



## Health Policy Briefing

December 24, 2012

### Congress Recesses Until December 27th Without a Compromise to Avert Fiscal Cliff

#### Will Congress Give a Last Minute Push to Avoid Fiscal Cliff?

The President and House Speaker John Boehner were unable to come up with a compromise last week on fiscal matters and the Speaker resorted to a maneuver in the House to present the Senate with legislation to alter the sequestration math and to give a nod (so-called "Plan B") to the President's demand to raise taxes on high-income individuals.

On a 215-209 vote, the House did pass H.R. 6684, the Spending Reduction Act of 2012, which in general would replace the Budget Control Act (BCA) mandated spending cuts with other cuts to raise about \$200 billion in savings over ten years. The bill would leave in place the 2% cut in Medicare spending beginning in 2013 as well as the BCA's level of cuts to NIH and various other programs. Among other things (see Appendix), the legislation includes a reduction from 6% to 5.5% in the cap on taxes states can levy on Medicaid providers and certain medical malpractice claim limitations.

Upon passage of H.R. 6684, the House turned to H.J. Res. 66, Speaker Boehner's "Plan B" legislation

which would allow income tax rates to rise on those with annual income of \$1 million or more. The White House issued a statement that the President would veto this bill absent a final agreement on taxes and spending while Senate Majority Leader Harry Reid said he would not take up the bill in that body. The House recessed until December 27th after it became apparent there were not enough Republican votes to pass the bill. Speaker Boehner said the Democrats' plan "is to slow-walk us over the fiscal cliff..." He also said that it is now up to the President to work with Senate Majority Leader Reid to develop legislation to avert the fiscal cliff.

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In an indication that negotiations may not be over, on Friday the President said he spoke with both the Speaker and the Senate Majority Leader and called on them to develop a proposal “in the next few days” to prevent a tax increase on middle class Americans and to extend unemployment insurance for two million Americans. Because the number of Republican votes in the House remains uncertain for any particular deal, it is possible that Senate Democrats and Republicans may attempt to gather the 60 votes necessary to pass a compromise and force the Speaker to take up the legislation and pass it with both Republican and Democrat votes, or be blamed for leading the country over the fiscal cliff. With few legislative days left in the session, it is also possible that Congress could kick the can into the early weeks of next year.

### ***Medicare Physician Payment Cut Caught in Fiscal Cliff Crosshairs***

**T**he lack of an agreement on fiscal matters has left the Centers for Medicare and Medicaid Services (CMS) in a bind as to what actions to take on the impending 26.5% cut in Medicare physician payments beginning in January. CMS sent a notice to physicians on December 19th stating that, in the absence of legislative action, the agency can hold claims for 14 days pending any congressional action to avoid the cuts. CMS said another notice will be forthcoming before January 11th with an update on congressional and agency actions. Although the House Ways and Means Committee is considering a stand-alone bill to avoid the cut, it is uncertain how that bill will fare if, as expected, the cuts are offset by other federal health program spending reductions. Apparently the budget deal proposed by the President would have provided for a one-year “doc fix” for 2013 and a promise to adopt a permanent fix as part of further negotiations on a grand fiscal bargain next year.

### ***House Passes Health Legislation***

**L**ast week the House passed the following bills: H.R. 1509, the Medicare Identity Theft Prevention Act of 2011, which would require HHS to establish “cost-effective procedures” to ensure that Social Security numbers are not displayed on Medicare identification cards (GAO is also directed to study whether smart card technology can be used for such ID cards); H.R. 6672, legislation to reauthorize certain programs under the Public Health Service Act and the Federal Food, Drug, and Cosmetic Act with respect to public health security and all-hazards preparedness and response; and S. 1440, the PREEMIE Reauthorization Act, which is designed to reduce preterm labor and delivery and the risk of pregnancy-related deaths and complications due to pregnancy, to reduce infant mortality caused by prematurity, to provide for a National Pediatric Research Network, including with respect to pediatric rare diseases or conditions and to reauthorize support for graduate medical education programs in children’s hospitals.

## **IVIG and NDAA headed to the White House**

**H**.R. 1845, the Medicare IVIG Access Act passed the House on Wednesday, December 19th under suspension of the rules by a vote of 401-3. The bill establishes a 3-year demonstration project providing Medicare coverage for items and services related to in-home administration of intravenous immune globulin (IVIG) for beneficiaries with primary immunodeficiency diseases (PIDD). The bill was amended to include provisions from the Strengthening Medicare and Repaying Taxpayers (SMART) Act which empowers Medicare to provide settling parties with the amount of their Medicare Secondary Payer (MSP) repayment obligation during the settlement process. The Senate passed the bill by unanimous consent on Friday, December 21st. The House and Senate also passed the conference report on H.R. 4310, the National Defense Authorization Act for Fiscal Year 2013, which extends funding for DOD health programs. Both bills now go to the President for his signature into law.

***HHS Okays More State-Based Health Insurance Exchanges***

**T**he Department of Health and Human Services (HHS) announced that it has given conditional approval to plans for state-based health insurance exchanges submitted by Minnesota, Rhode Island and Delaware (a so-called partnership exchange to be operated jointly by the state and federal government). After Friday's deadline for states to declare their intentions regarding whether they will establish health insurance exchanges, HHS said that 18 states and the District of Columbia will establish their own exchanges, 7 states will help run partnership exchanges and 25 states will allow the federal government to operate a federal default exchange in their states.

***PCORI Approves CER Awards***

**T**he Patient-Centered Outcomes Research Institute (PCORI) announced that 25 entities will receive a total of \$40.7 million over three years as part of first cycle of primary research funding. The awards relate to: improving health care systems; communicating and disseminating research; addressing disparities; and assessing prevention, diagnosis and treatment options.

***HHS Approves School-Based Health Center Awards***

**H**HS announced that 197 school-based health centers have been awarded more than \$80 million in funding to improve access to health care for school-age children.

***HHS Asks Courts to Hold Off on PPACA Contraceptive Coverage Rulings***

**H**HS announced that the agency will issue new regulations in January-March next year with respect to the PPACA requirement that plans include certain contraceptive coverage. HHS said that the new rules will give further accommodation to employers having a religious affiliation or viewpoint. As a result the DOJ has asked that the U.S. District Court of Appeals for the District of Columbia dismiss cases brought by Wheaton College in Illinois and Belmont Abbey in North Carolina which maintain that the requirement is unconstitutional.

**Medicare/Medicaid/PHSA Corner**

***CMS Provides SCHIP Bonuses***

**C**MS announced that 23 states have been awarded a total of \$306 million in FY 2012 Children's Health Insurance Program Reauthorization Act (CHIPRA) performance bonus awards for improving children's access to health coverage.

***NIH Revises Grant Application Process***

**I**n an effort to balance the grant review process and encourage diversity in the biomedical research field, the National Institutes of Health (NIH) announced that it will: launch a pilot program that removes all identifying information from grant applications; provide research opportunities for minority undergraduate students; provide \$50 million annually for minority undergraduate and graduate students in the field; and establish a mentoring program to help minority students and researchers beginning their careers.

## Health Legislation Recently Introduced

**S. 3699 (MEDICARE)**, A bill to amend title XVIII of the Social Security Act to include information on the coverage of intensive behavioral therapy for obesity in the Medicare and You Handbook, to provide written notification to beneficiaries and providers regarding new Medicare coverage of intensive behavioral therapy for obesity, and to provide for the coordination of programs to prevent and treat obesity, and for other purposes; CARPER, to the Committee on Finance, Dec. 16.

**S. 3684 (MEDICARE)**, to amend Title XVIII of the Social Security Act to provide for advanced illness care coordination services for Medicare beneficiaries, and for other purposes; WARNER; to the Committee on Finance, Dec. 17.

**H.R. 6672 (EMERGENCY PREPAREDNESS)**, to provide a comprehensive deficit reduction plan, and for other purposes; CORKER; to the Committee on Finance, Dec. 12.

**H.R. 6679 (PRESCRIPTION DRUGS)**, to amend the Federal Food, Drug, and Cosmetic Act to increase criminal penalties for the sale or trade of prescription drugs knowingly caused to be adulterated or misbranded, to modify requirements for maintaining records of the chain-of-custody of prescription drugs, to establish recall authority regarding drugs, and for other purposes; ISRAEL; to the Committee on Energy and Commerce, Dec. 18.

**S. 3695 (TAXATION)**, to amend Section 5000A of the Internal Revenue Code of 1986 to provide an additional religious exemption from the individual health coverage mandate; LIEBERMAN; to the Committee on Finance, Dec. 19.

**H.R. 6687 (TAXATION)**, to amend the Internal Revenue Code of 1986 to include vaccines against seasonal influenza within the definition of taxable vaccines; GERLACH; to the Committee on Ways and Means, Dec. 19.

**S. 3702 (VETERANS)**, A bill to provide grants to establish veteran's treatment courts; to the Committee on the Judiciary; KERRY, Dec. 20.

**H.R. 6692 (SUBSTANCE ABUSE)**, A bill to amend the Balanced Budget and Emergency Deficit Control Act of 1985 to exempt the Substance Abuse and Mental Health Services Administration (SAMHSA) from sequestration; to the Committee on the Budget; CLARKE, Dec. 20.

**H.R. 6702 (ORGAN TRANSPLANT)**, A bill to amend the National Organ Transplant Act to prevent the sale of bone marrow and umbilical cord blood, and for other purposes; to the Committee on Energy and Commerce; YOUNG, Dec. 20.

## Appendix

## Relevant Portions of H.R. 6684, the Spending Reduction Act of 2012,

**Title II:** Committee on Energy and Commerce -

**Subtitle A: Repeal of Certain ACA Funding Provisions** - (Sec. 201)

Amends the Patient Protection and Affordable Care Act (PPACA) to repeal provisions: (1) appropriating funds to the Secretary of Health and Human Services (HHS) to award grants to states for activities (including planning activities) related to establishing an American Health Benefit Exchange (a state health insurance exchange), (2) establishing and appropriating funds to the Prevention and Public Health Fund (a Fund to provide for expanded and sustained national investment in prevention and public health programs to improve health and help restrain the rate of growth in private and public sector health care costs), and (3) appropriating funds for the establishment and operation of the Consumer Operated and Oriented Plan (CO-OP) program (designed to foster the creation of qualified nonprofit health insurance issuers to offer qualified health plans in the individual and small group markets). Rescinds any unobligated balance appropriated under such provisions.

**Subtitle B: Medicaid** - (Sec. 211)

Amends title XIX (Medicaid) of the Social Security Act (SSA) to: (1) extend the reduction of the threshold level of permissible state taxes on health care providers before federal funding to the state for Medicaid is reduced; (2) reduce the state disproportionate share hospital (DSH) allotment for FY2022; and (3) repeal provisions prohibiting states from reducing eligibility levels for Medicaid.

(Sec. 213) Amends title XXI (State Children's Health Insurance Program) (CHIP, formerly known as SCHIP) of SSA to repeal provisions prohibiting states from reducing eligibility levels for CHIP.

(Sec. 214) Repeals provisions that increased Medicaid payments to territories through FY2019. Decreases the federal medical assistance percentage (FMAP) for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(Sec. 215) Repeals provisions providing bonus payments to states for enrollment and retention programs for children covered under Medicaid and CHIP.

**Title IV:** Committee on the Judiciary -

**Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2012** -

Sets conditions for lawsuits arising from health care liability claims and actions concerning the provision of health care goods or services or any medical product affecting interstate commerce.

(Sec. 402) Establishes a statute of limitations of three years after the date of manifestation of injury or one year after the claimant discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first, unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence in the the injured person of a foreign body that has no therapeutic or diagnostic purpose or effect.

(Sec. 403) Limits noneconomic damages to \$250,000, regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same injury. Provides that each party shall be liable only for the amount of damages allocated to such party in direct proportion to such party's percentage of responsibility, and not for the share of any other person. Requires the court to supervise the arrangements for payment of damages to protect against conflicts of interest that may have the effect of reducing

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the amount of damages awarded that are actually paid to claimants. Limits contingent fees.

(Sec. 405) Permits punitive damages to be awarded against any person in a health care lawsuit only if: (1) it is proven by clear and convincing evidence that such person acted with malicious intent to injure the claimant or that such person deliberately failed to avoid unnecessary injury such person knew the claimant was substantially certain to suffer; and (2) a judgment for compensatory damages has been rendered against that person. Sets forth factors that may be considered in determining the amount of punitive damages, which shall be limited to the greater of \$250,000 or two times the amount of economic damages awarded. Prohibits the award of punitive damages against a manufacturer or distributor of, a supplier of any component or raw material of, or a health care provider that prescribes or dispenses, a medical product that complies with FDA standards.

(Sec. 406) Requires the court, at the request of any party in the lawsuit, to enter a judgment ordering that future damages be paid by periodic payments, in accordance with the Uniform Periodic Payment of Judgments Act promulgated by the National Conference of Commissioners on Uniform State Laws, if an award of future damages equaling or exceeding \$50,000 is made against a party with sufficient insurance or other assets to fund such a payment.

#### **Title VI: Committee on Ways and Means -**

##### **Subtitle A: Recapture of Overpayments Resulting From Certain Federally-subsidized Health Insurance -**

(Sec. 601)

Amends the Internal Revenue Code to repeal the limitation on the recapture of advance payment amounts of the tax credit for health insurance premium assistance that exceed the allowable amount of such credit for certain low-income taxpayers.

#### **Title VII: Sequester Replacement -**

Sequester Replacement Act of 2012 - (Sec. 702)

Amends the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act) to remove veterans' medical care from the accounts subject to a sequester.

(Sec. 703) Abolishes the distinction between security and non-security categories of discretionary spending for new budget authority in FY2013. Combines the dollar amounts of the current categories (\$686 billion for the security category and \$361 billion for the non-security category) into a single amount of \$1.047 trillion in new budget authority.

Revises sequestration requirements for FY2013 to require a \$19.104 billion across-the-board decrease in the discretionary spending category as of January 2, 2013.

Directs the Office of Management and Budget (OMB) to issue a supplemental sequestration report for FY2013 to eliminate any discretionary spending breach of the \$1.047 trillion spending limit, as adjusted by the \$19.104 billion across-the-board reduction requirement of this Act. Directs the President to order a sequestration, if any, as required by such report.

(Sec. 704) Amends the Congressional Budget Act of 1974 to authorize the chair of the Committee on the Budget of the House of Representatives or the Senate to make adjustments to any legislative measure to conform to the discretionary spending limits of this Act.

(Sec. 706) Nullifies any sequestration order the President may issue under the Gramm-Rudman-Hollings Act to carry out reductions to direct spending for the FY2013 defense function (050).