



THE PERIODIC COUNSEL ADVISORY



"Knowledge is Good" - Emil Faber

THE SEQUESTER THAT DIDN'T HAPPEN

Sequesters, the "doc fix", and how something complicated can be made even more so by seasoning with budget process.

In the summer of 1997, something happened just before Congress went on its much cherished, inviolable even, August break. It occurred just before Members and Staff alike escaped the dense steamy D.C. summer, when people wade rather than walk down the street, when staffers might be heard muttering "whose bright idea was it to build the U.S. capital in a swamp?" and when moving to Canada becomes a plausible idea.

Just before the halls of Congressional office buildings became replete with crickets and tumbleweeds, Congress passed, and President William J. Clinton signed, the Balanced Budget Act of 1997.

Among quite a number of deficit reduction reforms in it was the "Sustainable Growth Rate" idea related to the Medicare program. This made some important changes to the way in which doctors were reimbursed for services provided under that health insurance program for seniors. In doing so, deficit reduction was achieved, paving the way for a balanced budget shortly after that Act's signing amidst the steam.

A problem with it, though, became apparent about five years later. The reimbursements were going to be a lot less than people really expected, or at least less than what most people wanted – especially doctors, Medicare beneficiaries, and Members of Congress. This was in 2003 and Congress passed the first of many short-term modifications to the SGR, modifications that became known as "the Doc Fix". It essentially boosted reimbursement rates for participating doctors.

BUMBLE QUERY: WHAT IS A "MEASURE"?

For purposes of drafting law, a tried and true method by which different kinds of legislation may be referred to is: "a bill or joint resolution, or any amendment thereto or conference report thereon..."

Since this is a mouthful, and takes up space in a sentence that might otherwise be pithy in function and form, another word was needed. Hence the term "measure" has come into use, at least in House budget law.

Other uses may be found in law and even in the English language: "the measure of a man", "measure twice cut once", "Three measures of Gordon's, one of vodka, half a measure of Kina Lillet." (James Bond's Martini).

So if "measure" appears, it might be a law, a drink, or James Bond obtaining employment a position at Legislative Counsel.

These fixes, it turns out, were quite expensive since the expected level of spending (the amount estimated in the much loved, and much detested, “baseline”) was far lower than desired, so a great deal of additional money was required to “fix” the “docs”.

One favored method of “paying for” this increased spending was to prevent the lower reimbursements in the short term by reducing the reimbursements even more in future years (“I will gladly pay you Tuesday for a really expensive hamburger today”).

“Wait a minute, doesn’t increasing spending now and decreasing it later as an offset violate some sort of point of order?” you might well ask. The answer, as you might expect, is “Why yes. Yes it does.” That might be something to deal with later – often in budget speak, “later” means “never” and also often used when talking about Budget Act points of order (section 302(f), by the way, that’s the one).

For the SGR, the future projected decreases in reimbursements began to sink really, really low to the point the joke went around: “Do you think we can get the doctors to pay *us* for services they provide?” These short term “fixes” became harder and harder to offset. Recently a more permanent fix passed the House and on April 14th, passed the Senate 92-8, and after that enacted.

Included in the legislative text of this bill is the following language some might view as obscure, arcane even:

STATUTORY PAY-AS-YOU-GO SCORECARDS.—The budgetary effects of this Act shall not be entered on either PAYGO scorecard maintained pursuant to section 4(d) of the Statutory Pay-As-You-Go Act of 2010.

Though it is not the subject of water cooler discussion, or the cause of many bar fights, those few words would have quite the repercussion and would be keenly felt had they been absent that day.

If arcane language had decided to take the day off and go wherever it is arcane legislative text goes on vacation, people would have noticed, and not just the kind of people who are reading this now.

The Interesting Part and the Budget Control Act

This is where the interesting part starts, since this piece is not about the SGR in particular, but about a twist in the winding roads



of the budget process – a twist on sequestration. It is a component yet to hit in force, but if it does, it might cause some folks to ask “who came up with that?” This is a very good, though unanswerable, question.

When the Budget Control Act of 2011 (BCA) was enacted, it set in motion a rather unique system of across-the-board cuts to spending. Though sequestration has been an essential part of budget law since 1985, the crafters of the BCA found a new and even more complicated way of using it, one incomprehensible for even daftly seasoned budget technicians.

The main point in this context is that it set in motion automatic spending reductions that would reduce entitlement programs, including Medicare reimbursements to physicians. These reductions are set to occur in current law every year under section 251A of the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA) through the end of fiscal year 2024. These reductions are limited to 2% of the payments under Medicare – that limitation is special to Medicare. Other non-exempt direct spending either has special rules associated with it (such as Student Loan origination fees) or is just reduced by a higher percentage than Medicare.

When the legislation addressing the “doc fix” was enacted, it did not change this BCA-derived (251A of BBEDCA) sequestration – that will still happen 15 days after the end of the session of Congress, and will continue to be so ordered through fiscal year 2024, unless the law is changed. The order actually is included in something called the “sequestration preview report” that comes earlier, but that’s not relevant, and is even more mystifying as to method.

Everyone knows about this. Not news.

The Wonders of the Statutory Pay-As-You-Go Act of 2010

Yet something lurked in the nether regions, the recesses, of budget land (and not the enjoyable kind of recesses). It was a thing some folks hadn’t taken into account, a thing about which still not very many people are aware: the second sequestration. If this is so ominous, why do so few people know about it? This has a simple answer: Because it didn’t happen. Reading the title of this piece, that was probably a spoiler.

A year before the BCA was enacted, another sequestration-related bill became law: The Statutory Pay-As-You-Go Act of 2010



(S-Paygo). This was an oddly written law since it was based on the 1990s budget control system that came from the Budget Enforcement Act of 1990 (BEA), but only partially so. The BEA amended BBEDCA and had an annual deficit test for direct spending (generally entitlement programs) and also discretionary spending caps. These expired at the end of 2002. Though S-Paygo did not include discretionary caps, it brought back the deficit-test for enacted legislation increasing spending or cutting taxes.

If the net effect of all law enacted during a year was a deficit increase, then non-exempt direct spending in the upcoming fiscal year would be automatically cut by a percentage high enough to erase the resulting deficit.

The reason for S-Paygo's oddity, though, is not because it didn't also include discretionary caps like the expired provisions of BBEDCA (the BCA did this later and made BBEDCA permanent). It was odd because, as close as its provisions were to the relevant sections of the expired pay-as-you-go in BBEDCA, only half of it was put in that law. The other half was set up as freestanding law. So half of S-Paygo is in BBEDCA, half is outside of it. That's odd.

So how come we haven't heard much about S-Paygo? When the President's health care law was enacted, whatever one's opinion on the relative merits of that law, the scorekeepers estimated it would reduce the deficit by \$82.6 billion over five years and \$44.4 billion over ten years – all of which was placed on the S-Paygo Scorecards as positive "balances".

There are actually two S-Paygo scorecards: They enforce a 5-year and a 10-year period. Through a procedure known as "averaging", OMB adds up the deficit effects an enacted bill has in each fiscal year of the two periods, and then divides these totals by five and ten. OMB records the result for a fiscal year on the scorecards. The scorecard having the higher deficit amount on it for a fiscal year is one OMB uses when sequester day arrives (a not very merrily celebrated holiday of dubious distinction), and that is the level of spending reduction ordered for that fiscal year.

While there have been other bills that both increased and decreased the deficit during those time periods, the President's health law has had the most substantial effect and placed large positive balances (by decreasing the deficit) on the scorecards. This makes a large sequestration very unlikely since all those decreases in the deficit act as offsets for future enacted bills causing deficit increases. Until a bill with a sufficiently large deficit increase is enacted to



erase those positive balances and cause the balances on the scorecards to go negative, the waters remain unroiled.

One reason it hasn't happened yet is that Congress began regularly including language in bills having deficit impacts instructing the Office of Management and Budget (keeper of the Scorecards) to ignore a bill's budget effects when calculating the balances on the scorecards. By pretending the deficit effects don't happen, the positive balances remain in place.

When those balances finally are erased, and deficits are calculated to happen, a sequestration will be triggered. As an example, this is what would have happened if all those tax cuts and tax extenders passed through the House over the past several years had been enacted and did not include the magic "get out of sequestration jail free card" language.

The Background of Sequestration

Under the 251A of BBEDCA, there will be a sequestration for fiscal year 2016 and the OMB order will effect a reduction in Medicare by an estimated \$12.1 billion. This will be caused by the two percent sequestration required under the terms of the BCA-amended BBEDCA. That same law exempts most entitlement programs and has a two percent limit for Medicare reductions. All non-exempt programs that don't receive special treatment like Medicare are subject to a 6.8 percent across-the-board spending reduction.

The second sequestration under S-Paygo, currently the 5-year scorecard has a negative balance for fiscal year 2016 on it of \$440 million – this means that if nothing is done, that amount will need to be cut from all non-exempt programs, and the special rules applied. Even though most entitlement programs are exempt, \$440 million spread over the remaining entire amount, nearly \$300 million from Medicare will end up having a small impact.

The Round Up

Bringing this all together, one might note that it is impossible to tell this story without a litany of letters littering the landscape. That is not merely alliteration, it gives rise to the semi-humorous semi-pejorative term "letterbug" for one who says things like "BEA 1990 PAYGO amended BBEDCA, extended by the BEA 1997 in the



BBA 1997 but expired and then S-Paygo came, but OMB still has to enforce the BCA BBEDCA sequester, as adjusted by the BBA 2013.”

The round up comes with an amendment offered in the Senate to strip out the previously quoted language prohibiting the placement of the increase in the deficit that will be caused by the doc fix on the scorecards. Without that language, the S-Paygo 5-year scorecard amount of \$440 million will be increased by an amount to be determined by OMB, but it would be in the billions added to that relatively small amount. The amendment failed.

Herein lay the basic kicker: Under the sequestration caused by the deficit test in S-Paygo, the limitation for Medicare is not 2%, it's 4% -- it's just the way the law is written.

A reasonable, though untested, conclusion would be that these two sequesters would be cumulative and ordered on the same day, 15 days after the end of the session for this year (1st session of the 114th Congress). One might use the word “ironic” when describing a budget process that would require a 6% reduction in Medicare spending, in part caused by a bill that sought to boost Medicare spending in order to prevent a reduction in Medicare spending.

Quote of the Day

“When in doubt, reinvent the wheel. When your new wheel comes out oval shaped and someone has the outrageous temerity to point it out, just say: ‘I don’t like going around in circles.’”

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