PUBLICATION

Congressional Leaders Name "Super Committee" Members

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Budget Control Act Embroils Health Care Industry in High Stakes Poker Game

The first in a series of updates from Baker Donelson's Health Policy Group

Congress has finalized selection on all 12 members of its Super Committee on deficit reduction today, as House Minority Leader Nancy Pelosi (D-California) named Reps. Jim Clyburn (D-South Carolina), Chris Van Hollen (D-Maryland) and Xavier Becerra (D-California) to the panel. The top Republican congressional leaders had already appointed six members with conservative policy credentials to make up the GOP half of the panel charged with reducing the deficit by $1.5 trillion over the next decade, including Ways and Means Chairman Dave Camp (R-Michigan), Energy and Commerce Chairman Fred Upton (R-Michigan) and Republican Conference Chairman Jeb Hensarling (R-Texas), all named by Speaker John Boehner.

Senate Majority Leader Harry Reid's picks for the "super committee" charged with finding more than $1 trillion in spending cuts by the end of this year included Democratic Senators Patty Murray (Washington), Max Baucus (Montana) and John Kerry (Massachusetts). Senate Minority Leader Mitch McConnell's Republican picks for the committee were Jon Kyl of Arizona, Pat Toomey of Pennsylvania and Rob Portman of Ohio.

Background - On August 2, President Obama signed into law the Budget Control Act of 2011 (BCA) (P.L. 112—25). The BCA established specific spending targets between fiscal years FY 2012, which starts October 1, 2011, and FY 2021, which ends September 30, 2021, and creates a special congressional budgeting process to meet those targets. The goal is to achieve cumulative budgetary savings of $2.1 trillion to $2.4 trillion over the ten-year period.

The BCA is a culmination of discussions between Democrats and Republicans over the last three months about achieving long-term deficit reduction as a precondition to increasing the U.S. government's debt limit. The end result is a compromise that establishes a down payment of $917 billion in savings derived from cuts in discretionary spending over a ten-year period and a special budget procedure to produce another $1.2 trillion to $1.5 trillion in additional savings either through legislation recommended by a congressional Joint Committee on Deficit Reduction or by so-called automatic sequestration procedures.

By writing enforceable deficit reduction goals into congressional statute, Congress and the president believe they have demonstrated to global markets and the American people the collective commitment of both political parties to true deficit reduction. However, the BCA puts the onus on the joint congressional committee (referred to in most circles as the "Super Committee") to reconcile deep differences between the two political parties on entitlement reform, tax revenue, and spending priorities in order to avoid the draconian sequestration process that will occur if the joint committee cannot produce legislation.

If the joint committee proposal is not adopted, sequestration will include automatic cuts totaling $1.2 trillion and will come from, among other things, a two percent uniform reduction in payments to providers for services under Medicare Parts A, B, and C.

What this means is that various elements of the health care community who worked vigorously to stave off possible reimbursement cuts and policy changes in the months leading up to the BCA compromise still have their work cut out for them in trying to influence the outcome of the joint committee's work. Because the committee must produce legislation by Thanksgiving and Congress must pass legislation by Christmas to stave off sequestration, time is short.

Leading up to the BCA, the pharmaceutical industry successfully lobbied against a proposal that would have required them to give the Part D prescription drug programs the same rebates that they are forced to provide the government under Medicaid, but that will likely be back on the table in the new committee's deliberations.

Hospitals, nursing homes and home health care providers have also been seriously eyed for cuts as part of deficit negotiations. Doctors, for example, are hoping lawmakers will include a permanent fix to their Medicare reimbursement rates. As it is now, doctors return to Congress year after year for their "doc fix" to prevent severe cuts to their Medicare reimbursement rates. According to several sources, the joint committee process is an ideal venue to deal with a long-term fix to the Medicare physician reimbursement problem because you can't realistically address the national debt without solving the physician payment problem. If they don't fix it, doctors' payments will be cut 29 percent. It they do, it will cost more than $325 billion.

The Paramount Role of the Joint Committee - The BCA enshrines in statute specific spending caps that Congress must meet each year during the annual discretionary appropriations process. By capping total discretionary spending at $917 billion, the remaining $1.5 trillion in deficit reduction must come from legislation reported by the congressional joint committee. If for whatever reason the joint committee fails to reach consensus or the House and Senate reject the proposal, sequestration will be triggered on January 15, 2012 that would result in automatic cuts of $1.2 trillion between FY 2013 and FY 2021. The BCA would cap at two percent cuts in Medicare payments resulting from sequestration.

In theory, sequestration is intended to incentivize the joint committee to approve legislation and for rank and file members of the House and Senate to support legislation. But two barriers exist. First is the ability of the joint committee to reach consensus. The 12-member panel will consist of six congressional Democrats and six congressional Republicans. Each recommendation adopted by the joint committee must achieve at least seven votes, which means one panel member might be asked to "cross-over." According to Nancy Johnson, Baker Donelson's senior policy advisor and former chairwoman of the House Health Subcommittee, it is too early to say whether the joint committee will be one of "paralysis or progress." The BCA did not resolve the deep differences between the House, Senate and the president with regard to taxes, entitlements, or spending priorities, but merely deferred them to the super committee. Some analysts are predicting that, like many other special fiscal committees and commissions before them, this one will deadlock, resulting in triggered automatic spending cuts in discretionary spending and "direct" spending, including Medicare. Since such cuts would inflict maximum damage on defense and programs for the truly needy and because two well-regarded commissions – one appointed by the president - have laid out the urgent need for action and the path forward, Ms. Johnson believes this group will act on both tax and entitlement reforms. In those areas, big out-year saving are possible with minimum pain. With the recent S&P action, she thinks significant action by the committee is more likely than if the downgrade had not occurred.

The appointees come from key committees of jurisdiction over entitlement and taxes, with well-developed views on how changes in both might effectuate real deficit reduction. Alternatively, according to Baker Donelson senior policy advisor Laine Glisson Oliver, a former Senate staffer to Sen. John Breaux (D-La.), congressional leaders may pressure their appointees to limit their work to reflect the predominant views of their respective party's rank and file members (that is, each party's "center of political gravity"). The two alternatives may be mutually exclusive because the ideological centers may be antithetical to any joint committee consensus that achieves bona fide deficit reduction through a mix of entitlement "reform" and increases in tax revenue, regardless of how achieved.

According to Baker Donelson senior policy advisor Sheila Burke, a former Chief of Staff to Senate Majority Leader Bob Dole (R-KS) and a co-director of the health project of the Bipartisan Policy Center, although everything is supposed to be on the table – including entitlements, taxes, and discretionary spending – the joint committee's first order of business will be the budget baseline by which savings will be calculated. House Speaker John Boehner (R-OH) has stated that because, in his view, the baseline assumes expiration of the Bush tax cuts by December 31, 2012, the joint committee will be precluded from considering additional tax increases. This suggests ongoing resistance to revenue increases will continue to put pressure on panel members to consider entitlement "reform," including changes to Medicare.

It should be noted that Obama administration economic adviser Gene Sperling argued in an August 1 blog that it's up to the committee to choose its own baseline, notwithstanding a reference in the new law citing the existing Congressional Budget Office baseline.

The new law "does not anywhere require the joint committee to work off a current law baseline," Sperling wrote, noting that Congress frequently instructs the CBO to use alternative baselines, including for Congressman Ryan's (R-WI) recent budget.

Impact on the Affordable Care Act (ACA) - Another possible incentive to avoid sequestration is the fact that some aspects of the president's health care reform may be affected by such automatic cuts. According to Lance Leggitt, Chair of Baker Donelson's Federal Health Policy Group and former White House health policy advisor, while many spending components of the ACA would likely be exempt from the sequester, significant parts of the law could be subject to cuts if the joint committee fails. This includes:

- Cost-sharing Subsidies (Section 1402): Approximately $111 billion from 2014-2021
- Risk Adjustment (Section 1342): More than $100 billion from 2014-2021
- Prevention and Public Health Fund (Section 4002): A total of $16.75 billion from 2013-2021
- Rate Review Grants (Section 1003): Funds from the initial $250 million that remain available in 2014
- High-Risk Pool Funding (Section 1101): Funds from the initial $5 billion that remain in 2013 and 2014
- Health Insurance Cooperatives (Section 1322): $3.8 billion
- Re-insurance for Early Retirees (Section 1102): $5 billion, but likely that the funds will be obligated before 2013
- Health Insurance Exchange Administrative Grants (Section 1311): Unspecified amounts in FY2013 and FY 2014
- Community Health Centers Fund (Section 10503(b)(1)): A total of $7.3 billion for FY2013 through 2015
- Health Center Construction and Renovation (Section 10503 (c)): Funds remaining from the initial $1.5 billion remain available until FY 2015
- National Health Service Corps (Section 10503 (b)(2)): A total of $900 million in mandatory funding for 2013, 2014, and 2015
- Maternal, Infant, and Early Childhood Home Visiting Program (Section 2951): A total of $800 million in mandatory spending in 2013 and 2014
- Personal Responsibility Education Programs (Section 2953): A total of $150 million for 2013 and 2014
- School Based Health Centers (Section 4101): $50 million in FY 2013
- Patient Centered Outcomes Research Trust Fund: A total of $1.05 billion between 2013 and 2019

Joint Committee Timeline

Below is a timeline of key joint committee dates:

August 16, 2011 – House and Senate bipartisan leaders appoint joint committee members

September 16, 2011 – Joint committee holds initial meeting

October 14, 2011 - Deadline for recommendations to the Joint Committee by the authorizing committees, including House Ways and Means, House Energy and Commerce, Senate Finance Committee and Senate Health Education Labor and Pensions

November 23, 2011 – Joint committee votes to approve legislation

December 2, 2011 – Joint committee report and legislative language transmitted to the president, vice president, and congressional leadership (legislation must be formally introduced by floor leaders in the House and Senate on the next legislative day following transmittal)

December 9, 2011 – House and Senate committees to which the joint committee report is referred must report the bill to the floor without amendment

December 23, 2011 – Deadline for floor votes on the joint committee legislation by the House and Senate (without amendment)

January 15, 2012 – Automatic sequestration is triggered if the joint committee legislation is not signed into law by the president by this date

Baker Donelson will continue to report on the deficit reduction process as it unfolds this fall. Should you have questions please contact your Baker Donelson attorney or policy advisor, or any member of the Baker Donelson Health Policy team:

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