



## Health Policy Briefing

July 15, 2013

### Congress To Take Action on PPACA as Administration Delays Employer Mandate

#### Senate Appropriators Approve FY 2014 Labor/HHS/ Education Spending Bill

On Thursday the Senate Appropriations Committee approved the related Labor/ Health and Human Services/ Education Subcommittee’s fiscal year (FY) 2014 appropriations bill on a 16-14 party-line vote. The bill would generally fund nearly all Department of Health and Human Services (HHS) health programs at slightly higher levels than in FY 2013 with the Centers for Medicare and Medicaid Services (CMS) being allotted about \$5.2 billion and the National Institutes of Health (NIH) about \$32 billion. In addition, the bill would fully fund the Administration’s request of \$5.2 billion to implement the Patient Protection and Affordable Care Act (PPACA). The Prevention and Public Health Fund would continue to be allotted \$1 billion. The bill served as a platform for senate Republicans to force votes on the PPACA in light of the Administration’s announced delay of the employer mandate until 2015. Committee Democrats rejected amendments that would: delay the implementation of both the employer and individual mandate under the PPACA; defund the

Independent Payment Advisory Board (IPAB); and stop the full implementation of the health insurance exchanges if further problems are found to hinder enrollment efforts scheduled to begin October 1st.

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## PPACA Health Reform Update

### *Quick Reactions to Delay of PPACA Employer Mandate*

The Internal Revenue Service (IRS) provided notice to plan sponsors (Notice 2013-45) of the framework of the transitional relief from the Administration's delay until 2015 of the employer mandate under the PPACA. The IRS said the one-year delay of the information reporting requirements under Internal Revenue Code (IRC) Sections 6055 and 6056 and from the employer shared responsibility provisions under IRC Section 4980H will allow for more time to simplify the reporting rules and allow employers the ability to better conform their plans to the coverage and reporting requirements under the PPACA. The IRS said that employees still would be eligible for premium tax credits under exchanges when their employer plan does not provide minimum essential coverage and they are otherwise meet the income requirements. However, in a final rule published by CMS (see more below), the Administration said it will roll back requirements for state and federal health insurance exchanges to verify the income and insurance status of people applying for coverage until 2015. Congressional Republicans charged that this will open the door to potential fraud by individuals who may underreport their income in order to obtain federal health insurance subsidies. House Speaker John Boehner (R-OH) and other Republican leaders sent a letter to the President stating that "We agree with you that many of the provisions in the law cannot be implemented within the current time frame; but we strongly disagree with you that time will ever remedy these predictable consequences of the law..." They also requested information by this Tuesday on: changes in the number of individuals receiving subsidies on the exchanges during 2014; changes in the number of employers that provide health care coverage; changes to federal outlays and revenue; and the impact of the employer mandate on increasing the number of individuals working part time and businesses reducing the number of hours employees work to less than 30 hours. Republican leaders have also asked the Congressional Budget Office (CBO) to update their cost analysis of the delay. Building on the Administration's admission, and congressional Democrat support, that the delay is necessary for the proper implementation of the law, House Republican leaders said the treatment of the employer mandate should be extended to the individual mandate as well. At a House Ways and Means Health Subcommittee hearing, Chairman Kevin Brady (R-TX) said a conforming delay of the individual mandate would be a matter of "fairness". In this connection, the House Majority Leader announced that the House will take up legislation this Wednesday to delay both the employer and the individual mandates. H.R. 2667, the Authority for Mandate Delay Act, would delay until 2015 the enforcement of requirements that large employers offer their full-time employees the opportunity to enroll in minimum essential coverage as well as the effective date of related reporting requirements. H.R. 2668, the Fairness for American Families Act, would delay until 2015 the requirement that individuals maintain minimal essential health care coverage. Also, the House Ways and Means Health Subcommittee will hold another hearing on the delay this Wednesday and the House Energy and Commerce Oversight and Investigations Subcommittee will follow suit the next day. In an effort to enhance the Administration's efforts to implement the PPACA, the White House announced that Chris Jennings, a former Clinton Administration health advisor, will assume these duties for President Obama. As to the effect of the delay on pending lawsuits contesting the employer mandate, the Department of Justice filed motions in several cases arguing they are "unripe" and should be dismissed. Nonetheless, the 4th U.S. Circuit Court of Appeals ruled in *Liberty University Inc. v. Lew* that the mandate is "simply an example of Congress's longstanding authority to regulate employee compensation offered and paid for by employers in interstate commerce." As to whether the Administration has the authority to delay the employer mandate, a Congressional Research Service (CRS) analysis requested by Rep. Phil Roe (R-TN) said that while the executive branch does not have "unfettered ability" to delay the implementation of any of the law's provisions, a court could, in theory, issue an injunction halting the delay of the employer mandate if it found that the executive branch lacks the authority to put off its enforcement, but that it may be difficult to find an identifiable plaintiff with legal standing to challenge the delay in federal court.

## PPACA Health Reform Update cont.

### *Final Rules for Navigators, Exchanges, Medicaid and CHIP*

CMS issued a final rule for exchanges, Medicaid and the Children's Health Insurance Program (CHIP) which includes a requirement that employers fill out a 12-page "Application for Health Coverage & Help Paying Costs" form when requested to do so by employees who apply for advance premium tax credits to buy health insurance in the health insurance marketplaces. However, the failure of employers to offer affordable minimum health coverage will not trigger employer responsibility penalties in 2014. Employees should be able to determine if their employer coverage meets minimum value requirements in the information contained under the summary plan descriptions as required to be updated under the PPACA. CMS also released a final rule for "navigators" and "certified application counselors" under federally facilitated exchanges and state partnership exchanges and optionally for "non-navigator assistance personnel" under state based exchanges. The rules include provisions to avoid conflicts-of-interest (e.g. non-insurance-industry associations) and training and certification standards relating to Small Business Health Options Program (SHOP), Medicaid, CHIP and premium tax credits. In related news, HHS announced the granting of \$150 million in awards to community health centers in every state for outreach efforts to help the uninsured obtain health coverage under the PPACA.

## Medicare/Medicaid/Public Health Services Corner

### *Senate Finance Committee Hearing on SGR Replacement*

At last week's Senate Finance Committee hearing to take testimony on means to replace the current Medicare physician payment sustainable growth rate (SGR) system, the CMS principal deputy administrator said that while the delivery system reforms that CMS is pursuing "do not obviate the need for a legislative solution to address the sustainable growth rate formula on a more permanent basis...", Congress should not "start fresh" in developing a different payment model. He also attributed the CBO lowered cost of replacing the SGR (\$139 billion over ten years) to CMS efforts to make payment codes more accurate and to other improvements already underway, such as payment for care coordination and for value, feedback reports, shared savings initiatives and quality bonuses. He also said the Administration supports a 4-5 year period of stability to "allow time for the continued development of scalable, accountable payment models." Chairman Max Baucus (D-MT) and Senator Orrin Hatch (R-UT) said the lower CBO cost gives Congress the opportunity to act on legislation this year to change the "antiquated, inefficient and flawed" system. They also said they have received 133 responses on means to reform the SGR from various elements of the health care system. In response to Senator Mike Enzi's (R-WY) question, CMS testified that the Medicare Part A and B cost sharing structure needs to be reformed and that the agency is willing to work with Congress to this end.

### *CMS Proposes Medicare Physician Payment Rule*

CMS issued a proposed 2014 Medicare physician payment rule under which the agency would pay for non-face-to-face complex chronic care management services for Medicare beneficiaries who have at least two significant chronic conditions and have had an annual wellness visit or an initial preventive physical examination. The separate payments would be through two G-codes for establishing of a plan of care and furnishing care management over 90-day periods. CMS also said the actual values used to compute physician payments for CY 2014 (currently subject to an estimated 24.4% cut) will be based on later data and promulgated under the final rule. The rule also proposed new geographic practice cost indices (GPCIs) using updated data and changes to the Physician Quality Reporting System (PQRS), the Medicare Electronic Health Record (EHR) incentive program as well as the Physician Compare tool on the Medicare.gov website.

## Medicare/Medicaid/Public Health Services Corner cont.

### *CMS Proposes OPPS Payment Rule*

**C**MS issued a proposed 2014 Medicare outpatient prospective payment system (OPPS) rule under which payments would increase by 1.8%, or about \$4.4 billion in total. The number of categories of related items and services packaged into a single payment for a primary service under the OPSS would also be expanded. Also, payments to ambulatory surgical centers would be increased by 0.9%. The final rule will be issued by November 1st.

### *Hearing on Medicaid Prospects*

**A**t a House Energy and Commerce Health Subcommittee hearing, Making Medicaid Work for the Most Vulnerable, the Executive Director of the National Academy for State Health Policy testified that the current Medicaid system provides states with sufficient flexibility to introduce new reforms, such as innovations in the areas of long-term services and supports, managed care programs and patient-centered medical homes. Other witnesses, including the Director of the Center for Health Policy Studies at the Heritage Foundation, were critical of the expansion of Medicaid under the PPACA and said CMS should focus efforts on providing states more flexibility to deliver quality services, especially to existing enrollees. Possible legislative changes as promoted by congressional Republicans include: increasing the use of premium assistance to allow states to use Medicaid funding to purchase health coverage in the private market; allowing states to enroll people into Medicaid managed care plans without having to receive advance approval from CMS; requiring CMS to act on state Section 1115 waiver requests within 120 days; and imposing a per-capita cap on Medicaid expenditures.

## Health-Related Hearings and Markups

*House Energy and Commerce Health Subcommittee will hold a hearing entitled “Reforming the Drug Compounding Regulatory Framework;” 3:00 p.m., 2123 Rayburn Bldg; July 16.*

*House Ways and Means Health Subcommittee: will hold a second hearing on the delay of the employer mandate and employer information reporting requirements under the Affordable Care Act. 10 a.m., 1100 Longworth; July 17.*

*Senate Finance Committee (Chairman Baucus, D-Mont.) will hold a hearing titled “Health Information Technology: A Building Block to Quality Health Care;” 10:00 a.m., 215 Dirksen Bldg; July 17.*

*Senate Appropriations Defense Subcommittee: will hold hearings on proposed fiscal 2014 appropriations for agencies, programs and activities under its jurisdiction. 10 a.m., 192 Dirksen; July 17.*

*House Energy and Commerce Oversight and Investigations Subcommittee: will hold a hearing on the 2010 health care overhaul law and delays in its implementation. 1:30 p.m., 2123 Rayburn; July 18.*

## Health Legislation Recently Introduced

**H.R. 2618** (MEDICARE), to allow certain state and local government employees to elect to treat employment as Medicare qualified government employment for purposes of entitlement to Medicare coverage; GENE GREEN of Texas; jointly, to the committees on Ways and Means and Energy and Commerce, July 8.

**H.R. 2619** (MEDICARE), to amend Title XVIII of the Social Security Act to provide for Medicare coverage of pulmonary self-management education and training services furnished by a qualified respiratory therapist in a physician practice; LEWIS; jointly, to the committees on Energy and Commerce and Ways and Means, July 8.

**H.R. 2632** (SCHOOL-BASED HEALTH CENTERS), to amend Section 399Z-1 of the Public Health Service Act to extend for five years the authorization of appropriations for operational grants under the school-based health centers program; CAPPS; to the Committee on Energy and Commerce, July 9.

**S. 1272** (REFORM), to provide that certain requirements of the Affordable Care Act do not apply if the American Health Benefit Exchanges are not operating on Oct. 1, 2013; ROBERTS; to the Committee on Finance, July 10.

**S. 1277** (PRESCRIPTION DRUG ABUSE), to establish a commission for the purpose of coordinating efforts to reduce prescription drug abuse, and for other purposes; BOXER; to the Committee on Health, Education, Labor and Pensions, July 10.

**H.R. 2639** (PATENT INFRINGEMENT), to amend Title 35, U.S. Code, to add procedural requirements for patent infringement suits, and for other purposes; JEFFRIES; to the Committee on the Judiciary, July 10.

**H.R. 2651** (CRITICAL CARE), improve the understanding and coordination of critical care health services; PAULSEN; jointly, to the committees on Energy and Commerce and Ways and Means, July 10.

**S. 1284** (APPROPRIATIONS), making appropriations for the Departments of Labor, Health and Human Services, and Education, and related agencies for the fiscal year ending Sept. 30, 2014, and for other purposes; HARKIN; from the Committee on Appropriations; placed on the calendar July 11.

**S. 1286** (ELECTRONIC HEALTH RECORDS), to encourage the adoption and use of certified electronic health record technology by safety net providers and clinics; ROCKEFELLER; to the Committee on Finance July 11.

**S. 1292** (REFORM), to prohibit the funding of the Affordable Care Act; CRUZ; read the first time July 11.