



Appropriations Omnibus to Fund HHS/NIH; Spending Bill Stalls Health Reform Debate

FY 2010 Omnibus Spending Bill

Last week the House passed H.R. 3288, the Transportation/HUD appropriations bill to which was attached the FY 2010 Consolidated Appropriations Act (i.e. Omnibus for six agency bills) which includes the LHHS spending for this fiscal year. Because Republicans blocked a consent agreement to take up the bill this week, the Senate remained in session over the weekend to finish up the legislation before the December 18 date of expiration for the current continuing resolution. The bill includes \$78 billion for Military Construction/VA and \$163.6 billion for LHHS (including \$31.009 billion for the 26 accounts that comprise the National Institutes of Health). It is expected that the House will take up an amended FY 2010 Defense Appropriations “minibus” bill by Wednesday before recessing for the holidays. This measure is also expected to include an extension of COBRA coverage subsidies (without cost offsets) and an extension of the public debt limit, which is likely to draw considerable opposition from the minority.

However, **Speaker Nancy Pelosi** said the House could remain in session past the scheduled departure date for the holidays if it means passing a final version of health care reform legislation before Christmas.

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Health Reform Update

Senate Debate Temporarily Stalled

Republican attempts to delay the health care debate prevailed over the weekend with the Senate taking up FY 2010 omnibus appropriations instead. Also, stalling the debate is the drug importation amendment by Senator Dorgan that, if it comes to a vote, would probably pass, thus breaking the White House agreement with big pharma to oppose importation and help close the donut hole under Medicare Part D at an estimated \$80 billion cost to the industry. The FDA sent a letter to the Senate raising safety concerns about importation. Another potential bill killer would be an amendment proposed by Senator Mike Crapo that would eliminate from the legislation any tax increases on individuals earning less than \$200,000. In a similar vein, among the 376 pending floor amendments, is one by Vermont **Senator Bernie Sanders** that would remove the 40% excise tax on so-called “Cadillac” policies and replace it with the 5.4% surtax on high-income households used in the House-passed bill. An alternative to the bill’s CPI+1% inflation adjustment, filed by **Senator**

John Ensign, would keep the excise tax, but raise the inflation indexing to the three-year average increase in the cost of the federal employee health benefit plan. An amendment by **Senator Blanche Lincoln** would allow small businesses with an average wage of \$25,000 to qualify for tax credits (an increase from the \$20,000 limit in the bill). Amendments by **Senators Lincoln, Landrieu, Stabenow and Snowe** would help small businesses, including moving up to 2010, rather than 2011, tax credits worth up to 50% of health care costs. An amendment filed by **Senator Herb Kohl** would ban so-called pay-for-delay settlements of drug patent litigation. In an attempt to pass a Senate bill this year, **Senate Majority Leader Reid** is apparently planning to file a package of cloture motions this week that would allow a final vote on health reform before the Senate goes home for Christmas; simultaneous cloture motions would be on the bill, a manager’s amendment containing key compromises and a substitute amendment.

Abortion Coverage Debate Thickens

The Senate rejected, 54-45, the amendment by **Senators Ben Nelson and Orrin Hatch** that would mirror the abortion coverage language contained in the House bill, authored by **Rep. Bart Stupak**. It remains unclear whether **Senator Nelson** will vote for cloture or final passage of health reform without a provision on abortion coverage that meets his goals. It will be up to Senator Reid to craft a compromise provision to be included in his manager’s amendment which satisfies **Senator Nelson’s** demands on the issue. The issue continues to twist and turn in the House as well, with Democrats supporting the Stupak amendment insisting that their vote on a conference report is contingent on retention of this provision and other members threatening to vote against the final bill if it remains. **Rep. Diana DeGette** said she has 41 House members who will not vote for a conference report that goes beyond the current law “Hyde amendment”.

Public Option or Not?

With **Senators Lieberman, Lincoln, Nelson (NEB) and Landrieu** objecting to the public option/state-opt-out in **Senator Reid’s** initial bill, **Senator Reid** marshaled a group of moderates to come up with a possible alternative. **Senator Reid** announced the group had come up with a compromise, but a number of Senators did not agree with that assessment, pending a CBO cost analysis that is expected early this week. Several potential options were sent to the CBO for analysis, with the overall framework (1) paralleling a national exchange of insurance options to be operated by OPM (which administers the similar Federal Employees Health Benefits Program), and (2) a “buy-in” to Medicare coverage for uninsured persons aged 55-64. Critics were quick to condemn the Medicare buy-in as being too costly and further undermining the solvency of Medicare for seniors. Including this option would not get the Republican vote of **Senator Olympia Snowe**, who **Senator Reid** is courting to obtain the needed 60 votes in the Senate for cloture and final passage. The cloture motions would automatically trigger 30 hours of debate, which Republicans would be happy to time fill, thus possibly delaying a vote on final passage until after Christmas and, possibly, into next year.

Health Reform Update

CMS Actuary Throws Cold-Water on Cost of Reform

Last week the **CMS Chief Actuary, Rick Foster**, provided Congress with a cost estimate showing the Senate bill would increase national healthcare spending slightly and raise premiums. Among the estimates: healthcare spending would increase by \$234 billion, or 0.7%, above the baseline projection for the next decade; the rise in spending is due mainly to the expansion in coverage to 33 million currently uninsured Americans creating additional demand for health services that could be difficult to meet initially with existing health provider resources and that could lead to price increases, cost shifting and/or changes in provider willingness to treat patients with low-

reimbursement health coverage; savings stemming from the Independent Medicare Advisory Board may be difficult to achieve in practice; up to 20% of Medicare Part A providers could become unprofitable as a result of reduced payments under productivity adjustments, causing some to end their Medicare participation and possibly jeopardizing access to care for beneficiaries; and taxes levied on the pharmaceutical, medical device and insurance industries would be passed on to consumers at a cost of about \$11 billion annually in the form of higher product prices and premiums. CRS also issued a report, Medicare Program Changes in the Senate Amendment in the Nature of a Substitute to H.R. 3590, which includes a discussion

of the financial impact on the Medicare program, an overview of Medicare changes by provider type and program, the changes to address efficiencies and quality in Medicare, efforts to address long-term Medicare financing and program integrity changes. Republicans were quick to jump on the CMS actuary report with **Senator Mike Enzi** saying “How many more devastating studies do we need before the Democratic leadership will agree we need to scrap these flawed bills and start over?” However, **Senator Chris Dodd** said the actuarial report is based on an old version of the bill, so it is completely wrong.

Last Week’s Senate Health Reform Amendments

Failing on a 43-56 vote (with 60 needed for adoption), was a Gregg amendment that would have required OMB and CMS to certify that the bill’s revenue reduction and spending provisions for 10 years would be fully offset by the generated savings before they are allowed to go into effect. Also rejected on a 56-42 vote was a Lincoln amendment that would reduce to \$400,000 the deductibility of compensation for health insurance industry executives. The Senate rejected, by a vote of 41-53, a Republican motion to strip the bill of \$42.1 billion in cuts to home health agencies. Also rejected, on a 42-57 vote, was a Hatch amendment to restore the

extended benefits provided to all beneficiaries in the Medicare Advantage program. An amendment by **Senator John Thune** to strike the Community Living Assistance Services and Supports Act from the bill failed on a 51-47 vote. An Ensign amendment to restrict plaintiff attorney fees in medical malpractice cases was rejected on a 32-66 vote. Adopted on a 98-0 vote was a Pryor amendment that would require HHS to establish a system to survey consumer satisfaction of the health insurance plans offered through the health insurance exchanges.

MedPAC Medicare Payment Recommendations

Last week MedPAC released its projected Medicare payment rates for FY 2011 with a final vote scheduled for next month. If approved, the following rates would be recommended to Congress: hospitals would get a 1.5% increase (1% less than a full

market-basket increase); a 2.5% increase in payments for hospital outpatient care; a 0.6% increase in payments for ambulatory surgery centers; a 0.9% increase in payments for dialysis facilities; a 1.2% increase in payments for hospice services; no payment

updates for skilled nursing facilities; and no increase for home health agencies. MedPAC is also tentatively expected to consider a 1% increase in Medicare physician payments in CY 2011.

Medicare Coverage for HIV Screening

CMS has announced its final decision to cover HIV infection screening for Medicare beneficiaries who are at increased risk for the infection. The coverage determination memo said that “the evidence is adequate to conclude that screening for HIV infection, which is recommended with a grade of A by the U.S. Preventive Services Task Force (USPSTF) for certain individuals, is reasonable and necessary for early detection of HIV.”

House E&C Committee Report on MA Loss Ratios

Still taking aim at Medicare Advantage plan payments, the House Energy and Commerce Committee released a report finding that MA plans spent an average 84.8% of premium revenues on health care services and 15.2% on other expenses. Loss ratios ranged from 83.6% in 2007 to 85.8% in 2008. Of note, the House-passed health reform bill requires MA plans to have a minimum 85% loss ratio.

HHS Publishes ARRA FMAP Rates

Last week HHS published the federal matching rates for state Medicaid programs in the second half of FY 2009 under the ARRA. Reflecting the law’s 6.2% minimum increase, state FMAP levels for the fourth quarter of FY 2009 range from 58.78% in Wyoming to 84.24% in Mississippi.

Physician Advisory Panel Recommends Delay of PECOS Reporting

CMS’ Practicing Physicians Advisory Council (PPAC) has recommended that the agency further delay, from April, 2010, the enrollment requirement in the Provider Enrollment, Chain, and Ownership System (PECOS). The panel said CMS has not provided adequate notice to physicians to enable them to comply with the rule.

Senator Grassley Follow-up to IOM Report on MD Payments from Industry

Senator Chuck Grassley has sent a letter to 33 medical groups, including the AMA, seeking an accounting from 2006-2009 of industry funding that pharmaceutical, medical device companies, foundations established by these companies or the insurance industry have provided to each medical group. The letter follows an April IOM report that recommended new regulations and voluntary practices to increase disclosure of physician and scientist relationships with drug and device companies and to ban gifts from industry to doctors.

Medicare Claims Appeal Procedures

CMS has announced the final rule for Medicare claims appeal procedures which go into effect 30 days from December 8. CMS said only minimal changes were made to the claims appeal procedures since the 2005 interim rule and that the final rule is expected to have a negligible financial impact on beneficiaries, providers and suppliers.

S. 2838 (INFORMATION TECHNOLOGY), to give critical access hospitals priority in receiving grants to implement health information technology, to expand participation in the drug pricing agreement program under Section 340B of the Public Health Service Act, to provide for a study and report on pharmacy dispensing fees under Medicaid, to provide for continuing funding for operation of State offices of rural health, and for other purposes; BENNET; to the Committee on Health, Education, Labor, and Pensions, Dec. 4.

S. 2840 (CHILDREN'S HEALTH), to amend Title III of the Public Health Service Act to provide for the establishment and implementation of concussion management guidelines with respect to school-aged children, and for other purposes; MENENDEZ; to the Committee on Health, Education, Labor, and Pensions, Dec. 4.

S. 2842 (TAX POLICY), to amend the Internal Revenue Code of 1986 to deny the deduction for direct to consumer advertising expenses for prescription pharmaceuticals and to provide a deduction for fees paid for the participation of children in certain organizations which promote physical activity; BEGICH; to the Committee on Finance, Dec. 7.

H.R. 4216 (ELECTRONIC HEALTH RECORDS), to amend the Public Health Service Act and titles XVIII and XIX of the Social Security Act to establish guidelines to enhance the meaningful use and interoperability of electronic medical records with personal health records, including for purposes of Medicare and Medicaid payment incentives; KENNEDY; jointly, to the committees on Energy and Commerce and Ways and Means, Dec. 7.

H.R. 4222 (FRAUD), to provide for the establishment of the Office of Deputy Secretary for Health Care Fraud Prevention; GINNY BROWN-WAITE of Florida; to the Committee on Energy and Commerce, Dec. 8.

H.R. 4224 (HOME HEALTH), to establish a pilot program to train public housing residents as home health aides and in home-based health services to enable such residents to provide covered home-based health services to residents of public housing and residents of federally-assisted rental housing, who are elderly and disabled, and for other purposes; VELZQUEZ; to the Committee on Financial Services, Dec. 8.

H.R. 4230 (REFORM PROPOSAL), to limit access of members of Congress to government-administered health care benefits so long as comprehensive health reform legislation has not become law; BLUMENAUER; jointly, to the committees on House Administration, Oversight and Government Reform, Ways and Means, Energy and Commerce and Veterans' Affairs, Dec. 8.

H.R. 4235 (GRADUATE MEDICAL EDUCATION), to amend the Public Health Service Act to provide assistance for graduate medical education funding for women's hospitals; KENNEDY; to the Committee on Energy and Commerce, Dec. 8.

H.R. 4240 (MEDICARE), to provide for a grace period in which durable medical equipment suppliers may meet Medicare accreditation and surety bond requirements; MELANCON; jointly, to the committees on Energy and Commerce and Ways and Means, Dec. 8.

S. 2858 (MITOCHONDRIAL DISEASE), to amend the Public

Health Service Act to establish an Office of Mitochondrial Disease at the National Institutes of Health, and for other purposes; BOXER; to the Committee on Health, Education, Labor, and Pensions, Dec. 9.

H.R. 4250 (MEDICAID), to direct the secretary of health and human services to revise regulations implementing the statutory reporting and auditing requirements for the Medicaid disproportionate share hospital ("DSH") payment program to be consistent with the scope of the statutory provisions and avoid substantive changes to preexisting DSH policy; MELANCON; to the Committee on Energy and Commerce, Dec. 9.

S. 2864 (DISEASE MANAGEMENT), to provide for the enhancement of United States preparedness for outbreaks of infectious disease to protect homeland security; PRYOR; to the Committee on Health, Education, Labor, and Pensions, Dec. 10.

H.R. 4260 (FEDERAL MEDICAL ASSISTANCE PERCENTAGE RATES), to provide adjusted federal medical assistance percentage rates during a transitional assistance period; GENE GREEN of Texas; jointly, to the committees on Energy and Commerce and Ways and Means, Dec. 10.

H.R. 4263 (MEDICAID), to amend the American Recovery and Reinvestment Act of 2009 to extend for one year the period of temporary increase in the Medicaid FMAP; BALDWIN; to the Committee on Energy and Commerce, Dec. 10.