



## **Senate Could Sabotage IPAB By Blocking Board Member Nominations**

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The Senate could try thwarting the health reform law's Independent Payment Advisory Board by blocking nominations to the panel, congressional and lobbyist sources say. No one knows of senators in either party who are considering such a move, and the president could recess appoint IPAB members, but sources say blocking nominations is probably the easiest way to sabotage the IPAB, were any senators so inclined. The appropriations process also could be used, sources say, though that would probably require changing the law.

The IPAB, which is authorized to be formed as early as this October, is unpopular with lawmakers in both parties because it usurps Congress' power over Medicare payments. The reform law calls for the yet-to-be-established board to develop proposals that reduce the per capita growth rate of Medicare spending and requires that CMS implement the proposals unless Congress blocks them. To block them, Congress must come up with an alternative plan that saves as much money.

Blocking board member nominations likely would have more to do with blocking the board itself than it would have to do with senators' qualms with the individuals nominated, sources say. That's because, once in place, IPAB restricts Congress in many, unprecedented ways, one of which makes it extremely difficult to undo the fast-track procedure that automatically implements IPAB recommendations. The law specifies that Congress may only repeal the law's fast-track procedures during a 14-business day period in 2017 - between Jan. 1, 2017 and Jan. 31, 2017. The repeal must receive a three-fifths vote in the House and Senate. The law further dictates that the repeal must be done through a joint resolution, and it even prescribes how that joint resolution must be written.

The Congressional Budget Office projects that the IPAB would save \$13 billion over 10 years, and the Senate would have to come up with an offset were it to repeal the measure. But letting board nominations languish would not require such offsets, sources say.

IPAB was included in the Senate version of the health overhaul law and was especially unpopular in the House, where both parties openly criticized it. Sources say Senate Republicans would be the most likely to block nominations, and question whether Senate Democrats would mount much of an opposition were Senate Republicans to do so.

However, some lobbyists suggest the IPAB may not be sufficiently high profile for senators to bother going to the mat over it.

Licy Do Canto of the Do Canto Group said there are several high-level political appointment openings among federal agencies and it is impossible to predict whether any senators would place holds on IPAB board members, which would likely be a lower priority than most higher-up agency positions. Do Canto pointed out that the head of the Wage and Hour Division at the Department of Labor has not been recess appointed, even though that's an important position for the administration's labor policy agenda. Although

holds have become more common in recent years, senators still do not use them without a certain amount of consideration, and they typically do not hold nominations without first alerting their party's leadership, he said.

"That's a perfect tactic if you don't want the board to be operational," he said, but added that he has not heard of anyone considering such a move.

A Senate Republican aide echoed those comments. No one has considered IPAB holds, as far as he knows, but it's an obvious tactic that could be used. Also, Republicans could delay nominations in hopes of nominating Republicans to the board to blow up the IPAB from the inside, the aide said.

IPAB is to be made up of 15, presidentially appointed members. Two HHS officials sit on the board. They are not Senate confirmed, but they are ex officio, non-voting members. IPAB may hold hearings with any number of members, including only the two HHS members, but a source familiar with IPAB said a majority of the appointed members of the Board are needed to make recommendations. Thus, if the Senate does not confirm any appointed members, IPAB may not make recommendations.

However, the law requires that IPAB submit a report each year by Jan. 15, and if it fails to do so, the HHS secretary may submit payment-cutting recommendations in its stead.

**Also, the president could recess appoint the IPAB slots.** That's exactly what happened several years ago when the Senate tried blocking nominations to the Base Realignment and Closure (BRAC) Commission, a source familiar with the issue said. The Senate could stay in pro forma session to stymie recess appointments, but that is unlikely and might not ultimately work, the source added.

"And could you imagine the napalm-like politics if, post-Berwick, the president recess appointed the IPAB members?" a Republican aide said. "Wow."

A spokesperson for Sen. Orrin Hatch (UT), who will be the ranking Republican on the Finance Committee, declined to speculate about the IPAB nomination process because no one has been nominated.

**Congress potentially could also use the appropriations process to block IPAB.** Lawmakers often cut off funding for policies or committees they don't like, and the appropriations process could be used in this instance, too, but they likely would have to change the law first, a source familiar with the IPAB measure says. The health overhaul law appropriates \$15 million to IPAB in fiscal 2012 and sets up an automatic appropriation for each subsequent year of that amount plus cost-of-living adjustments. The money comes out of a combination of two Medicare trust funds, which means it could be difficult to use the appropriations process to block funding.

However, Congress might be able to change the law, the source says. The health reform law makes it difficult for Congress to change other aspects of IPAB. It restricts the IPAB process by requiring super majorities to change IPAB recommendations in implementing bills or in any subsequent legislation, and it requires a supermajority to discontinue the board and stop the automatic IPAB implementation process. But changing the appropriations for the board in subsequent legislation does not seem fall into either of those categories, the source says, though the decision would be left to Congress' parliamentarians.

"I think the Senate could delay the process by not confirming them, but ultimately not stop it," the source said. -- *John Wilkerson* ([jwilkerson@iwppnews.com](mailto:jwilkerson@iwppnews.com))