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BEIJING BRUSSELS DUBAI JOHANNESBURG LONDON
LOS ANGELES NEW YORK SAN FRANCISCO SEOUL
SHANGHAI SILICON VALLEY WASHINGTON

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

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Memorandum

From: Robert Long, Muftiah McCartin, and Thomas Brugato

Re: Overview of IPAB Termination Provisions

This memorandum provides an overview of the statutory provisions governing termination of the Independent Payment Advisory Board (“IPAB”), 42 U.S.C. § 1395kkk. As explained below, a Joint Resolution introduced between January 1 and February 1, 2017, and enacted by August 15, 2017 terminating the IPAB will effectively terminate the statute, because (1) the Chief Actuary’s determination issued in July 2017 did not trigger the statute, and (2) the Chief Actuary will be prohibited from triggering the statute in any future year.

I. Overview of IPAB

The IPAB provisions are designed to limit the growth of Medicare spending. *Id.* § (b). They require the IPAB to propose Medicare spending cuts if the Chief Actuary of the Centers for Medicare and Medicaid Services finds, in any given year, that the projected actual growth rate in Medicare spending will exceed a target growth rate. *Id.* § (c)(3)(A), (c)(6). Although the Chief Actuary is likely required to issue such a determination by April 30 each year, the Chief Actuary has failed to meet that deadline since 2013. *Id.* § (c)(6)(A).¹

If the Chief Actuary determines that the projected growth rate in Medicare spending exceeds the target growth rate set by the statute, the IPAB—or the Secretary of Health and Human Services, if the IPAB has not been constituted (which it has not, as no members have been appointed to it)—must develop a proposal to reduce spending to “at least” the savings target set by the Chief Actuary. *Id.* § (c)(1)-(3). The proposal must be submitted to Congress in January the year after the Chief Actuary’s determination. *Id.* § (c)(3). The Secretary must implement the proposal beginning on August 15 of that year, unless it is revised by Congress. *Id.* § (e)(1).

¹ The Chief Actuary must make the determination “not later than April 30, 2013 and annually thereafter.” *Id.* § (c)(6)(A). This language could be interpreted to impose an April 30 deadline only for 2013, but that interpretation would allow the Chief Actuary to delay a determination until December 31, just two weeks before the IPAB (or the Secretary, if no IPAB has been established) is required to submit spending proposals based on the Chief Actuary’s determination.

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II. Joint Resolution to Discontinue IPAB Provisions

The statute provides that Congress may discontinue the IPAB by enacting a Joint Resolution. To be effective, the Joint Resolution must be introduced between January 1 and February 1 of 2017, and be enacted by August 15, 2017.² *Id.* § (f)(1)(A), (f)(3). The Joint Resolution must be passed by a three-fifths vote of each house of Congress. *Id.* § (f)(2)(F).³ In the Senate, the Joint Resolution process is governed by fast-track procedures. *Id.* § (f)(2).

III. Consequences of Enacting a Joint Resolution

Enactment of the Joint Resolution by August 15, 2017 would have the practical effect of terminating the IPAB process.

The statute provides that a timely Joint Resolution terminates the authority of the Chief Actuary to “make any determinations” under the statute “after May 1, 2017.” *Id.* § (f)(3)(A)(i). Accordingly, no such determinations can be issued after the date of enactment of any Joint Resolution.

The Chief Actuary issued a determination on July 13, 2017, before enactment of a Joint Resolution, but did not find that spending cuts are required for 2019.⁴ Accordingly, no proposal would need to be submitted in January 2018. *Id.* § (c)(3)(A)(ii).

As a result, enactment of the Joint Resolution by August 15, 2017 will effectively terminate the statute. That is because the Chief Actuary will no longer be able to make determinations that could trigger an obligation to submit a proposal. Moreover, the Joint Resolution also terminates the IPAB’s ability to submit a proposal “after January 16, 2018.”⁵ *Id.*

² August 15, 2017 refers to the date by which the Joint Resolution is (1) signed by the President, (2) becomes law after the President takes no action for 10 days (not including Sundays), or (3) Congress overrides the President’s veto. *See* U.S. Const. Art. 1 § 7.

³ Consideration of a Joint Resolution in the House will be under procedures prescribed by a rule reported to the House by the House Rules Committee. Such rule will likely turn off the three-fifths’ vote requirement in subsection (f)(2)(F), allowing the Joint Resolution to pass by a simple majority.

⁴ Chief Actuary Determination (July 13, 2017) (“Because the projected 5-year Medicare per capita growth rate does not exceed the Medicare per capita target growth rate, there is no applicable savings target for implementation year 2019 (determination year 2017).”), *available at* <https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/IPAB-2017-07-13.pdf>

⁵ If the July 2017 determination had found that spending cuts were required, a proposal would have been required to be submitted by the IPAB “on January 15” of 2018, and that would not have been prevented by the Joint Resolution, which would only have barred the IPAB from submitting proposals “after January 16, 2018.” *Id.* § (f)(3)(A)(ii), (c)(3)(A)(i). Because the IPAB would not have been constituted, the Secretary would have had an obligation to submit a proposal in place of the IPAB in January 2018. *Id.* § (c)(5). Such a proposal could, of course, have been halted by separate legislation.

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§ (f)(3)(A)(ii). Because the statute was not triggered in 2017, and no determinations could be issued in 2018 or beyond (nor any proposals submitted after January 2018), the IPAB would effectively be terminated by enactment of the Joint Resolution by August 15, 2017.