



## Health Policy Briefing

July 28, 2014

### House Set to Vote on Court Challenge to PPACA Regulations; VA/Appropriations Stalled

#### *House to Vote on Resolution Authorizing Lawsuit Challenging PPACA Implementation*

**O**n a 7-4 vote the House Rules Committee passed H. Res. 676 setting up the measure for a vote in the House this week. The resolution would authorize the House to bring suit against executive agency actions to delay the Patient Protection and Affordable Care Act's (PPACA) employer mandate and related penalties for non-compliance. The proposed civil action seeks injunctive relief regarding the "failure of the President" or any other Administration official "to act in a manner consistent with their duties under the Constitution and laws of the United States" with respect to the implementation of any provision of the PPACA. All eleven amendments offered by committee Democrats failed.

#### *Veterans' Reform Legislation Update*

**O**n Thursday the Democrat motion to instruct conferees on H.R. 3230, the Veterans' Access to Care Through Choices, Accountability, and Transparency Act of 2014, failed on 205-207 vote. If approved, the resolution would have directed the House conferees to agree to Senate's provision which would authorize the VA to execute 26 leases for major medical facilities to help decrease the long waiting times that veterans face. House Veterans' Affairs Chairman Jeff Miller (R-FL) and the Senate Chairman, Bernie Sanders (I-VT) worked to

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reach an agreement on a VA reform package over the weekend. The deal will be unveiled on Monday. Also confronting the two committees is a request by the VA for an additional \$17.6 billion to hire up to boost services and an additional 10,000 employees, including 1,500 physicians. Also of note, last week the Senate Veterans Affairs Committee approved the President's nomination of Robert McDonald to head the Veterans' Administration.

### ***Appropriations Actions to Slide into September***

**T**he House and Senate continue at odds over the Health and Human Services (HHS) supplemental spending bill which would help pay for the costs of caring for illegal migrant children. The House Appropriations Committee has not scheduled action on the fiscal year (FY) 2015 Labor/HHS/Education appropriations bill while in the Senate, Senator Tom Harkin (D-IA) released a draft bill for full committee consideration which will likely be used as a guide for negotiations over an omnibus spending bill which appears inevitable, most likely after the November elections (although the Senate would prefer earlier action). The bill which would fund PPACA implementation at FY 2014 levels and give the National Institutes of Health (NIH) a 2% increase in funding over FY 2014 levels generally follows the terms of the previously reported subcommittee bill. Appropriations Committee Chairwoman Barbara Mikulski (D-MD) remains intent to have the Senate take up the Military Construction/Veterans Affairs (VA) FY 2015 spending bill before the beginning of the new fiscal year. It is almost certain that a continuing resolution (CR) will be passed before October 1, with the Defense appropriations bill possibly being approved so as to avoid the CR spending restrictions.

## **PPACA Health Reform Update**

### ***PPACA Implementation Moves Forward Amid Republican Criticism***

**A**t a House Ways and Means Subcommittee on Oversight hearing, a Government Accountability Office (GAO) official testified that the agency's investigation of the law's HealthCare.gov enrollment process resulted in 11 out of 12 fraudulent applications for individual subsidies when using false identities and citizenship and forged documents. Chairman Charles Boustany (R-LA) said that the Centers for Medicare and Medicaid Services (CMS) is "either unaware or unable to screen out fraudulent applications nationwide with regard to subsidies.... This is all very troubling." GAO said that the limited test indicates that controls, particularly at the front-end of the enrollment process, are ineffective. HHS issued a statement that the agency is "examining this report carefully and will work with GAO to identify additional strategies to strengthen our verification processes." Democrats said that HHS and the Internal Revenue Service (IRS) need adequate funding to prevent fraud. HHS also reported on enrollment progress, released a study finding that 10.3 million previously uninsured adults gained coverage during the first open enrollment period, thus reducing the age 18-64 uninsured rate from 21% to 16.3%. Also, the agency reported that the law's medical loss ratio (MLR) rule resulted in 6.8 million insured receiving refunds totaling \$330 million, or about \$80 per family. HHS also eased the application of the law's provisions relating to--community rating, preexisting conditions, essential health benefits, and medical loss ratios, et al--for U.S. territories using administrative authority to remove the territories from the term covered "state". The territories are not subject to the individual mandate and their residents are not eligible for subsidies. The IRS also released "Health Coverage" and "Employer-Provided Health Insurance Offer and Coverage" forms employers must submit pursuant to the law's employer mandate. Failure to comply would result in penalties capped at \$2,448 for individuals and \$12,240 for families with five or more members. The IRS/Treasury also issued regulations which would allow victims of abandonment and domestic abuse who file separate tax returns to be eligible for PPACA premium subsidies.

## PPACA Health Reform Update cont.

### *House Ways and Means Committee Probes Effect of PPACA on MA Plans*

**A**t a House Ways and Means Health Subcommittee hearing, a health researcher said his analysis shows that Medicare Advantage (MA) beneficiaries could experience benefit reductions/premium increases of \$3,700 or more because of the changes in the PPACA affecting plan payment levels. The researcher said that the CMS pilot program which gives bonuses to plans having rating “stars” of 3-3.5 will end this year and, thus, lead to future plan payment reductions. Republican members contend that the PPACA will ultimately cut about \$300 billion from the Medicare Advantage program in the long run. Subcommittee Ranking Democrat Jim McDermott (D-WA) countered that the PPACA has already put Medicare fee-for-service (FFS) and MA on a stronger financial footing, resulting in premium stability. Chairman Brady (R-TX) said that this issue will be part of the discussion among House Republicans in their consideration of PPACA “repeal and replace” efforts.

### *Courts Give Conflicting Rulings on PPACA Subsidies in Non-Electing States*

**T**he U.S. Court of Appeals for the District of Columbia Circuit ruled in Halbig v. Burwell that the IRS overstepped the plain language of the PPACA in the agency’s ruling that individual subsidies are available in states that do not establish their own health insurance exchanges (thus deferring enrollment to HealthCare.gov). However, in King v. Burwell the U.S. Court of Appeals for the Fourth Circuit found that the law is ambiguous on this matter and, thus, the IRS did not exceed its authority to interpret the subsidies as being available to individuals in states not having their own exchange. If the DC Circuit ruling is not reversed in an en banc rehearing being requested by the Department of Justice, the split decision would be ripe for adjudication by the U.S. Supreme Court. The Administration said that the individual subsidies at issue will continue pending a final resolution in the courts.

### *Court Rules Congressional Staff Eligible for Employer Contributions Under PPACA*

**I**n a suit brought by Senator Ron Johnson (R-WI) maintaining that Members of Congress and their staff are not eligible for continued employer contributions to their health plans after the passage of the PPACA, the U.S. District Court for the Eastern District of Wisconsin said the case lacked “concrete injury” and dismissed the challenge.

## Medicare/Medicaid/PHSA Corner

### *House E&C 21st Century Cures Hearing*

**A**t a House Energy and Commerce Health Subcommittee hearing, following up on the committee’s 21st Century Cures initiative, Chairman Joe Pitts (R-PA) said that barriers to the development and use of medical technology include efforts to limit off-label use among the provider community and limitations on communication included under the provisions of the Health Insurance Portability and Accountability Act (HIPAA) and the Physician Sunshine Act. Witnesses testified that means have to be in place to allow the capture of the large volume of real-time data that contain the secrets to ensuring the next generation of high quality health care; and that there is a need for open access to federally collected health care data and changes to HIPAA allowing the sharing of data among medical researchers. As to evidence of a decline in medical innovation in the United States, a device company executive testified that Congress could help support the Food and Drug Administration (FDA) in its efforts to bring innovative treatments to patients on a more acceptable timetable.

### *HHS Confirms Previous Ruling on Orphan Drug Discounts*

**T**he Health Resources and Services Administration (HRSA)/HHS released a document containing an interpretive ruling under which safety-net providers can continue to receive 340B program discounts on common, non-orphan uses of drugs that have orphan indications. The ruling follows a recent court decision that HHS does not have the authority to rule on whether drugs with a rare-disease or orphan designation can be available at a discount for non-orphan uses. HRSA said the court did not impinge on the agency’s ability to interpret the law’s “exclusion” provisions.

## FDA Issues

The FDA gave notice that, pending approval by the Office of Management and Budget (OMB), it will conduct a study to analyze how adolescents weigh the risks and benefits of drug classes that are marketed directly to consumers. Two different medical conditions will be used to determine the effect of direct-to-consumer (DTC) marketing and the potential adverse effects. Comments are due by August 20.

## Upcoming Health-Related Hearings and Markups

*House Energy and Commerce Health Subcommittee: will hold a hearing titled “Protecting Americans from Illegal Bailouts and Plan Cancellations Under the President’s Health Care Law;” 4:00 p.m., 2123 Rayburn Bldg. ; Monday, July 28.*

*House Energy and Commerce Health Subcommittee: will convene for opening statements only regarding pending legislation including: H.R. 3522, the Employee Health Care Protection Act of 2013; H.R. 4701, the Vector-Borne Disease Research Accountability and Transparency Act; H.R. 4067, a bill regarding supervision requirements for outpatient therapeutic services in critical access and small rural hospitals; a draft bill regarding clinical data registries and other legislation. 4:00 p.m., 2123 Rayburn, Tuesday, July 29.*

*House Oversight and Government Reform, Energy Policy, Health Care and Entitlements Subcommittee: will hold a hearing titled “Examining the Federal Government’s Failure to Curb Wasteful State Medicaid Financing Schemes.” 10:00 a.m., 2247 Rayburn; Tuesday, July 29.*

*Senate Finance Committee: will hold a hearing titled “Tobacco: Taxes Owed, Avoided, and Evaded;” 10:00 a.m., 215 Dirksen Bldg.; Tuesday, July 29.*

*House Energy and Commerce Health Subcommittee: will mark up pending legislation including: H.R. 3522, the Employee Health Care Protection Act of 2013; H.R. 4701, the Vector-Borne Disease Research Accountability and Transparency Act; H.R. 4067, a bill regarding supervision requirements for outpatient therapeutic services in critical access and small rural hospitals; a draft bill regarding clinical data registries and other legislation. 10:00 a.m., 2123 Rayburn; Wednesday, July 30.*

*Senate Special Aging Committee: will hold a hearing titled “Admitted or Not? The Impact of Medicare Observation Status on Seniors;” 2:15 p.m., 216 Hart Bldg.; Wednesday, July 30.*

*House Energy and Commerce Committee: will hold a hearing on implementation of the PPACA and its challenges since the opening of health care exchanges. 9:00 a.m., 2123 Rayburn; Thursday, July 31.*

*House Energy and Commerce Oversight Subcommittee: will hold a hearing on implementation of the PPACA, including updates from the Centers for Medicare and Medicaid Services and the Government Accountability Office; 9:00 a.m., 2123 Rayburn Bldg. ; Thursday, July 31.*

*House Small Business Health and Technology Subcommittee: will hold a hearing titled “Telemedicine: A Prescription for Small Medical Practices?” 10:00 a.m., 2360 Rayburn; Thursday, July 31.*

## Health Legislation Recently Introduced

**S. 2639** (VETERANS' HEALTH), to amend Title 38, U.S. Code, to increase the number of graduate medical education residency positions at medical facilities of the Department of Veterans Affairs, and for other purposes; BALDWIN; to the Committee on Veterans' Affairs, July 22.

**S. 2645** (ACCESS), to provide access to medication-assisted therapy, and for other purposes; MARKEY; to the Committee on Health, Education, Labor and Pensions, July 23.

**H.R. 5173** (FAMILY AND MEDICAL LEAVE), to amend the Internal Revenue Code of 1986 to provide a credit to employers who provide paid family and medical leave; CASSIDY; to the Committee on Ways and Means, July 23.

**H.R. 5175** (INSURANCE REGULATION), to amend the PPACA to repeal the risk corridor program, and for other purposes; LANCE; to the Committee on Energy and Commerce, July 23.

**H.R. 5177** (REFORM), to amend the PPACA to eliminate benefits under the Federal Employees Health Benefits Program for members of Congress so they are treated the same way as other taxpayers, and for other purposes; MAFFEI; jointly, to the committees on House Administration and Ways and Means, July 23.

**H.R. 5183** (MEDICARE), to establish a demonstration program requiring the utilization of value-based insurance design to demonstrate that reducing the copayments or coinsurance charged to Medicare beneficiaries for selected high-value prescription medications and clinical services can increase their utilization and ultimately improve clinical outcomes and lower health-care expenditures; BLACK; jointly, to the committees on Ways and Means and Energy and Commerce, July 23.

**S. 2655** (WOMEN'S HEALTH), to reauthorize the Young Women's Breast Health Education and Awareness Requires Learning Young Act of 2009; KLOBUCHAR; to the Committee on Health, Education, Labor and Pensions, July 24.

**S. 2658** (NATIONAL INSTITUTES OF HEALTH), to prioritize funding for the National Institutes of Health to discover treatments and cures, to maintain global leadership in medical innovation and to restore the purchasing power the NIH had after the historic doubling campaign that ended in fiscal year 2003; HARKIN; to the Committee on the Budget, July 24

**S. 2660** (HEALTH PLANS), to amend the Internal Revenue Code of 1986 to clarify the special rules for accident and health plans of certain governmental entities, and for other purposes; CANTWELL; to the Committee on Finance, July 24.

**S. 2662** (TELEHEALTH), to promote and expand the application of telehealth under Medicare and other federal health-care programs, and for other purposes; COCHRAN; to the Committee on Finance, July 24.

**H.R. 5185** (WOMEN'S HEALTH), to reauthorize the Young Women's Breast Health Education and Awareness Requires Learning Young Act of 2009; WASSERMAN SCHULTZ; to the Committee on Energy and Commerce, July 24.