



Congress Fails to Complete Medicare Physician-Reimbursement-Fix/Extenders Bill

Federal Budget for FY 2011 or Not?

Last week **House Majority Leader Steny Hoyer** said that Congress can still meet its fiscal responsibilities without adopting a budget resolution for FY 2011. He said discussions are ongoing and that no deadline has been set to pass a budget resolution in the House. The House is expected to pass a so-called “deeming resolution” in the event intra-Democratic-Caucus negotiations prove fruitless. If Democrats cannot produce a budget, an opening will be given to Republicans to tie the lack of a budget to the rising national debt and current economic problems. In this connection, the Department of the Treasury released its Annual Report on the Public Debt which projects the total public debt will reach \$13.62 trillion, or 93.1% of GDP, by the end of FY 2010 and \$14.75 trillion, or 96.4% of GDP, for FY 2011. The Administration attempted to assume a position of restraint on the rising deficit when OMB directed non-security federal agencies to submit a list of 5% savings from their lowest priority discretionary programs in order to reallocate funds to obtain a freeze on total discretionary spending in FY 2012. Also, HHS announced that it intends to cut in half the level of improper payments made under Medicare.

Senate Fails to Pass Medicare MD Fix/Jobs Bill

The Senate returned last week to consideration

of the House-passed “Extenders” legislation, the American Jobs and Closing Tax Loopholes Act of 2010 (H.R. 4213). The cost of the \$114 billion House bill was raised to about \$140 billion (and will raise the federal deficit by about \$77.5 billion) under a Baucus amendment that would add about \$24 billion in state Medicaid assistance for the first six months of 2011. The Baucus provision would also delay the scheduled 21% cut in Medicare physician payments through 2013, two years later than the House provision, while retaining the CY 2010 2.2% increase and CY 2011 1% increase. A Casey amendment would reinstate the COBRA subsidy for 2010 at a cost of about \$7 billion. The CMS delay of the 21% physician payment cut will end on June 15 and,

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unless both Houses extend the cut moratorium, physicians will likely have their payments cut at that time. If so, physicians who treat Medicare patients would have two options to receive payment: either file their claims immediately to receive the reduced payment rate and wait to collect the rest until the extenders bill is implemented, or wait to file their claims until the bill is passed. Despite President Obama's plea last week for immediate passage of the extenders package, final Senate passage is not expected until this week on what is likely to be a partisan vote. A Republican alternative (expected to fail on a party-line vote), introduced by **Senate Republican**

Policy Committee Chairman John Thune, is projected by CBO to cut spending by \$113.1 billion and the deficit by \$54.9 billion over a 10-year period. The spending cuts include \$37.5 billion in unobligated stimulus funds, \$45 billion in savings from unspent appropriations, the sale of \$15 billion in unused government property, a salary freeze for government workers and \$100 million in congressional office expense savings. Among other things, the alternative also excludes Democrat provisions: \$24 billion for state Medicaid funds; an expanded prescription drug-discount program; and \$2.5 billion for state Temporary Assistance for Needy Families

programs. The alternative does include several Medicare-related extenders that passed the Senate in March; a Robert's provision that would save \$11 billion by lowering the affordability exemption under the PPACA individual mandate from 8% of income to 5%; and a provision that would redirect \$8 billion for Medicaid reimbursements to primary care physicians in 2013 and 2014 to a grant program allowing states to increase primary care reimbursements permanently.

Virginia Responds to Federal Motion to Dismiss Individual Mandate Suit

Last week **Virginia Attorney General Kenneth Cuccinelli II** urged **U.S. District Court Judge Henry Hudson** to reject the Department of Justice's motion to dismiss his lawsuit challenging the constitutionality of the PPACA's provision requiring citizens to carry health insurance or pay a fine (Virginia ex rel. Cuccinelli v. Sebelius, E.D. Va., No. 3:10cv188,

response filed 6/7/10). He objected to most of the DOJ arguments, including the assertion that the insurance purchase mandate is a matter of interstate commerce properly governed by Congress under the U.S. Constitution's commerce clause. He said the clause always has been used to regulate economic activity, not inactivity.

PPACA Implementation Issues

HHS Secretary **Kathleen Sebelius** told MA plans that they should compete on price and quality when developing their 2011 bids, rather than increasing plan premiums. She expressed concern that some MA plans may have raised plan cost-sharing for high-cost beneficiaries in order to lower their company costs. Under the PPACA, HHS has the authority to ensure that plan benefit designs, such as what copayment applies to what service, are not discriminatory or unfairly priced. The HHS Secretary also has urged governors to ask their legislatures for more authority to oversee health insurance rate increases, stating that HHS will serve as a backup for state law in this area. The new CMS OCIO announced that a new website will soon show all of the health insurance policies that are for sale for individuals and for small businesses throughout the country. Later this year the website will post the price for such policies and provide other consumer information. HHS will issue grants to states at some point this year to provide more health insurance assistance for consumers. Last week the OCIO also announced the first round of grants for states to review health

insurance premiums and establish rate review programs. About \$51 million is to be made available to states for this purpose. The OCIO also issued FAQs stating that applications for the \$5 billion Early Retiree Reinsurance Program will be considered on a first-come, first-served basis, but that there is no predetermined number of applications that HHS will accept. Last week HHS also announced it has awarded more than \$23 million for demonstration projects and planning grants to develop alternatives to the current medical malpractice legal system. HHS said \$19.7 million in three-year grants has been distributed for seven proposals to reduce preventable harm to patients, to inform injured patients promptly of medical mistakes; for efforts to provide prompt compensation; and for settling malpractice disputes via a court-directed alternative dispute model. Another \$3.5 million will be awarded for 13, one-year planning grants that meet several goals, including preventing medical injuries. The PPACA also provides authorization for medical malpractice demonstrations, but they have yet to be funded. OMB, in a two-step dance, placed on its website and then withdrew an 83-page draft of regulations

spelling out what constitutes “grandfathered health plans” under the PPACA. **Senate Minority Leader Mitch McConnell** criticized the proposed regulations as denying 51% of employer plans so-called grandfather status. OMB responded that “The president made a promise to the American people that if they liked their health care plan, they can keep it. The regulation, when finalized, will uphold that promise.” As originally displayed, any increase in the percentage of cost-sharing requirements would be barred in order for plans to keep their grandfathered status, as would any increase in fixed-dollar cost-sharing that exceeds the rate of medical inflation plus 15%. For copayments, plans could not be increased more than 15% above the medical inflation rate, or \$5 adjusted for medical inflation. The draft also would limit the ability of employers to decrease the portion of premiums or fixed costs of coverage relative to the portion paid by employees. Eliminating a substantial amount of benefits to treat particular conditions, even if the condition affects only a few people in the plan, would cause a loss of grandfather status.

CRS Reports Explain CLASS Act and Insurance Exchange Rules

CRS issued a report, Community Living Assistance Services and Supports (CLASS) Provisions in the Patient Protection and Affordable Care Act, which explains the long term care aspects of the CLASS Act. The LTC provisions will allow individuals to obtain private long-term care insurance and prevent insurance companies from barring enrollment because of pre-existing conditions. Also, employees 18 and older can voluntarily enroll in a CLASS program or opt out if employers participate in an automatic enrollment program. HHS will issue regulations regarding: premiums (which would remain the same for those with continuous enrollment); enrollment for self-employed individuals; employees with more than one employer and those who have an employer that does not elect to participate. To be eligible to receive benefits an enrollee must meet a five-year vesting and minimum earnings

requirement and have a functional limitation, as certified by a licensed health care practitioner, that is expected to last for 90 days. Benefits include a cash payment of up to \$50 a day, along with advocacy services and advice and assistance counseling on accessing and coordinating long term care services. Another CRS report, PPACA Requirements for Offering Health Insurance Inside Versus Outside an Exchange, explains that health plans offered in insurance exchanges starting in 2014 will have several advantages over non-exchange plans, including federal premium tax credits available for an estimated 20 million people. Among the requirements applying only to exchange plans is one requiring insurers to charge the same premiums for all of their plans both inside and outside the exchanges.

FDA Issues

Guidance on Clinical Trials for New Antibacterial Drugs--At last week's House E&C Subcommittee on Health hearing, the FDA announced that the agency is developing guidance for industry on demonstrating the safety and effectiveness of new antibacterial drugs, particularly for indication-specific clinical trial designs used to study a new drug. The FDA said that the pathway to FDA approval is clear for drugs that are "obviously superior" to current treatments but there is uncertainty in the pathway for new drugs that treat conditions that have many other satisfactory, FDA-approved treatment options. The spokeswoman testified that before the guidance is available, companies may obtain advice from the FDA on an individual basis.

New State Medicare Fraud Education Outreach

Last week **Attorney General Eric Holder** and **HHS Secretary Kathleen Sebelius** called on all state attorneys general to create outreach programs this summer to educate seniors on Medicare fraud prevention and protection. In addition to state-level education efforts, the Secretary and the Administration on Aging announced a national fraud prevention campaign focusing on beneficiary education.

H.R. 5491 (TAX POLICY), to amend the Internal Revenue Code of 1986 to provide a refundable credit for taxpayers with long-term care needs; CARNEY; to the Committee on Ways and Means, June 9.

S. 3479 (BIRTH DEFECTS), to authorize the secretary of health

and human services, acting through the director of the Centers for Disease Control and Prevention, to establish and implement a birth defects prevention, risk reduction, and public awareness program; HAGAN; to the Committee on Health, Education, Labor, and Pensions, June 10.

H. RES. 1433 (DISEASE AWARENESS), expressing support for designation of September 2010 as Blood Cancer Awareness Month; JONES; to the Committee on Energy and Commerce, June 10.