

## **Failsafe Drafting Options with Additional Examples**

Navigating around the objections to the Cost Containment Coalition Failsafe Proposal requires addressing two issues:

1. Ensure that the cost containment provision does not suffer from a 60 vote point of order in the Senate, or, at a minimum, that the provision mirrors other provisions in the bill that may suffer from the same 60 vote point of order.
2. Ensure that the cost containment provision does not trigger any "on-budget" categorization by the CBO. The cost containment provision under discussion does not mandate reductions that the Secretary may propose but rather forces Congressional consideration in a manner that improves the probability of action. If the House Budget Committee or the CBO have determined that such "probability of action" is high enough to be considered a mandate, then – and only then--you must dial back the process to lower such probability.

There are three alternative pathways to navigate both these hurdles:

- Modify the cost containment mechanism;
- Dial back the Congressional consideration requirements of the private sector cost containment recommendations;
- Rewrite the private sector cost containment to make policy recommendations, but with requirements that enhance their power and usage.

### **Options:**

#### **1. *Modify the Failsafe Cost Containment Mechanism***

All drafting of any such expedited procedure for consideration of cost containment should mirror the provisions of section 3403 in the Senate passed bill, the Independent Medicare Advisory Board (IMAB). The section is important because it spells out expedited procedures for consideration of cost containment measures in Medicare, including a time certain for a House and Senate vote. An important question is did section 3403 violate section 306 of the Congressional Budget Act? (N.B., No 60 vote point of order was raised against this provision in the Senate, but that does not mean that the point of order did not lie against it.)

If the House and Senate negotiators plan to include some variation of this expedited Medicare savings proposal, that model should be used as a starting point for the Failsafe mechanism, but with an important twist.

**A.) Take section 3403 of the Senate passed health bill, and draft a similar proposal that applies to all federal healthcare, and expand it to apply on an annual, biennial or similar timeframe. This will solve "half" the problem by applying a repeated and automatic cost containment provision to all public health expenditures, not just a one-time mechanism to Medicare.**

Note that IMAB is a one-time commission to make recommendations, and that the Secretary implements the savings unless Congress supersedes those recommendations or disbands the IMAB. This effectively makes Congressional consideration not approval, but a disapproval resolution – effectively a bicameral legislative veto -- something happens unless Congress acts to stop it. This creates a very high probability of action.

By using the existing Senate provision, or whatever variation comes out of the House and Senate negotiations, and applying it to either all public health spending or even public and private health spending, that would ensure that the Failsafe cost containment provision would not suffer from any NEW 60 vote point of order in that one would already apply against the existing IMAB provision.

**B.) Create a second board to review and make recommendations on private sector cost containment. Specifically preclude ANY such private sector cost containment recommendations from being submitted to Congress under the same terms and conditions of A.). Also prohibit the automatic implementation of any such savings by the Secretary or any other government authority. However, permit such recommendations to be submitted separately to the Congress and to be "considered" jointly by the Congress when considering implementing any public sector savings under A.).**

It appears that some believe that any effort to include private sector savings in an automatic implementation or expedited Congressional consideration process similar to existing section 3403 or the so-called BRAC model commission could trigger an "on-budget" classification of some element of private sector health care expenditures. By separating the automatic steps on the public sector cost containment from the private sector provisions, this on-budget designation can be avoided while maintaining the sentinel effect.

This option would allow the private sector cost containment provisions to be recommended, and perhaps even drafted, but are not part of the automatic implementation mechanism by the Secretary or the automatic consideration requirements by the Congress. However, a formulation that permits (but does not require) Congress to consider such private cost containment mechanisms at the same time of any consideration of public cost containment steps while less desirable from a policy perspective would clearly avoid this perceived problem.

Together, these provisions would allow any 60 vote point of order to be successfully navigated (either by avoiding, or flying under the point of order that already would lie against the bill) as well as to avoid so strong an automatic mechanism involving the private sector that any "on budget" characterization could be made by CBO. The probability of serious consideration and inclusion of private sector savings in the expedited public sector savings mechanism could also be enhanced if this alternative were selected.

## 2. ***Dial Back Congressional Consideration Requirements***

Note that the policy options to dial back Congressional consideration requirements already under discussion adequately serve this section. Those recommendations from the NCHC Action Fund are reproduced below. For each of these recommendations, note that the greater the probability of automatic action by the government with regards to the private sector cost control, the higher the probability of the CBO classifying the mechanism as tightly controlling the private sector, which would trigger the "on budget" designation. It would certainly appear that proposal number 1 below is in effect a disapproval resolution, and would likely trigger the on budget designation. Recommendations 2, 3 and 4 have reduced probabilities of action and therefore are less likely to trigger the on budget categorization by CBO. Each of those could be individually considered :

(1) Expedited consideration of policy recommendations by Congress with limited debate. Automatic action unless Congress within a certain period of time (e.g., 45 days) adopts a joint resolution disapproving the recommendations (BRAC legislative veto model).

(2) Expedited consideration of policy recommendations by Congress with limited debate. Recommendations introduced by the chairs of the House and Senate committees with jurisdiction over the recommendations. Policy recommendations would not be implemented unless passed by both House and Senate (either by majority vote or supermajority vote).

(3) Policy recommendations to be included in President's budget submission. Policy recommendations would not be implemented unless passed by both House and Senate (either by majority vote or supermajority vote).

(4) Policy recommendations to be reviewed by CBO or GAO and included in President's budget submission. Policy recommendations would not be implemented unless passed by both House and Senate (either by majority vote or supermajority vote).

### **3. Convert to Strong Reporting Requirements**

Finally, it is possible to have public and private sector cost containment provisions drafted in a manner that makes them easy to explain, easy to use, and hard to resist. A designated board could draft these recommendations, requiring the Secretary to craft them into legislative proposals for submission to Congress. The CBO and GAO could be required to review them on an annual basis for merit and budgetary savings, and publish their findings prior to congressional debate on the budget resolution. The president's budget could be required to include a separate appendix that identifies, scores and justifies the inclusion or exclusion of such recommendations in the president's budget.

#### **Possible Options for Levels of Congressional Consideration of the Policy Recommendations (i.e., failsafe)**

*Note that the legislative examples under the options below should not and cannot be used to demonstrate whether a particular level of congressional consideration triggers the "on budget" charge. These examples are merely being provided to facilitate legislative drafting of the options.*

- (1) Expedited consideration of policy recommendations by Congress with limited debate. Recommendations introduced by the majority leaders of the House and Senate. Policy recommendations would not be implemented unless passed by both House and Senate (either by a majority vote or a supermajority vote).

#### ***More specifics about a potential process:***

- A bill containing recommendations must be introduced by the Senate and House majority leaders. The bills are referred to the appropriate committees with jurisdiction. If the bill is not introduced in this way, any member of Congress can introduce the bill starting on the 5<sup>th</sup> day after submission of the recommendations to the President and Congress.
- Within a certain period of time (e.g., 60 days) after bill introduction, each committee with jurisdiction shall report the bill. If a committee does not report the bill within the timeframe, the bill will be discharged from such committee.
- All amendments must be relevant to the bill. Amendments shall not exceed 5 hours of debate.
- Floor Consideration in Senate. Within 30 days after the bill has been reported or discharged, the bill shall be considered. Motions to proceed are not debatable nor subject to motions to postpone considerations or consider other business. Debate is limited to 40 hours. [could eliminate the right to filibuster here] Bill shall be recommitted to committee for further consideration unless 3/5 [or a majority] of

members agree to proceed to passage. Vote shall immediately follow conclusion of 40 hour period.

- Floor Consideration in House. Similar floor consideration as in the Senate.
- Consideration in Conference. Conferees shall be promptly appointed. All motions to proceed to conference are not debatable. Conference committee shall file report within 30 days after conferees appointed. Report shall be acted on by Senate and House within 5 days after report filing. If conferees unable to agree within 30 days, they shall report back to their respective Houses.
- If a conference report is defeated, debate on any request for a new conference is limited to 1 hour.

**Legislative examples:**

- Section 7 of S. 355 introduced in the 110<sup>th</sup> Congress.
- Potentially SA 3256 (Bennet Amendment), subsection (f) as reportedly being modified to avoid the “on budget” categorization.
- Language contained in the Senate bill pertaining to Medicare cost containment (Section 3403, pp. 1017 – 1029) [*Note, under Section 3403, the Secretary implements savings unless Congress supersedes those recommendations or disbands the IMAB/IPAB. This effectively makes Congressional consideration not approval, but a disapproval resolution. Thus, the language specifically pertaining to House and Senate consideration and approval in Section 3403, is an option but not the full process for implementing Medicare cost containment proposals.*]

- (2) Policy recommendations to be included in President’s budget submission. Expedited consideration of policy recommendations by Congress with limited debate. Recommendations introduced by the majority leaders of the House and Senate. Policy recommendations would not be implemented unless passed by both House and Senate (either by a majority vote or a supermajority vote).

**More specifics about a potential process:**

- The President would be required to submit specific legislative language within 15 days of the applicable year’s budget submission. The President’s legislative proposal must be introduced in Congress as a bill and referred to the committees of jurisdiction. Whether or not the President submits legislation, the House and Senate committees of jurisdiction are required to report legislation within a certain time period.
- See bullets under option 1 for more specifics about a potential process.

**Legislative example:**

- Language contained in the “45 Percent Trigger” provisions included in the 2003 Prescription Drug Law (P.L. 108-173, Section 803 – 804). The process is described in the Appendix of a February 15, 2008 Center on Budget and Policy Priorities paper, “The President’s Budget and the Medicare ‘Trigger’”. See, <http://www.cbpp.org/cms/index.cfm?fa=view&id=1143>.
- (3) Policy recommendations to be reviewed by CBO or GAO and included in President’s budget submission. Policy recommendations to be included in President’s budget submission. Expedited consideration of policy recommendations by Congress with limited debate. Recommendations introduced by the majority leaders of the House and Senate. Policy recommendations would not be implemented unless passed by both House and Senate (either by a majority vote or a supermajority vote).

***More specifics about a potential process:***

- Policy recommendations are submitted to the President, Congress and the GAO. To assist Congress, the GAO shall review recommendations and inform Congress as promptly as practicable on the merit of the recommendations and whether such recommendations could result in the achievement of targets.
- See bullets under options 1 and 2 for more specifics about a potential process.

***Legislative example:***

- Language contained in Title X of the Congressional Budget Act of 1974, P.L. 93-344, Sections 1014 - 1017.

**Possible Options for Body/Entity Making Policy Recommendations**

- (1) **HHS Secretary**
- (2) **Independent Payment Advisory Board.** The proposal could build off of the Senate bill (Section 10320 included in the Manager’s Amendment).
- (3) **GAO.** [This option would require language to ensure that GAO has the authority to undertake such activities.]
- (4) **OMB/CBO.** The proposal could build off an amendment – establishing a failsafe process to ensure that budgetary savings are equal or exceed estimated savings – previously offered by Senator Bennet (D-CO) which was under consideration for inclusion in the Manager’s Amendment and may now be in play in an amended format.

### **Possible Options for Overall Proposal**

- (1) **Review of Unit Costs.** Since premium increases are primarily driven by unit price increases, expand any processes to review premium rates to include a review of the cost of health services and supplies. If unit price increases exceed a specific threshold (which takes into account factors such as changes in technology and demographics), then the Secretary should submit recommendations to Congress aimed at slowing the rate of growth in costs associated with the relevant stakeholder sector(s).
  
- (2) **Setting of Targets.** Establish a specific affordability goal for the system beginning in 2011. This goal, for example, could be to reduce the rate of growth of national health expenditures to 1.5 percentage points below projections for each subsequent year in the budget window. An annual report should be issued by the Secretary or another entity to monitor each stakeholder sector's progress in helping to achieve this goal and identify categories of high spending. Additionally, specific recommendations should be made to reduce costs in areas which exceed projections enabling Congress address any cost-shifting or savings shortfalls expeditiously.
  
- (3) **Failsafe Mechanism.** Establish a failsafe process that would be triggered if the annual increase in national health expenditures exceeds projections. The Secretary or another entity should issue policy recommendations to Congress within 90 days of the end of the calendar year to bring costs in line with projections. Congress then would have a certain amount of time to evaluate the recommendations. Congress would have to approve the recommendations in order for them to go into effect. Congress