



THE COMMITTEE ON ENERGY AND COMMERCE

INTERNAL MEMORANDUM

March 1, 2012

To: Energy and Commerce Committee

From: Majority Committee Staff

Re: Full Committee Markup of H.R. 452, the “Medicare Decisions Accountability Act of 2011,” H.R. 3309, the “Federal Communications Commission Process Reform Act,” and H.R. 3310, the “Federal Communications Commission Consolidated Reporting Act”

On March 6, 2012, at 10:00 a.m., in Room 2123 of the Rayburn House Office Building, the Committee on Energy and Commerce will meet in open markup session to consider H.R. 452, the “Medicare Decisions Accountability Act of 2011,” H.R. 3309, the Federal Communications Commission Process Reform Act,” and H.R. 3310, the “Federal Communications Commission Consolidated Reporting Act.”

Members must submit any amendments they may have two hours before they are offered during the markup. Members may submit amendment by email to: peter.kielty@mail.house.gov. Any information with respect to an amendment’s parliamentary standing (e.g., its germaneness) should be submitted at this time as well.

I. H.R. 452, the “Medicare Decisions Accountability Act of 2011”

On Wednesday, February 29, 2012, the Subcommittee on Health met in open markup session and voted 17 ayes and 5 nays to favorably forward the bill to the full committee.

On July 13, 2011, the Subcommittee on Health held a hearing examining the effects and consequences of the Independent Payment Advisory Board (IPAB).

Background

The Patient Protection and Affordable Care Act (PPACA) established the IPAB to “reduce the per capita rate of growth in Medicare spending.”¹ Under PPACA, an annual process was established, to begin in 2013, whereby the Medicare spending growth rate is monitored and targets are established. Working with the findings of the Actuary Office of the Centers for Medicare and Medicaid Services (CMS), the IPAB will eventually make annual proposals through the Department of Health and Human Services (HHS) to the Congress to obtain enabling legislation to set Medicare spending tied to the gross domestic product (GDP). By April 30 of each year—beginning in 2013—the Office of the Actuary at CMS will project whether the Medicare per-capita spending growth rate in the following 2 years will exceed a targeted rate.

¹ Section 3403, Patient Protection and Affordable Care Act (Public Law 111-148).

Initially, the targeted rate of spending growth will be based on the projected 5-year average percentage increase in the Consumer Price Index (CPI) for all urban consumers and the Consumer Price Index for all urban consumers for medical care.

H.R. 452 would repeal section 3403 and section 10320 of PPACA, which established the IPAB. The bill has widespread bipartisan support, with 226 co-sponsors, including 17 Democrats.

Overview of IPAB Targets

Beginning with the 2018 determination year, the target for the Medicare spending growth rate will be set at the nominal gross domestic product per capita plus 1.0 percent (President Obama's FY 2013 budget proposes that this be changed to GDP plus 0.5 percent).² If future Medicare spending is expected to exceed the targets, the IPAB will propose recommendations to Congress and the President to reduce the growth rate. The IPAB's first set of recommendations would be proposed on January 15, 2014.

Spending rate reductions will be established as follows:

- 0.5 percent in 2015
- 1.0 percent in 2016
- 1.25 percent in 2017
- 1.5 percent in 2018 and beyond.

The IPAB Board will be composed of 15 members appointed by the President with the advice and consent of the Senate. As such, the members are officers of the United States under the appointments clause of the U.S. Constitution. The Secretary of HHS, the Administrator of CMS, and the Administrator of the Health Resources and Services Administration are ex-officio, non-voting members. The Chairperson is appointed by the President from among the members of the Board. Each appointed member may serve two consecutive 6-year terms. Appointed members of the Board will be compensated at a rate equal to Level III of the Executive Schedule (\$165,300 for 2011), and the Chairperson will be compensated at a rate equal to Level II (\$179,700 for 2011). At present, the Administration has not nominated any members to the Board.

The budget for the Board for FY 2012 was to be \$15 million, with annual adjustments based on increases in the CPI; this is slightly more than the Medicare Patient Advisory Commission (MedPAC) budget. The FY 2012 Consolidated Appropriations bill cut \$10 million of the \$15 million that PPACA advanced appropriated for IPAB for FY 2012. The disposition of the remaining \$5 million that was to be appropriated for FY 2012 remains unclear. The Board will be funded out of the Medicare trust funds—specifically, 60 percent of the Board's funds will come from the Federal Hospital Insurance Trust Fund, and 40 percent from the Federal Supplementary Medical Insurance Trust Fund.

² FY 2013, Budget in Brief, U.S. Department of Health and Human Services; p. 55.

The IPAB Process

Each year, beginning in 2013, the CMS Chief Actuary determines whether the projected per capita Medicare expenditures will exceed certain target levels. The *target growth rate* will initially be calculated based on the midpoint between the 5-year average overall inflation (using the Consumer Price Index for all items and services, the CPIu) and 5-year average medical inflation (using the Consumer Price Index for medical inflation, the CPIm). However, beginning with the 2018 determination year, the *target growth rate* will be tied to the growth of the economy, based on the 5-year average increase in the nominal GDP plus 1 percentage point. If the Chief Actuary determines that Medicare per capita spending will exceed the targets, the Chief Actuary is required to establish an *applicable savings target* for the implementation year. This sets in motion a 3-year sequence of events.

Since hospitals, skilled nursing facilities, long-term care hospitals, and other providers are exempt from IPAB cuts through 2019, and laboratory services through 2015, some are concerned that physicians will be disproportionately affected by IPAB recommendations.

Fast Track Proposal/Implementation Process

By September 1 of each determination year, the Board will submit a draft of its proposal for review to the Secretary of HHS and to MedPAC for consultation. The Board will transmit its annual proposal to Congress and the President on January 15 of each proposal year, beginning in 2014. The proposal is referred to the House Committee on Energy and Commerce, the House Committee on Ways and Means, and the Senate Committee on Finance. These committees must report IPAB-implementing legislation that achieves at least the same level of targeted reductions in Medicare spending growth as are contained in the IPAB plan. If Congress does not take such action, the Secretary immediately implements the Board's proposals on August 15 of the proposal year, and the recommendations regarding payment rate changes that take effect on a fiscal year basis will take effect on October 1 of the proposal year. Recommendations relating to payment rate changes that take effect on a calendar year basis take effect on January 1 of the implementation year.

- II. H.R. 3309, the Federal Communications Commission Process Reform Act; and
H.R. 3310, the Federal Communications Commission Consolidated Reporting Act

Background

The communications marketplace is one of this country's most vibrant sectors. Poor process at the Federal Communications Commission can jeopardize that vibrancy, especially in this economy. The two bills at issue are the product of the Subcommittee on Communications and Technology's May 13, 2011, and June 22, 2011, hearings on the need to reform the processes of the Commission. Those hearings sought feedback from the Chairman and Commissioners, as well as from members of industry, public-interest groups, and the academic community on draft legislation. The legislation has been refined to respond to the feedback provided at the hearings as well as additional discussions with stakeholders and Members from both sides of the aisle. The legislation draws on principles contained in the President's January

executive order, which only applies to executive agencies and does not bind the Commission. To avoid micromanaging the agency, many of the provisions simply require the Commission to set its own process rules and then live by them. Although Chairman Genachowski has made good progress in improving process, only statutory changes can ensure that best practices continue from one administration to the next. Moreover, even with recent progress, we have witnessed in the Universal Service Fund proceeding further examples of why process reform is needed. The Commission added hundreds of pages of documents into the record at the last minute, giving parties almost no time to respond. And the Commission did not release the text of the adopted order for three weeks, providing Washington insiders ample time to lobby the Commission for further changes to the order after its “adoption.”

Section-By-Section

H.R. 3309, The Federal Communications Commission Process Reform Act

Section 1. Short Title.

Section 2(a). Adds section 13 to the Communications Act.

New Section 13(a)—Rulemaking Reforms. Requires the Commission to survey the marketplace before initiating a new rulemaking, with exceptions for deregulatory rulemakings and for good cause. Requires Notices of Proposed Rulemaking to follow within three years of Notices of Inquiry (to ensure that the information relied upon is current), include specific text of proposed rules, and include at least 30 days each for comments and replies. Requires adopted rules to follow within three years of Notices of Proposed Rulemaking and be a “logical outgrowth” of the proposed rules. For economically significant rules—those rules that will have an annual effect of \$100 million or more on the economy—the Commission is required to identify the problem it is trying to solve and make a reasoned determination that the benefits of the adopted rule justify its costs. Requires the Commission to develop performance measures for its program activities, defined as each program of the Commission listed in the federal budget as well as each program through which the Commission collects or distributes \$100 million or more. When possible, the Commission should adopt measures that are based on data it already collects.

New Section 13(b)—Ensuring Deliberation by Commissioners. Requires the Commission to establish internal procedures to inform Commissioners of a reasonable number of options available for resolving a proceeding, to provide adequate time for Commissioners to deliberate pending orders, and to ensure time for the public to read orders before open meetings.

New Section 13(c)—Nonpublic Collaborative Discussions. Allows a bipartisan majority of Commissioners to meet for collaborative discussions if they disclose such meetings within two business days and comply with Office of General Counsel oversight. Also applies to meetings of Federal-State Joint Boards.

New Section 13(d)—Initiation of Orders by Bipartisan Majority. Requires the Commission to establish procedures to allow a bipartisan majority of Commissioners to direct staff to draft an order, to put such an order on the Commission’s agenda, and to require that the Commission

vote on any order.

New Section 13(e)—Public Review of Reports and Ex Partes. Requires the Commission to seek public comment on reports and to establish procedures that provide the public an opportunity to evaluate *ex parte* filings before the Commission may rely on them in their decisionmaking.

New Section 13(f)—Pending Item Publication. Requires the Commission to establish rules regarding the publication of the status of open rulemaking proceedings as well as a list of the draft items the Commissioners are currently considering.

New Section 13(g)—Shot Clocks. Requires the Commission to establish “shot clocks” that set time frames for Commission action in each type of proceeding it oversees.

New Section 13(h)—Release of Documents and Reports. Requires the Commission to establish a schedule for the release of its required reports and to release all orders within seven days of adoption. The Commission must report to Congress whenever it misses its own deadlines.

New Section 13(i)—Biannual Scorecard. Requires the Commission to report every six months regarding its progress in meeting its shot clocks as well as how it has used administrative law judges and independent studies.

New Section 13(j)—Transaction Review Standards. Preserves the Commission’s ability to review transactions but requires conditions to be (a) narrowly tailored to remedy harms that arise as a direct result of the transaction and (b) within the Commission’s general authority. Applies same requirements to “voluntary” commitments.

New Section 13(k)—Access to Budget Information. Requires the Commission to provide direct access from the homepage of its website to budget, appropriations, and performance information.

New Section 13(l)—Online Publication. Requires the Commission to publish the documents and reports specified in this section on the Commission’s website.

New Section 13(m)—Definitions. Defines several terms used in the Act, including the terms “economically significant impact” and “program activity.”

Section 2(b). Establishes the effective date of new reporting obligations to be 2013 and the effective date of the remainder of new section 13 to be six months after enactment. Requires the Commission to conduct rulemaking to implement new section 13 within one year of enactment.

Section 3. Specifies that the Act does not alter the general framework established by the Administrative Procedures Act and related laws, except where it does so explicitly (*i.e.*, with regard to allowing deliberative collaboration among Commissioners and on the Federal-State Joint Boards).

H.R. 3310, The Federal Communications Commission Consolidated Reporting Act

Section 1. Short Title.

Section 2. Adds section 13 to the Communications Act.

New Section 13(a)—Communications Marketplace Report. Requires the Commission to publish and submit to Congress a communications marketplace report synched to the two-year Congressional cycle.

New Section 13(b)—Contents. Requires the Commission to assess the state of competition in the communications marketplace, the state of deployment including the deployment of advanced telecommunications capability, and regulatory barriers to market entry and competitive expansion. Requires the Commission to identify the issues it plans to address over the next two years as a result of this assessment and to report on its progress on those issues previously identified.

New Section 13(c)—Special Considerations. Requires the Commission to consider intermodal, facilities-based, and Internet-based competition among other forms of competition and to compile a list of geographical areas that are not served by any provider of advanced telecommunications capability. Specifically empowers the Commission to consider international and demographic data in making its assessments and requires the Commission to consider market entry barriers to small businesses in conducting its analyses.

Section 3. Eliminates the ORBIT Act Report, the Satellite Competition Report, the International Broadband Data Report, the Status of Competition in the Market for the Delivery of Video Programming Report, the Report on Cable Industry Prices, Triennial Report Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, the Section 706 Report, and the Report on the State of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, all of which are consolidated into the Communications Marketplace Report. Also strikes from the Communications Act outdated or already repealed reports, including the Report on Competition between Wire Telephone and Wire Telegraph Providers, the 1997 Report on Spectrum Auctions, and several reports repealed by the Federal Reports Elimination and Sunset Act of 1995.

Section 4. Specifies that this Act does not alter the authority of the Commission in any way.

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Should you have any questions regarding the markup, please contact John O'Shea or Ryan Long at (202) 225-2927 regarding H.R. 452 and Neil Fried or Nick Degani regarding H.R. 3309 or H.R. 3310.