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Health Policy Briefing

December 17, 2012

Grinch Lurks as Congress Likely to Miss Christmas Deadline to Avoid Fiscal Cliff

White House and Republicans Deny Progress Made on Fiscal Negotiations

Even after several terse negotiating sessions between **President Obama** and House **Speaker John Boehner** last week, both parties had no progress to report other than to say that the "lines of communication remain open" in their efforts to reach a last minute deal to avoid the upcoming BCA mandated sequestration and increase in individual income tax rates. Reportedly the Speaker is sticking to his position to raise only $800 billion in revenue over ten years while the President is still demanding an increase in tax rates for those earning over $250,000 and a total increase in revenues of $1.4 trillion.

There is also a gap in their positions on health care spending with the Speaker negotiating down from $1.4 trillion to a $600 billion reduction in such federal spending and the President holding out for only a $400 billion reduction over ten years. The Speaker has been unable to extract from the White House the details on what federal health program changes would yield the desired spending cuts and congressional Democrats have made the job harder by taking various Republican proposals off the table. Both **Senator Dick Durbin** and House **Minority Leader Nancy Pelosi** have publicly expressed their opposition to raising the Medicare eligibility age from 65 to 67 years and the White House also said that Medicaid cuts will be non-negotiable. This latter stance was recently taken after it became clear that cuts to Medicaid would serve as a further disincentive for state governors, Republicans in particular, to declare their intent to expand Medicaid as provided for under the Affordable Care Act (ACA).

With only one legislative week left before Christmas it is clear that a compromise will not be acted on by Congress before Christmas. But with

continued on page 2

Inside

continued from page 1

members staring at the year-end fiscal cliff, some Republicans would like to have a Plan B legislative solution to at least avoid the 27% cut in 2013 Medicare physician reimbursements due to the flawed Sustainable Growth Rate (SGR) formula and the tax hike resulting from the alternative minimum tax increase. House Ways and Means Committee **Chairman Dave Camp** has indicated an interest to bring up separate legislation to provide a one-year doc fix. On the other hand, Ranking Democrat **Rep. Sander Levin** expressed his view that without a major agreement it would be hard to pass such separate legislation and that the House should instead pass the Senate bill extending the Bush tax cuts for those earning up to $200,000. The White House spokesman also made clear that "first and foremost" the middle class should not have their taxes go up on January 1st.

Indicative of the impasse, House **Majority Leader Eric Cantor** scheduled the House to be in session through this Friday and advised Members that a weekend session is possible, without putting any tax bill or other fiscal fix on the docket. It appears that only a last-minute mini-deal after Christmas will fend off the fiscal cliff at year-end (reportedly Speaker Boehner's latest offer would allow the Bush-era tax rates to expire for those earning over $1 million). As if the budget negotiations did not present a high enough hurdle for bipartisan cooperation, Senate **Majority Leader Harry Reid** continues to pursue his quest to place limits on minority filibusters in the Senate beginning next year.

Senate Democrats Name New Health Committee Members

The Senate Democratic Steering Committee announced that the ranks of the Senate HELP Committee will be filled by incoming Senators Tammy Baldwin (WI), Chris Murphy (CT) and Elizabeth Warren (MA). Senators Baldwin, Warren and Joe Donnelly (IN) were also assigned to the Senate Special Committee on Aging. The Senate Finance Committee majority next year will also include Senators Sherrod Brown (OH) and Michael Bennet (CO).

House Acts on Health Legislation

The House failed to raise the two-thirds majority needed under the suspension calendar to pass H.R. 6190, Rep. Michael Burgess' legislation that would have overturned an FDA ruling preventing the sale of a particular existing stockpile of over-the-counter **asthma inhalers** that contain CFCs. However, in a unanimous vote the House did pass H.R. 4053, the Improper Payments Elimination and Recovery Improvement Act of 2012 which would help identify and prevent **waste fraud and abuse** under federal health and other programs. This week the House will take up additional health-related legislation under suspension of the rules: H.R. 1509, the **Medicare Identity Theft Prevention Act of 2011**; and H.R.1845, the **Medicare IVIG Access Act**. The conference report on H.R. 4310, the National Defense Authorization Act for Fiscal Year 2013, is also expected to be taken up and passed before the Christmas break.

PPACA Health Reform Update

House PPACA Hearings

At a House Energy and Commerce Health Subcommittee hearing, the representative from the state of Pennsylvania testified that the Patient Protection and Affordable Care Act (PPACA) dictates health care policies to the states and that the Medicaid expansion fails to treat states as true partners (e.g. by supplanting the successful State Children's Health Insurance Program (SCHIP) program in that state). As a result, he said the PA Governor would not establish a state-based health insurance exchange and will delay deciding whether to adhere to the Medicaid expansion dictated by the law.

continued on page 3

PPACA Health Reform Update continued

continued from page 2

Republican members were critical of the U.S. Department of Health and Human Services (HHS) for not providing "critical information to members of Congress, to the states, or to the health plans" regarding the implementation of the exchanges. On the other hand the Center for Consumer Information and Insurance Oversight (CCIIO) Director testified that the Administration has provided ample guidance and $2.1 billion in grants to the states to help them establish their health insurance exchanges. A consulting firm also testified that current estimates show that only about one-third of all exchange enrollees will be covered under state-run exchanges and that the remainder will be covered under the default federally-run exchange.

In related news, HHS announced that six states--Colorado, Connecticut, Massachusetts, Maryland, Oregon and Washington--have received "conditional" approval to operate their own health insurance exchanges and that eight states--California, Hawaii, Kentucky, Minnesota, Mississippi, New York, Rhode Island and Vermont--and the District of Columbia have applied to do so. The Governor of Idaho recently announced his state will attempt to set up its own state-run health insurance exchange while the Tennessee Governor said he will not.

In response to the call for more guidance on health insurance exchanges, the HHS Secretary sent a letter to governors which includes 39 Frequently Asked Questions on Exchanges, market reforms and Medicaid, e.g. how state partnerships and the Federal Exchange will work, including how they will interact with state insurance departments and Medicaid programs; how exchanges and Medicaid administrative costs will be paid for; how states can provide premium assistance for exchange plans, as well as adopt "bridge" plans that will allow individuals and families to keep the same health plans and providers if their eligibility changes for Medicaid and exchange coverage; how multistate insurance plans will be managed by the Office of Personnel Management; and how HHS will supplement coverage to ensure that all "essential health benefits" are covered. HHS also said that so-called "blueprint applications" for state-based exchanges expired on December 14th and that partnership exchange applications are due by February 15th.

HHS Disallows Partial Medicaid Expansion Under PPACA

HHS/CMS announced that states will not receive enhanced federal funding if they expand Medicaid at a level below the levels set under the PPACA. However, CMS said the agency will consider a state's proposal for a "partial Medicaid expansion" in accordance with the agency's federal authority to approve demonstration projects. Federal funding at 100% will be provided to states that expand Medicaid coverage to 133% of the federal poverty level in 2014-2016, but the matching rate will scale down to 90% by 2020. In addition, the SCHIP/Medicaid "blended" federal matching rate will no longer be available to state programs. By eliminating the chance for states to receive such a blended matching rate, Senators Orrin Hatch and Rep. Fred Upton accused the Administration of employing a "bait and switch" tactic.

PPACA Medical Device Tax in Crosshairs

Senator Joseph Lieberman (CT-I) and 17 senate Democrats sent a letter to Senate Majority Leader Harry Reid (D-NV) urging him to take up legislation to delay the implementation of the 2.3% PPACA medical device tax which takes effect on January 29, 2013. However, Senate Finance Committee Chairman Max Baucus (D-MT) was cool to the idea given the major hurdle to find revenues to offset the cost of the delay.

Medicare/Medicaid/PHSA Corner

Senator Rockefeller Opposes Managed Care for Dual-Eligibles

At a Senate Finance Committee hearing, "Improving Care for Dually-Eligible Beneficiaries: A Progress Update," Senator John D. Rockefeller (D-WV) said the CMS Financial Alignment Initiative designed to improve care for Medicare/Medicaid eligibles is a failed approach in that it is pushing dual-eligibles into managed care plans which he said have not demonstrated success in improving care for such beneficiaries.

GAO Recommends Changes to ESRD Payments

The Government Accountability Office (GAO) issued a report, "End-Stage Renal Disease: Reduction in Drug Utilization Suggests Bundled Payment Is Too High," which recommends that Congress consider requiring HHS to "rebase the ESRD bundled payment rate as soon as possible and on a periodic basis thereafter, using the most current available data….". The GAO said the current framework may have resulted in $650-800 million in 2011 overpayments.

Medicare PET Scan Coverage

CMS issued a proposal under which local Medicare Administrative Contractors (MACs) would be allowed to determine coverage of FDA approved imaging agents used in positron emission tomography (PET) scans. The proposal would not preclude a CMS national coverage decision on the matter in the future.

Health Legislation Recently Introduced

H.R. 6643 (FEDERAL BUDGET), to amend Title 31, U.S. Code, to provide authority to increase the debt limit when an act of Congress provides budget authority or reduces revenue, and for other purposes; FATTAH; to the Committee on Ways and Means, Dec. 7.

H.R. 6645 (MEDICARE), tto amend Title XVIII of the Social Security Act to save and strengthen Medicare; HERGER; jointly, to the committees on Ways and Means, Energy and Commerce, and Rules, Dec. 11.

S. 3673 (FEDERAL BUDGET), to provide a comprehensive deficit reduction plan, and for other purposes; CORKER; to the Committee on Finance, Dec. 12.

H.R. 6666 (OBESITY), to provide a comprehensive approach to preventing and treating obesity; KIND; jointly, to the committees on Energy and Commerce, Ways and Means, Natural Resources, Education and the Workforce, Transportation and Infrastructure, and Agriculture, Dec. 13.