

Appeals to the ALJ
(Stretched to the Breaking Point)

ALSTON & BIRD LLP

TO: Health Care Clients

FROM: Alston & Bird LLP

DATE: March 12, 2014

RE: House Committee on Ways and Means Hearing on the President's FY 2015 Budget

On March 12, 2014, the House Committee on Ways and Means held a hearing on the *President's Fiscal Year 2015 Budget Proposal* with US Department of Health and Human Services (HHS) Secretary Kathleen Sebelius as witness. On March 4, 2014, President Barack Obama submitted his fiscal year (FY) 2015 budget proposal to Congress. The President's proposed budget contains his tax, spending and policy proposals for the coming fiscal year, including his proposed budget for HHS and the programs it oversees and operates. Many of the Department's programs such as Medicare, health care programs under the Affordable Care Act (ACA) and Temporary Assistance for Needy Families (TANF) are within the Committee's jurisdiction.

Opening Statements

Committee Chairman Dave Camp (R-MI) asserted that the ACA has had a deleterious impact on low-and middle-class individuals by increasing the cost of healthcare and decreasing the size of the United States workforce. He cited a recent Congressional Budget Office (CBO) report, the *Budget and Economic Outlook: 2014 to 2024*, which finds that the Act will cause a decline in the number of fewer full-time equivalent (FTE) workers by 2 million in 2017. Camp said he hoped Sebelius would provide the Committee with specific statistics on the proportion of people enrolled in coverage under the ACA's Health Insurance Exchanges who have paid their premiums, as well as information on whether the Obama Administration planned to issue additional delays or "administrative changes" as the law is implemented. He also suggested that the budget proposal does not go far enough to address entitlement reform and to "secure the promise of Medicare for seniors in the future".

Committee Ranking Member Sander Levin (D-MI) acknowledged that Exchange enrollment has fallen short of the Administration's original goal, but noted that under the law, many more young adults now have access to healthcare coverage under their parents' insurance plans.

Witness Testimony

Secretary Kathleen Sebelius, HHS, asserted that the President's budget reflects the Administration's priorities, including "opportunity for all, economic growth, and security". Sebelius highlighted several of the major provisions in the proposal, including expansion of early childhood education programs, protections for seniors against abuse and neglect, and enhanced funding for the Food and Drug Administration (FDA), the National Institutes of Health (NIH), and the National Health Service

Corps. She insisted that the budget also makes “tough, fiscally responsible choices”, and incentivizes high quality, efficient healthcare delivery. Sebelius went on to cite enrollment statistics for the ACA Health Insurance Exchanges. She said that 4.2 million people had signed up through the Exchanges by the end of February, and the Administration expects that the number will continue to rise until the current open enrollment period ends on March 31st. She added that 8.9 million people have been determined eligible for new or renewed Medicaid benefits since the launch of the ACA in October 2013.

Question & Answer

Committee Chair Camp reiterated that it is critical for HHS to obtain and share data on the proportion of Exchange enrollees who have paid their premiums. Sebelius said that ultimately there will be a fully automated system that will share this information between HHS and insurers, and she said that HHS will be glad to share these figures with the Committee as soon as they are available. Camp said the Committee is interested in learning about individual premium payment data as it become available because the Exchange premium tax credit falls under the Committee’s jurisdiction.

Representative Kevin Brady (R-TX) asked if the Administration would delay the ACA’s “individual mandate” provision or extend open enrollment period past March 31st. Sebelius said that the Administration would not. Brady referred to recent guidance issued by the Centers for Medicare and Medicaid Services (CMS) announcing the availability of advance payments of premium tax credits and cost-sharing reductions for individuals who have been unable to obtain eligibility determinations and enroll in qualified health plans (QHPs) because certain Exchanges experienced technical difficulties during the 2014 enrollment period. Brady asserted that HHS lacks the statutory authority to issue this policy. He also suggested that it is unfair for CMS to extend until 2016 a “transitional policy”—announced March 5th—exempting insurers from complying with ACA market reform requirements since the individual mandate will not be delayed for individual consumers. Sebelius said that most employers (94%) are not impacted by this transitional policy.

Representative Jim McDermott (D-WA) said that the Administration’s proposed “structural reforms” to the Medicare program will increase beneficiary cost sharing without requiring providers and pharmaceutical companies to “share in the pain”. McDermott acknowledged that there is widespread agreement that the Sustainable Growth Rate (SGR) formula needs to be reformed, but suggested the Administration is “cherry-picking” offsets. He added that it is “unconscionable” to ask low-income beneficiaries to shoulder the burden. Sebelius said that the Obama Administration hopes to achieve meaningful, broad-reaching reforms to entitlements and the tax code.

Representative Jim Renacci (R-OH) said that the ACA has fallen short of expectations that it would make healthcare more affordable for beneficiaries. He referred to a news interview Sebelius gave in September 2013, in which she defined a “successful” rollout as one in which 7 million people would have signed up for coverage under the Exchanges by March 31, 2014. Renacci asked Sebelius to redefine success in light of the Act’s troubled rollout. Sebelius said that she defines success as “millions of people with affordable health coverage” across the private market and other markets such as Medicaid.

Representative Linda Sánchez (D-CA) said she agrees that the budget reflects the Administration's priorities, citing increased funding for NIH research and Ryan White Act programs. Sánchez added that the budget calls for an increase in Title X *Public Health Service Act* funding, which is dedicated to reproductive health and family planning services. She asked Sebelius to comment on the cost effectiveness of such programs. Sebelius agreed that family planning programs are cost effective, and added that private actuaries have found that contraceptive coverage reduces long-term costs to insurance companies.

Representative Tim Griffin (R-AR) suggested that NIH research funding is being “squeezed out” by the growth of entitlement spending. He asked Sebelius to explain how the budget addresses entitlement reform. Sebelius said that the Administration welcomes the opportunity to address a large-scale budget deal that includes entitlement and tax code reforms. She added that the ACA represents one of the most significant steps toward long-term Medicare solvency in recent years.

Representative Joseph Crowley (D-NY) said that there is a great need to invest in physician training. He cited legislation he introduced along with Representative Michael Grimm (R-NY), the *Physician Shortage Reduction Act of 2013*, which would expand the current cap on the number of Medicare-supported training slots for doctors. He insisted that it is not the appropriate time to draw federal funds away from doctor training given the predicted shortage of physicians. Sebelius said that the President shares Crowley's concern about training the healthcare workforce. She cited increased funding for the National Health Service Corps in the budget as an example, and said it is critical to “focus on targeted support” for graduate medical education.

Representative Mike Kelly (R-PA) referred to statements by the Administration which suggest that even with reforms to the Medicare program, additional revenues (i.e. taxes) will be needed. Kelly asked Sebelius to explain the taxes that the Administration will impose, and suggested that they may propose a value-added tax (VAT) similar to the system in the European Union. Sebelius asserted that the President has proposed closing a “number of tax loopholes”, and added that “nobody has suggested a VAT tax”. Sebelius also noted that Medicare cost growth has slowed significantly in recent years.

Representative Bill Pascrell (D-NJ) expressed his support for investments in education, research and science in the President's budget, particularly the NIH “BRAIN Initiative”.

Representative Todd Young (R-IN) thanked the Secretary for HHS' support in developing the Healthy Indiana Plan (HIP) to provide coverage to uninsured adults in Indiana. He referred to a recent report by Unite Here, an industry union, entitled “*The Irony of ObamaCare: Making Inequality Worse*” as an example of a report outlining the adverse impact the ACA has had on income inequality. He also referred to the CBO report which found that the Act would cause a reduction in 2 million FTEs in 2017. Sebelius said that the CBO report has been mischaracterized.

Representative Ron Kind (D-WI) implored Sebelius to take into consideration the special recruitment, retention and access challenges faced by Critical Access Hospitals (CAHs), such as those operating in his rural district. Kind also asked Sebelius to elaborate on the sustainability of

recent reductions in Medicare cost growth. Sebelius said that changes under the ACA, such as aligning provider payment with patient outcomes, has slowed Medicare cost growth to the lowest rates in history. She suggested that the legislation has fundamentally restructured the way care is delivered and reimbursed in the United States.

Representative Tom Reed (R-NY) asserted that proposed cuts to Medicare and Medicaid reimbursement are jeopardizing the operations of CAHs and other Medicare-dependent rural hospitals. Reed asked Sebelius if the Obama Administration believes there is a need for “legislative fixes” to the ACA. Sebelius said that the Administration is open to suggestions on how to improve the Act, but noted that both houses of Congress have yet to agree upon any such measures.

Representative Earl Blumenauer (D-OR) suggested that CMS should move forward with a 2010 proposal to reimburse voluntary physician consultation on end-of-life issues. Sebelius said that the Agency is interested in examining proposals for how patients and families can take control over end-of-life decisions. She said an annual wellness visit was added to the Medicare benefit which offers an additional opportunity for providers to engage in these discussions with patients and families.

Representative Diane Black (R-TN) referred to the recent “transitional policy” extension released by CMS, which she said “excused millions” of people from the individual mandate requirement. She suggested that the “hardship exemption”, as described in the rule, will mean that the only people subject to the tax are people who were previously uninsured. Sebelius said that this description is inaccurate, since the hardship exemption was part of the law from the outset. Black added that her constituents have been confused by continual changes to the law as it is implemented.

Representative Kenny Marchant (R-TX) said that the vast majority of cuts to the Medicare Advantage (MA) program established under the ACA have yet to go into effect. He asked Sebelius to describe the impact these cuts will have in the coming years. Sebelius said that seniors are benefitting from the healthcare law in many ways. She said that premiums in the MA program have fallen by 10% since 2010, enrollment has increased over 30%, and quality has improved. In addition, she noted that there are many more plan sponsors in the market. Sebelius said that MA plans are being paid over 100% of the cost of fee-for-service, and added that there is no evidence that these cuts to Medicare Advantage will “destroy the program”.

Representative John Larson (D-CT) asserted that the law has had a positive impact on the economy and on the health of the American public.

Representative Erik Paulsen (R-MN) stated that the law is “hurting more people than it is helping”. He said that people have more expensive premiums, and many people have fewer choices for doctors and plans under the legislation. Sebelius said the evidence so far indicates that the overall rate of uninsurance has gone down since the ACA was implemented. Paulsen asked if Sebelius expected premiums to go up in future years. Sebelius said that they likely would increase, but at a smaller pace than in previous years.

Representative Lynn Jenkins (R-KS) referred to a Government Accountability Office (GAO) report issued in 2013 which found that the ACA could increase the federal deficit by \$6.2 trillion over the long-term. Sebelius said that she was not familiar with the report, and asserted that CBO estimates indicate that the law will save money. She reiterated that healthcare costs have gone down since the ACA was implemented.

Representative Mike Thompson (D-CA) said that a bill he introduced last month with Representative Cathy McMorris Rodgers (R-WA), the *Primary Care Workforce Access Improvement Act of 2013*, will promote the training of primary care physicians in rural areas and test cost-neutral ways to distribute graduate medical education payments for the purpose of increasing the number of primary care physicians in the country. He asked Sebelius to confirm that the Administration will continue to support physician training programs over the long-term. Sebelius said that training grants will “be consistent with workforce goals”, which include physicians. She noted that the Health Resources and Services Administration (HRSA) is implementing programs that target new providers and connect them to underserved areas. Thompson then questioned Sebelius about the Medicare appeals process. The HHS Office of Medicare Hearings and Appeals (OMHA) has come under fire after its recent announcement that cases seeking an Administrative Law Judge (ALJ) hearing will not be assigned a judge for at least two years. Thompson acknowledged that the Administration has proposed an additional \$100 million to support the hearings and appeals process, but questioned whether that funding would be sufficient. Sebelius asserted that while HHS does not “want to recede from appropriate examinations of over-coding, over-billing and fraud”, there are some systems changes that the Administration can enact. She added that HHS has implemented a “triage” process so that beneficiaries who file claims will continue to be reviewed during this two year period.

Representative Adrian Smith (R-NE) asked Sebelius to reflect on the importance of CAHs. He said that CAHs are being subjected to cumbersome “cookie cutter” regulations such as physician supervision requirements. Sebelius agreed that CAHs are extremely important to healthcare delivery, and asserted that CMS is “very concerned that patients not be jeopardized by the care”. She said her office would work with Smith if he provided her with specifics on the regulations that are “burdensome” to CAHs.

Representative Vern Buchanan (R-FL) referred to a New York Times article which indicated that some groups, such as local governments and school systems, are reducing the number of FTEs in order to avoid ACA employer mandate penalties. Sebelius said that she is aware of concerns regarding the “30 hour rule” (the ACA defines a fulltime employee as one who works 30 hours) but said the evidence is insufficient to indicate that the rule will have a negative impact on the economy. Buchanan referred to Sebelius’ earlier statements that the ACA employer mandate only impacts 2% of businesses, and suggested that this still may represent a large proportion of the workforce.

Representative Lloyd Doggett (D-TX) expressed his frustration that less than 10% of Texans eligible to receive coverage under the Exchanges have done so. He said that his constituents report difficulty enrolling in coverage using HealthCare.gov, but asserted it is “more than a website problem”. Doggett described his efforts to create a dedicated hotline for people experiencing difficulty with the website. He said that he also is interested in receiving answers

to the questions posed earlier by Chairman Camp, such as the total cost paid by HHS to fix HealthCare.gov.

Representative Tom Price (R-GA) asked Sebelius how many of the 4.2 million individuals who signed up for coverage on an Exchange had paid their premium. Sebelius said she did not know. She said that because consumers are paying premiums to private insurance companies, HHS is not yet privy to this data. Price asked if Sebelius knew the proportion of people enrolled in the exchanges who were previously uninsured. Sebelius said she did not know. Price referred to a recent analysis conducted by consulting firm McKinsey and Company which estimates that 27% of Exchange enrollees were previously uninsured.

Representative Jim Gerlach (R-PA) asked Sebelius to explain the purpose of the reinsurance tax under the ACA, particularly whether the revenues were to be used to fund “other portions of the Act, including the Exchanges”. Sebelius said that the revenues would be used to “balance the marketplace”. Sebelius said that it is expected that \$10 billion would be raised this year through the tax. Gerlach asked if unions were allowed to receive a waiver for the tax. Sebelius said that the waiver exempts self-administered or self-funded plans from the tax, but noted that this definition is not exclusive to unions. Gerlach asked how much “relief” unions would receive under the exemption. Sebelius said she did not have the information but could obtain it.

Representative Xavier Becerra (D-CA) referred to the CMS Financial Alignment Initiative (which is being piloted in California, among other states) that seeks to coordinate care for individuals enrolled in both Medicaid and Medicare. He requested that CMS continue to keep the Congress informed about the demonstration’s outcomes. Sebelius agreed. Becerra noted that outside of the Exchanges, 3 million young adults have obtained coverage by staying on their parents’ plans, and nearly 9 million people are now covered by Medicaid. He said that the Act has created millions of jobs, including one million in the healthcare sector. Sebelius added that the number of people who work part-time is decreasing, while the number of people who work fulltime is increasing.

Representative Peter Roskam (R-IL) asserted that HHS should have access to information on the number of people enrolled in Exchange plans who have paid their premiums. He suggested that Congress could amend the ACA to allow the Secretary access to information under other Federal agencies’ jurisdiction, such as tax credit data. He said there should be a “special Inspector General” with broad jurisdiction over ACA implementation, citing similar entities that oversee Iraq and Afghanistan reconstruction as well as the Troubled Asset Relief Program.

Representative Charles Boustany (R-LA) noted that the ACA does not address SGR reform, which he characterized as a “glaring omission”. Boustany referred to recent SGR reform legislation that has bipartisan, bicameral approval, and asked if the Obama Administration supports this legislation. Sebelius said that the President supported a long-term SGR fix “long before the Affordable Care Act”, and said the Administration is generally supportive of the proposal. Boustany said that it has been difficult to agree on bipartisan offsets for the SGR legislation. He cited Medicare reforms that have been offered as “pay-fors” in the past, such as

combining Medicare Parts A and B or “means testing” Medicare beneficiaries. Sebelius said that the Administration is “eager to talk about pay-fors”, but in the context of a global discussion of entitlement reform and additional tax revenues.

Representative Richard Neal (D-MA) said that in Massachusetts, hospital systems are critical job creators. He asked Sebelius to discuss the impact of the ACA on Medicare’s longevity. Sebelius said that the ACA has added several years to the projected solvency of the Medicare Trust Fund.

Representative Dave Reichert (R-WA) said that the Obama Administration has delayed several components of the ACA’s planned implementation timeline, and asked if additional delays can be expected. Sebelius said the Administration does not have delays planned, but will “continue to put out policies...as we implement the Act”.

Representative Paul Ryan (R-WI) asked Sebelius about the Independent Payment Advisory Board (IPAB) created under the ACA. Ryan said that the 2014 budget claimed that \$4 billion would be saved by IPAB recommendations, and this year’s budget states that IPAB will save over \$12.9 billion. Ryan asked Sebelius to explain where the savings score came from. Sebelius said that President Obama had not yet submitted nominees for IPAB, but the law is constructed such that IPAB would not trigger any recommendations in the foreseeable future given the Medicare cost growth trajectory. Ryan asked when IPAB members would be recommended, and Sebelius said she did not know.

Representative Danny Davis (D-IL) said that the ACA has been successful in Illinois, and expressed his particular support for home visiting programs and community health centers supported by the legislation. Sebelius said that states where leadership is supportive of the ACA have been more successful than states with unsupportive leadership, such as Texas.

Representative Pat Tiberi (R-OH) asserted that the ACA has forced constituents to pay more and to make difficult choices regarding their care. He said that many previously insured people have been “forced” to use the Exchanges. He referred also referred to the Unite Here report, “*The Irony of ObamaCare: Making Inequality Worse*”.

Representative Aaron Schock (R-IL) noted that the House had passed a religious exemption clause the previous day, and asked Sebelius to comment. Sebelius said she had not read the clause but would offer her comments once she had done so. Schock echoed concerns voiced earlier in the hearing about the recently-announced decision by OMHA to suspend hearing new ALJ cases. Sebelius said she agreed that the Medicare hearings and appeals process is a major problem requiring systemic change. She noted, however, that the change did not apply to beneficiaries filing claims directly, who will continue to be assigned hearings during the two year moratorium.

Representative Charles Rangel (D-NY) asked whether Republicans have offered alternatives to the ACA. Sebelius said the Administration has engaged in a “number of conversations” with Republican Congressmen about ways to improve the ACA.

March 12, 2014
Page 8

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We hope this summary memorandum was helpful to you. Please do not hesitate to contact us if you have any questions.