



U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

March 10, 2016

TO: Members, Committee on Energy and Commerce

FROM: Committee Majority Staff

RE: Committee on Energy and Commerce Markup

I. INTRODUCTION

The Committee on Energy and Commerce will meet in open markup session on March 14, 2016, in 2322 Rayburn House Office Building and will reconvene on March 15 in 2123 Rayburn House Office Building.

On Monday, March 14, 2016, at 5:00 p.m., the Committee will convene for opening statements only. The Committee will reconvene on Tuesday, March 15, 2016, at 10:00 a.m. to consider the following:

- H.R. 2666, No Rate Regulation of Broadband Internet Access Act; and,
- H.R. 4725, Common Sense Savings Act of 2016.

In keeping with Chairman Upton's announced policy, Members must submit any amendments they may have two hours before they are offered during this markup. Members may submit amendments 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.

II. H.R. 2666, NO RATE REGULATION OF BROADBAND INTERNET ACCESS ACT

In February 2015, the Federal Communications Commission (FCC) reclassified broadband Internet access service as a telecommunications service regulated under Title II of the Communications Act of 1934. As a result of this reclassification, the FCC gained the ability to regulate the rates charged for broadband using both its tariffing authority and its authority over unjust and unreasonable rates for common carrier services. In the same order, the FCC decided to forbear from applying tariffing to broadband.

President Obama and FCC Chairman Tom Wheeler both have opposed the use of the Open Internet Order (Order) for regulating rates. In his YouTube video urging the FCC to reclassify broadband, President Obama stated that "I believe that the FCC should reclassify consumer broadband service under Title II of the Telecommunications Act – while at the same

time forbearing from rate regulation”¹ In addition to having been asked about this issue repeatedly by committees of Congress, FCC Chairman Wheeler stated at the time the Commission adopted the Order that “[w]e forbear from sections of Title II that pose a meaningful threat to network investment, and over 700 provisions of the FCC’s rules. That means no rate regulation, no filing of tariffs, and no network unbundling.”²

However, once the text of the Order was released, it was clear that the freedom from rate regulation envisioned by the President and described by Chairman Wheeler was not what the FCC had adopted. Under the terms of the Order, the Commission has used its authority to forbear from tariffing – before-the-fact setting of rates through the filing of rates with the Commission. But, this does not guarantee that the FCC will not regulate rates. First, the FCC retains the ability to regulate the rates for broadband through its enforcement authority. Sections 201 and 202 of the Communications Act provide authority to ensure that the rates charged for telecommunications services are just and reasonable.³ Through this authority, the FCC can engage in ratemaking by defining what the FCC deems a “reasonable” rate. Second, the Commission’s decision to forbear from rate regulation under the tariffing rules is not binding on successive Commissions.

H.R. 2666 would codify the vision that the President and Chairman Wheeler have both articulated: an Open Internet, free from rate regulation. H.R. 2666 would prohibit the FCC from regulating the rates charged for broadband Internet access service, whether directly through tariffing or indirectly through enforcement actions.

III. H.R. 4725, COMMON SENSE SAVINGS ACT OF 2016

H.R. 4725, introduced by Health Subcommittee Chairman Joe Pitts, would reduce the Federal deficit through targeted reforms to policies under Medicaid, CHIP, and the Prevention and Public Health Fund. The bill would make the following changes:

Section 1. Short Title; Table of Contents.

Section 1 provides the short title of the “Common Sense Savings Act of 2016.”

Section 2. Treatment of Lottery Winnings and Other Lump-Sum Income for Purposes of Income Eligibility Under Medicaid.

As required under the Patient Protection and Affordable Care Act (PPACA), States are required to use Modified Adjusted Gross Income (MAGI), for determining what income to include or disregard in determining Medicaid eligibility for most nonelderly and non-disabled individuals. Income eligibility for Medicaid applicants and new enrollees is based on current

¹ <https://www.youtube.com/watch?v=uKcjQPVwfdK> (transcript available at <https://www.whitehouse.gov/NetNeutrality>).

² Statement of FCC Chairman Tom Wheeler, Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A2.pdf.

³ 47 U.S.C. §§ 201, 202.

monthly household income. Under Medicaid regulations, irregular income received as a lump sum, such as lottery or gambling winnings, is counted as income only in the month received.

Section 2 would require States, for purposes of determining MAGI for Medicaid and CHIP eligibility, to consider monetary winnings of \$60,000 or more from lotteries and certain other lump sum income as if it were obtained over multiple months, even if obtained in a single month. The winnings would be counted in equal monthly installments over a specified period of months, not to exceed 120 months for winnings or income over \$1,240,000. This section would close a loophole in current statute and regulations that have allowed lottery winners, including multi-million dollar winners, to retain tax-payer financed Medicaid coverage.

Section 3. Eliminating PPACA Enhanced Medicaid FMAP for Prisoners.

Medicaid does not pay for most the health care of individuals incarcerated in prison. However, based on guidance issued by the Centers for Medicare and Medicaid Services, States have been allowed to claim Federal Medicaid matching funds for costs incurred for inpatient services (but no other services) provided to prisoners who would otherwise be Medicaid-eligible, and who are admitted to a non-correctional medical facility for at least 24 hours.

As a result of the Medicaid expansion under PPACA, more prisoners are likely to be eligible for Medicaid in States that have expanded Medicaid. Under current law the Federal government is financing 100 percent of the costs for this expansion population. Thus, prisoners' enrollment in Medicaid represents a significant cost shift to the Federal government.

Section 3 would eliminate the enhanced Federal Medicaid matching funds available for the coverage of prisoners as a result of the PPACA Medicaid expansion. States would continue to be allowed to receive Federal funds for Medicaid coverage for prisoner's inpatient services, but at the traditional Federal matching rate.

Section 4. Extending Previous Medicaid Threshold Applied for Determining Acceptable Provider Taxes.

The Federal government matches each State's expenditures for Medicaid services on the basis of a statutory formula known as the Federal Medical Assistance Percentage (FMAP). States have considerable flexibility in determining the source of funds to use to finance the non-Federal share. States finance the non-Federal share primarily with State general funds. However, States may also rely on funds from local governments and may levy taxes on health care providers to generate revenues to finance the non-Federal share of Medicaid payments. Federal statute and regulations place limits on States' ability to use provider taxes. For example, providers cannot be "held harmless"—there may not be a direct or indirect guarantee that providers will be repaid for the amount of taxes that they contribute. The indirect guarantee test does not apply if the tax rate falls within a "safe harbor" that is currently established as 6 percent of net patient revenue.

Section 4 would reduce the amount of the non-Federal share that can come from providers by gradually reducing the Medicaid provider tax threshold from its current 6 percent of the net patient service revenues to 5.5 percent, the amount in place until October 1, 2011.

Section 5. Sunsetting PPACA Increase in Enhanced FMAP Under CHIP.

Federal statute specifies an enhanced FMAP (E-FMAP) rate for both services and administration for the Children's Health Insurance Program (CHIP) Program. The E-FMAP rate is calculated by reducing the State share under the regular FMAP rate by 30 percent. By statute, the E-FMAP for CHIP traditionally ranged from 65 percent to 85 percent.

PPACA included a provision to increase the E-FMAP rate by 23 percentage points (not to exceed 100 percent) for FY 2016 through FY 2019. As a result, in FY 2016, the CHIP programs in 12 States are 100 percent Federally-financed. However, the Congressional Budget Office has estimated that the 23 percent funding increase in does not result appear to increase net enrollment in the program.

Democrats and Republicans in Congress – and governors of both parties – hailed CHIP as a success *at the original match rate*. Therefore, Section 5 would eliminate the 23 percentage point increase in the CHIP matching rate implemented in PPACA and return the joint Federal-State financing arrangement to the program.

Section 6. Repeal of the Prevention and Public Health Fund.

PPACA created the Prevention and Public Health Fund (PPHF) and funded it with advanced appropriations. Each year, in perpetuity, \$2 billion will be available for the Secretary of the Department of Health and Human Services to use to pursue “expanded and sustained national investment in prevention and public health programs.”

Section 6 would repeal the Prevention and Public Health Fund, saving taxpayers over \$14 billion over the next ten years.

IV. STAFF CONTACTS

If you have any questions regarding H.R. 2666, please contact David Redl or Kelsey Guyselman. If you have any questions regarding H.R. 4725, please contact Paul Edattel or Josh Trent. Committee staff can be reached at (202) 225-2927.