. 30.

H.R. 3406 (REFORM), to amend the Affordable Care Act to ensure that individuals can keep their health insurance coverage; DESANTIS; to the Committee on Energy and Commerce, Oct. 30.

H.R. 3419 (REFORM), to amend the Internal Revenue Code of 1986 to exempt certain small businesses from the employer health insurance mandate and to modify the definition of full-time employee for purposes of such mandate; KINGSTON; to the Committee on Ways and Means, Oct. 30.

H.R. 3420 (REFORM), to require any communication using Federal funds to advertise or educate the public on certain provisions of the Affordable Care Act and the Healthcare and Education Reconciliation Act of 2010 to state that such communication was produced at taxpayer expense, and for other purposes; KINGSTON; jointly, to the committees on Energy and Commerce, Ways and Means and Education and the Workforce, Oct. 30.

H.R. 3425 (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 website is fully operational, and for other purposes; LIPINSKI; jointly, to the committees on Ways and Means and Energy and Commerce, Oct. 30.

H.R. 3426 (MEDICARE), to amend Title XVIII of the Social Security Act to add physical therapists to the list of providers allowed to utilize locum tenens arrangements under Medicare; BEN RAY LUJÁN of New Mexico; jointly, to the committees on Energy and Commerce and Ways and Means, Oct. 30.

H.R. 3428 (TAXATION), to amend the Internal Revenue Code of 1986 to allow an increased credit for development and to extend and simplify the credit for increasing research; MCKINLEY; to the Committee on Ways and Means, Oct. 30.

H.R. 3429 (REFORM), to protect personal and financial information by requiring certain certifications by entities awarded funds under the Affordable Care Act for the operation of a navigator program or certain other exchange activities; MCMORRIS RODGERS; to the Committee on Energy and Commerce, Oct. 30.

H.R. 3444 (MEDICARE), to amend Title XVIII of the Social Security Act to provide flexibility in the manner in which beds are counted for purposes of determining whether a hospital may be designated as a critical access hospital under Medicare; WALDEN; to the Committee on Ways and Means, Oct. 30.

H.J. RES. 100 (APPROPRIATIONS), making further continuing appropriations for the fiscal year ending Sept. 30, 2014, and for other purposes; GEORGE MILLER of California; to the Committee on Appropriations, and in addition to the Committee on the Budget, Oct. 30.

H.RES. 396 (ALZHEIMER'S), supporting the goals and ideals of November as National Alzheimer's Disease Awareness Month; FATTAH; to the Committee on Energy and Commerce, Oct. 30.

H.R. 1629 (REFORM), to require the disclosure of determinations with respect to which congressional staff will be required to obtain health insurance coverage through an exchange; VITTER; to the Committee on Homeland Security and Governmental Affairs, Oct. 31.