

## Congress Adjourns for Year; Senate Sends Health Reform to February Super Bowl

### Medicare MD's Get Short-Term Pay Fix/COBRA Subsidy Extended

Last Monday, **President Obama** signed into law H.R. 3326, the FY 2010 Defense appropriations legislation which includes an extension through February 28, 2010 of 2009 Medicare reimbursement rates for physicians. Without the temporary freeze, the reimbursement rate would have been cut by 21% on January 1st. In November the House passed a \$210 billion permanent change to the physician reimbursement formula under H.R. 3961. **Senate Majority Leader Harry Reid** said the Senate would consider legislation early in 2010 to make a permanent fix to the SGR; reflecting his move to strip the one year MD fix that was included in the original Senate health reform bill. The defense bill also includes an extension to 15 months of the 65% COBRA premium subsidy originally provided under the AARA. DOL also announced that, under the COBRA provision, the eligibility period would be expanded through February 28, 2010. The FY 2010 spending increases under the omnibus and minibus bills will also necessitate another increase in the federal debt limit early next year, following the Senate's final action in 2009 to temporarily increase the debt limit by \$290 billion, H.R. 4314.

### Congressional Schedule for Second Session of the 111th Congress

With the acceptance by the Senate of the Defense bill and debt limit increase legislation, the House will not return until January 12, 2010. The Senate announced that it will return in pro forma sessions on January 5 and January 19, thus putting off any chance for passage of the conference report on health reform legislation until after that date. The conference report is thus unlikely to be ready to send to the President until after his 2010 State of the Union Address with a White House signing ceremony likely to occur in February around Super Bowl time.

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## Health Reform Update

### In Historic Session the Senate Passes Health Reform

Early in the morning of December 24 the Senate took the final vote on **Senate Majority Leader Harry Reid's** \$871 billion health reform measure, the Patient Protection and Affordable Care Act, revised by means of a "manager's amendment". The party-line vote on H.R. 3590, 60-39 (with **Senator Jim Bunning** not voting), sends the Senate version to the House with the differences with the House bill, H.R. 3962, to be resolved in a House/Senate conference this coming January. The critical vote took place early Monday morning with the 60 Democrat Caucus members voting on a cloture motion to limit debate. The removal of any remnant of a "public option" brought **Senators Lincoln, Lieberman, Landrieu and Nelson** into the fold with Senator Nelson also securing an alternative mechanism for abortion coverage to solidify his support. Republicans were quick to call out these and other Senators for their aye vote after receiving special treatment that would improve funding for their states, etc. In particular, **Senator Nelson's** \$100 million for Nebraska's Medicaid program was labeled the "Cornhusker Kickback" while **Senator Landrieu's** Louisiana received similar assistance. **Vermont Senator Bernie**

**Sanders** "sweetheart" deal brought an additional \$10 billion for community health centers while both Nebraska and Michigan both got a reprieve from new health insurer taxes for their non-profit health insurers. Pennsylvania, New York and Florida also will avoid the full brunt of the reduced payments to Medicare Advantage plans. Montana, North Dakota, South Dakota, Utah and Wyoming also will receive "frontier" boosts in MD and hospital payments under Medicare. Numerous other special deals are likely to be unveiled as the legislation is analyzed further in the coming weeks. In general, the legislation would expand health insurance coverage to more than 30 million uninsured Americans; expand Medicaid to everyone with incomes at or below 133% of the federal poverty level; set up health insurance exchanges in all 50 states where insurance companies could compete for customers among individuals and small businesses that currently lack coverage; establish a system of national, private insurance plans supervised by OPM; starting in 2014 individuals would be mandated to have insurance or pay a penalty and companies with more than 50 workers would be required to help provide affordable coverage or pay a penalty. The American Medical Association came on

board after a tax on elective cosmetic surgery was removed and **Senator Reid** substituted a tax on tanning services instead. **Senator Mitch McConnell** and other Republicans were blunt in their assessment of the Senate measure. **Senator McConnell** said "I guarantee you the people who voted for this bill are going to get an earful when they finally get home for the first time since Thanksgiving....They know there is widespread opposition to this monstrosity. This fight isn't over. My colleagues and I will work to stop this bill from becoming law...." **Senator Reid** was dismissive, stating "This is just the beginning....As Sen. **Ted Kennedy** said, his voice booming in our minds, "The work goes on, the cause endures.'" Republicans said the bill would not reduce the federal deficit and cited a CBO letter stating that the "savings to the [Medicare] trust fund under the [Senate reform bill] would be received by the government only once, so they cannot be set aside to pay for future Medicare spending and, at the same time, pay for current spending on other parts of the legislation or on other programs."

## Health Reform Update

### Next Step: Conference with the House

**Senator Chris Dodd** announced that discussions on producing a melded House-Senate bill have already taken place among the House and Senate leadership. Republican input on the final legislation will likely be nil with **Senator Orrin Hatch's** sentiment taking hold among the Republican conference in both the House and Senate, he said--“This bill is a dark example of everything that is wrong with Washington today. Despite all the promises of accountability and transparency, this bill is a grab bag of Chicago-style, back-room buy-offs. It is nothing more than a

private game of ‘Let’s Make a Deal’ with special interest groups financed by American taxpayers....” House Democrats are not all enamored with the Senate bill either, with **House Rules Committee Chairman Louise Slaughter** saying that “the Senate health care bill is not worthy of the historic vote that the House took a month ago.... millions of Americans will be forced into private insurance company plans, which will be subsidized by taxpayers....a conference report is unlikely to sufficiently bridge the gap between these two very different bills. It’s time that we draw the line on this weak bill and ask the

Senate to go back to the drawing board....” **Rep. Bart Stupak** said the Senate abortion coverage provision is “not acceptable.” However, **Speaker Nancy Pelosi** was upbeat, saying that “The Democratic Caucus is committed to middle class affordability, security for our seniors, responsibility to our children, and accountability for the insurance industry...on that basis, we look forward to working with the Obama Administration, the Senate and our Caucus to reconcile our bills and send final legislation to the President’s desk as soon as possible.”

### Constitutional Challenges

**D**uring consideration of health reform on the Senate floor, **Senator John Ensign** filed a constitutional point of order against the legislation, arguing that the mandate that all U.S. residents purchase health insurance or pay a penalty is unconstitutional and could be seen as a taking of private property under the Fifth Amendment. State attorneys general in Alabama, Colorado, Michigan, North Dakota, South Carolina, Texas and Washington are also reported to be examining the constitutionality of the Senate bill, focusing on a provision that would shield Nebraska permanently from the expected \$45 million annual cost of expanding Medicaid. These challenges show that, after enactment, the final health reform legislation will be tested in the courts and congressional Republicans will likely attempt to repeal some or all of the legislation. In an attempt to head off such an effort, it is reported that the Senate bill will contain changes to the rules in the Senate requiring 60 votes to substantially change or repeal the final health reform provisions.

### Importation of Prescription Drugs

**A**lthough the Dorgan amendment to allow prescription drug importation was defeated, the White House reports that the President is committed to advancing drug importation legislation after the House and Senate finish their conference work on health reform.

### Medicare Part D Guidance

**C**MS released a fact sheet warning Part D enrollees to make sure they buy only those prescription drugs approved by the FDA or risk nonpayment by Medicare. The fact sheet, *Protecting You and Your Prescriptions*, explained that “several drug companies may make and sell versions of a certain drug to pharmacies” and some versions may not be listed with the FDA. CMS also has urged plan sponsors to manage their supply chains and take steps to get such products listed on the FDA NDC Directory by reaching out to manufacturers, labelers, repackers and distributors.

## Senator Reid's "Manager's Amendment"

The 383-page manager's amendment included the legislative grease to obtain the votes of wavering senators as described above. Among other things, the amendment includes:

- ◆ compromise language on the use of federal funds to pay for elective abortions;
- ◆ eliminates the public insurance option, but requires OPM to contract with insurers to offer at least two nationwide plans, one of which must be nonprofit, through the exchanges;
- ◆ an expansion of delivery system and payment reforms;
- ◆ a requirement on insurers in the large group market to maintain a medical loss ratio of 85% and insurers in the individual and small group markets to maintain a loss ratio of 80%;
- ◆ a provision to exclude from the insurance exchanges any insurer who increases its prices unreasonably prior to implementation;
- ◆ a ban on lifetime and annual limits on the dollar value of benefits though insurers could establish restricted annual limits until 2014;
- ◆ provisions allowing HHS to expand successful pilot programs related to payment bundling and other value-based purchasing reforms;
- ◆ a provision requiring the independent Medicare Advisory Board to make recommendations for improving quality and improving costs in the private sector, as well as in Medicare;
- ◆ allow charitable hospitals to charge patients who qualify for financial assistance according to the amount generally billed by the hospital rather than the lowest amount charged to insured patients;
- ◆ \$10 billion for new or expanded community health centers and loan repayments and scholarships for providers through the National Health Service Corps;
- ◆ a provision that preserves 100% federal funding of the Medicaid expansion for three years and permanent funding in Nebraska and a 6-year temporary increase in Vermont and a 3-year increase in Massachusetts;
- ◆ a reauthorization of SCHIP through 2015;
- ◆ the retention of the 40% excise tax on insurance premiums in excess of \$8,500 for individuals and \$23,000 for families, but would add longshoreman to the list of high-risk professions, whose thresholds would be \$9,850, and \$26,000 for families;
- ◆ a delay in the implementation of the \$20 billion tax on medical device manufacturers until 2011;
- ◆ other tax provisions increasing the hospital insurance tax on high-income taxpayers, modifying the small business tax credit and adding a tax on indoor tanning services; and
- ◆ a provision that limits certain nonprofit insurers from third-party administration agreement fees.

The CBO said the bill and manager's amendment will cost \$871 billion in 2010-2019 and reduce the federal budget deficit by \$132 billion over 10 years.