

July 13, 2011

**“FAST TRACK” PARLIAMENTARY PROCEDURES RELATING TO THE
INDEPENDENT PAYMENT ADVISORY BOARD (IPAB):
SUMMARY OF MAJOR POINTS**

Hearing Before the House Committee on Energy and Commerce
Subcommittee on Health

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- The Independent Payment Advisory Board (IPAB) established by the Patient Protection and Affordable Care Act (PPACA) is made of up 15 individuals, appointed by the President, each subject to the Senate confirmation process. This means that IPAB nominees face the potential of extended Senate debate, the cloture process, and, under certain limited parliamentary circumstances, might be recess appointed.
- Under PPACA, the IPAB is, beginning in 2014, required to put forth recommendations on ways to reduce future rates of Medicare spending, along with legislation implementing these recommendations. The Secretary of Health and Human Services is required to automatically implement IPAB’s recommendations by August 15 of the year they are submitted, unless legislation is enacted superseding them.
- PPACA permits Congress to amend the IPAB-implementing legislation, but only in a manner that achieves at least the same level of targeted reductions in Medicare spending growth as are contained in the IPAB plan. The Act bars Congress from changing the IPAB fiscal targets in any other legislation it considers as well, and establishes a super-majority vote requirement in the Senate to waive this provision.
- The Act establishes special “fast track” parliamentary procedures governing House and Senate committee consideration, and Senate floor consideration, of legislation implementing the IPAB’s proposal. These mandates the immediate introduction of the legislation in Congress, and establish deadlines for committee and Senate floor consideration, as well as limit the amending process. PPACA establishes a second “fast track” procedure governing the consideration of a joint resolution discontinuing the automatic IPAB implementation process described above. This joint resolution requires a supermajority for passage.
- The fast track procedures make it more likely, but do not guarantee that Congress will be able to act to send a bill to the President superseding the IPAB’s recommendations.
- The arguable effect of these provisions of PPACA is to favor the continuation of the IPAB and its recommendations.
- Either the House and Senate can change the “fast track” procedures, but in practice, the Senate may find it difficult to do so if it cannot achieve unanimous consent.
- Some questions exist about the enforceability and mechanics of these fast track procedures, which will likely require clarification by the House and Senate in close consultation with each chamber’s Parliamentarian.

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**STATEMENT ON “FAST TRACK” PARLIAMENTARY PROCEDURES RELATING
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Chairman Pitts, Ranking Member Pallone, and Members of the Health Subcommittee:

I appreciate the opportunity to testify before you on behalf of the Congressional Research Service about the “fast track” parliamentary procedures relating to the Independent Payment Advisory Board (IPAB) which were established by Sections 3403 and 10320 of the Patient Protection and Affordable Care Act (PPACA).¹

This testimony begins with a discussion of expedited parliamentary procedures, generally. It then briefly describe the structure and establishment of the IPAB. The testimony then detail the two “fast track” parliamentary mechanisms established by PPACA related to the Independent Payment Advisory Board. This testimony concludes by raising considerations for policymakers related to these two parliamentary mechanisms.

EXPEDITED PROCEDURES GENERALLY

So-called expedited or “fast-track” legislative procedures are special procedures that Congress adopts to promote timely committee and floor action on a specifically-defined type of legislation. Congress does not adopt expedited procedures as part of the standing rules of the House or

¹ P.L. 111-148. 124 Stat. 489, 125 Stat 949.

Senate, but instead includes them in measures that are enacted into law, usually in the same measure that defines the kinds of bill or resolution that are subject to the expedited procedures. Congress sometimes chooses to enact expedited procedures because the regular legislative processes of the House and Senate can be time-consuming, and provide no guarantee that a bill or resolution will be considered quickly, or at all, in committee and on the floor. Although expedited procedures are enacted in law, they have the same force and effect as standing House or Senate rules, and accordingly, statutes that contain them are sometimes referred to as “rulemaking” statutes. Well-known examples of rulemaking statutes which include expedited parliamentary procedures for the consideration of legislation are the Trade Act of 1974², the War Powers Resolution³, the Congressional Budget Act of 1974⁴, and the Defense Base Closure and Realignment Act of 1990.⁵

Because Article I, Section 5 of the Constitution gives each chamber of Congress the power to determine the rules of its own proceedings, expedited procedure statutes can (like all rules of the House or Senate) be set aside, altered, or amended by either chamber at any time insofar as the procedure in that chamber is concerned.⁶ In order to change the way in which the features of an expedited procedure apply in either chamber, it is sufficient that the chamber decides to ignore or alter the expedited procedure through any of the same means by which it normally alters or overrides its rules. In the House, this can be accomplished through the adoption of a special rule reported by the Committee on Rules, by suspension of the rules, or by unanimous consent.⁷

² 19 U.S.C. 2191-2194.

³ 50 U.S.C. 1544-1546.

⁴ 2 U.S.C. 601-688.

⁵ 10 U.S.C. 2908.

⁶ William Holmes Brown and Charles W. Johnson, *House Practice, A Guide to the Rules, Precedents and Procedures of the House* (Washington: GPO, 2003), ch. 50, §4, p. 826.

⁷ Prior research undertaken by CRS suggests that the House of Representatives almost always supplants the terms of rulemaking statutes by adopting special rules by majority vote which establish terms for consideration which may resemble in whole or in part those included in law. CRS Memorandum, Use of Privileged Resolution of Disapproval and Approval, 1989-1998, by Richard S. Beth, Mar. 13, 2000, p. 13.

In recent years, many rulemaking statutes have focused mostly or exclusively on the Senate, where, unlike in the House, the Standing Rules do not ensure a voting majority the ability to bring consideration of a measure or matter to a vote or even to guarantee it will be considered at all. Although the same constitutional authority to determine its own rules resides equally in both houses of Congress, expedited procedures are, in a sense, more binding on the Senate than they are on the House of Representatives. The Senate most often operates under terms established by the unanimous consent of all Senators. If unanimous consent could not be achieved, altering the terms of a rulemaking statute for the consideration of a specified measure would, in all likelihood, require either the vote of three-fifths of Senators chosen and sworn necessary to invoke cloture or the concurrence of two-thirds present and voting necessary to suspend the rules. Motions to suspend the rules also require written notice one calendar day in advance, and are themselves fully debatable.⁸ In short, while the House and Senate can each choose to alter a statutory rule, in practice, once established, such fast track rules are potentially difficult for the Senate to change.

Section 1130 of the most recent edition of the *House Rules and Manual* lists 31 statutes which establish expedited parliamentary procedures applicable to the House of Representatives. Some of the listed statutes, such as the Trade Act of 1974 and the Arms Export Control Act, establish more than one set of expedited House procedures.⁹ The rulemaking statutes listed in the *House Manual* can generally be described as falling into two broad categories. The first category includes procedures which allow the House and Senate promptly to consider a measure (typically a joint resolution) that either approves or disapproves some action taken or policy established by the executive branch. Such procedures tend to be fully expedited when compared to the regular

⁸ Floyd M. Riddick and Alan S. Frumin, Riddick's *Senate Procedure: Precedents and Practices*, 101st Cong., 1st sess., S.Doc. 101-28 (Washington: GPO, 1992), p. 1266.

⁹ The House Manual lists most, but not all rulemaking statutes. It does not include statutes enacted subsequent to the publication of the Manual, and generally does not include expedited procedure statutes which apply exclusively to the Senate.

procedures of the House and Senate, calling for mandatory introduction of a joint resolution, its timely reporting or automatic discharge from committee, a finite period of floor debate and an automatic “hookup” between joint resolutions considered by the two chambers. Such procedures almost always bar the consideration of amendments altogether, including committee amendments, as well as preclude other motions which might delay or prevent a final vote.

A second broad category of rulemaking statute establishes special procedures for congressional consideration of legislation, often submitted to Congress by the President, and may apply to one or both chambers of Congress. Such procedures also tend to be more expedited than normal House or Senate procedures, but otherwise may vary in the extent that they place limits on debate and amendment of a given measure or class of measure. Some procedures in this second category bar amendments entirely, while others permit only germane amendments, or allow Congress to offer counterproposals to legislation forwarded by the executive branch which meet the same general policy criteria established by the President’s bill. Most procedures falling into this second broad category require automatic introduction by request, limit committee consideration, and include some limits on floor debate and motions. Many of the procedures also include elements which are intended to expedite consideration of a conference report or amendment exchange between the House and Senate. Some of these procedures might be described as establishing an only partially expedited legislative process. They may, for example, create a “fast track” in one chamber but not the other, or guarantee floor consideration, but not ensure final action.

It is difficult to establish fully expedited procedures for measures to which amendments are permitted, because the existence of an amendment process creates the possibility of a need to resolve bicameral differences. Because it is not possible to force the House and Senate to reach ultimate agreement on a legislative text, procedures of this type generally expedite some, but not all, aspects of congressional consideration.

ESTABLISHING THE INDEPENDENT PAYMENT ADVISORY BOARD

The Independent Payment Advisory Board was established by Sections 3403 and 10320 of the Patient Protection and Affordable Care Act.¹⁰ The IPAB is charged by that law with developing proposals to “reduce the per capita rate of growth in Medicare spending.”¹¹

Under the terms of the Act, the IPAB is to be composed of 15 members appointed by the President with the advice and consent of the Senate.¹² The Act requires the President to consult with the Speaker of the House, the House minority leader, and the Senate majority and minority leaders, each on the appointment of three IPAB members. The remaining three IPAB appointments are presumably the selections of the President alone. The Chairman of the IPAB is appointed by the President from among the 15 members of the Board and the position is also subject to Senate confirmation. In addition to the President’s 15 IPAB appointments, the Secretary of Health and Human Services, the Administrator of the Centers for Medicare and Medicaid Services (CMS), and the Administrator of the Health Resources and Services Administration (HRSA) serve as *ex-officio* nonvoting members of the Board.¹³

The Act requires the appointed membership of the IPAB to include individuals who enjoy “national recognition” in several stated aspects of health policy, including health finance and economics, and further stipulates occupations which should be represented on the Board, including physicians and “experts in pharmaco-economics.” The Act specifies that the appointed IPAB members have broad geographic representation and that the Board be balanced between

¹⁰ P.L. 111-148. 124 Stat. 489, 125 Stat 949.

¹¹ For more information on the duties of the IPAB and associated health policy issues, see: CRS Report R41511, *The Independent Payment Advisory Board*, by David Newman and Christopher M. Davis.

¹² §3403(g)(1). This citation and similar citations in this section are citations to the text of P.L. 111-148, as amended.

¹³ *Ibid.*

urban and rural representatives. In order to minimize conflicts of interest, the Act stipulates that a majority of the appointed members of the IPAB are not be persons “directly involved” in the provision or management of the delivery of items and services covered by Medicare.¹⁴

Each individual appointed to the IPAB will hold office for a term of six years, except that the initial appointments have staggered terms: Five are appointed for a term of one year, five are appointed for a term of three years, and five for a term of six years.¹⁵ With the exceptions noted below, an IPAB member may not serve more than two full consecutive terms. Members appointed to fill a vacancy occurring prior to the expiration of the term for which that Member’s predecessor was appointed shall be appointed for the remainder of that term. Members appointed to complete the remaining term of a vacancy in this way are eligible to serve two additional consecutive full terms. Additionally, members appointed to the IPAB may continue to serve beyond the expiration of their term until their successor has taken office.

Under the terms of the Act, a majority of the 15 appointed members of the IPAB constitute a quorum for the transaction of business, although a lesser number may hold hearings. The statute further stipulates that no vacancy on the Board will impair the right of the remaining IPAB members to exercise all of the powers of the Board.¹⁶ Finally, the members of the IPAB may only be removed by the President for cause.

As noted, the Members of IPAB require Senate confirmation. Unless the confirmation process is altered in the Senate by unanimous consent, the consideration of these nominations would take place under the normal parliamentary procedures the Senate uses to consider presidential nominations. That is, the nominations are potentially subject to extended debate and to the cloture

¹⁴ §3403(g)(1)(B).

¹⁵ §3403(g)(2).

¹⁶ §3403(g)(4).

process. Additionally, the President, under certain procedural circumstances, might be able to recess appoint some or all IPAB members should their confirmation be blocked in the Senate, an eventuality which might also be precluded by the Senate under certain circumstances.

TWO EXPEDITED OR “FAST TRACK” PROCEDURES RELATED TO IPAB

Under the terms of PPACA, if future Medicare spending is expected to exceed certain targets established by the Act, the Independent Payment Advisory Board will propose recommendations to Congress and the President to reduce the Medicare growth rate. The IPAB’s first set of recommendations would be proposed on Jan. 15, 2014. The Secretary of Health and Human Services must implement the Board’s recommendations unless Congress affirmatively acts to amend or block them within a stated period of time and under circumstances specified in the Act.

As noted above, PPACA requires the Board to submit its proposal to both Congress and the President. The proposal is to be accompanied by, among other things, implementing legislation. The Secretary is required to automatically implement the proposals contained in the IPAB legislation on August 15 of the year such a proposal is submitted, unless:

- prior to that date, legislation is enacted that includes the statement, “This Act supersedes the recommendations of the Board contained in the proposal submitted, in the year which includes the date of enactment of this Act, to Congress under section 1899A of the Social Security Act,” or
- in 2017, a joint resolution discontinuing the automatic IPAB implementation process has been enacted.¹⁷

¹⁷ Such a joint resolution and the procedures for its consideration are described below.

To begin, § 3403(d) of the Act establishes special “fast track” parliamentary procedures governing House and Senate committee consideration, and Senate floor consideration, of legislation implementing the Board’s proposal. The Act mandates the immediate introduction of the legislation in Congress, and by establishing strict deadlines for committee and Senate floor consideration, as well as by placing certain limits on the amending process. The procedures established by the Act permit Congress to amend the IPAB-implementing legislation, but only in a manner that achieves at least the same level of targeted reductions in Medicare spending growth as are contained in the IPAB plan. The Act bars Congress from changing the IPAB fiscal targets in any other legislation it considers as well, and establishes procedures whereby a super-majority vote is required in the Senate to waive this requirement.

The Act establishes a second set of “fast track” procedures governing the consideration of a joint resolution discontinuing the automatic IPAB implementation process described above. This joint resolution requires a super-majority vote of both chambers and either the signature of the President or overriding his veto by a two-thirds vote in each house to enter into force.

PROCEDURES FOR CONSIDERING IPAB-IMPLEMENTING BILL

House and Senate Introduction of IPAB-Implementing Bill

On the day that the IPAB-implementing legislation is submitted to Congress by the President, it is to be introduced “by request” in each chamber by the House and Senate majority leaders or by a designee.¹⁸ If a house is not in session on the day the proposal is submitted, the measure is to be

¹⁸ The term “by request” indicates that the measure is being introduced as a courtesy to the President, who can not introduce legislation, and that the sponsor of the bill does not necessarily favor it.

introduced on the first day the chamber is in session thereafter. In the event that the House and Senate majority leaders fail to introduce the legislation within five days after the date on which the proposal is submitted to Congress (or after that chamber came into session after the proposal's submission), any Member may introduce the bill in his or her respective chamber.¹⁹

House and Senate Committee Referral, Report, and Discharge

When introduced in the House, an implementing bill is to be referred to the House Committees on Energy and Commerce and on Ways and Means. In the Senate, the measure is to be referred to the Committee on Finance. Not later than April 1 in any year in which a proposal is submitted, the committees of referral each may report the bill “with committee amendments related to the Medicare program.” Rule XV of the Standing Rules of the Senate, which bars the Senate from considering a committee amendment containing any “significant matter” not in the jurisdiction of the committee recommending the amendment, does not apply to the IPAB legislation. The effect of the exemption is that the Committee on Finance may report committee amendments to the IPAB-implementing bill that include matter not in its jurisdiction “if that matter is relevant to a proposal contained” in the IPAB plan.²⁰

If a committee of referral has not reported the IPAB-implementing bill to its respective chamber by April 1, the committee will be automatically discharged of further consideration of the legislation.

¹⁹ Several existing expedited procedure statutes contain provisions for the mandatory introduction of legislation by House and/or Senate leaders. CRS is unaware of any instance in which a House or Senate officer failed to introduce legislation by request when directed to do so by such a statutory rule. For examples of such statutes, see U.S. Congress, House, *Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H.Doc. 110-162, 110th Cong., 2nd sess. (Washington: GPO, 2009), §1130.

²⁰ Unlike germaneness, any requirement that amendments be “relevant” does not stem from the Senate's standing rules. It is a limitation that is traditionally only imposed on the amendment process by unanimous consent. In cases in which such a requirement has been imposed by unanimous consent, it has traditionally meant that the subject of an amendment must relate to the subject of the text it proposes to amend, and does not contain any significant subject matter not addressed by that underlying text.

Congress Can Consider Only Legislation That Meets the Same Fiscal Targets as Those Recommended by the IPAB

The special parliamentary procedures established by the Act attempt to bar the House or Senate from considering any bill, resolution, amendment, or conference report pursuant either to the special fast track procedures contained in the Act *or by any other legislative mechanism*, which would repeal or change the recommendations of the IPAB if that change would fail to achieve the same targeted reductions in Medicare spending growth achieved by the IPAB proposal. In other words, the procedures propose to bar Congress (including future Congresses) from considering, in any legislation (not just the IPAB-implementing bill), changes to the Board’s recommendations that fail to meet at least the same fiscal targets as those forwarded by IPAB.

The Act attempts to “entrench” this limitation on congressional action by stating that the provision can be waived in the Senate only by an affirmative vote of three-fifths of Senators chosen and sworn (60 votes if there is no more than one vacancy), the same threshold required to invoke cloture on most measures and matters. An appeal of a ruling on a point of order under this provision carries the same super-majority vote threshold to overturn the ruling of the Senate’s presiding officer.²¹

Initial House Floor Consideration

²¹ While the Chief Actuary of the Centers for Medicare and Medicaid Services is to determine whether the IPAB proposal meets certain fiscal targets laid out by the Act, it is not specified how such a determination is to be made for other legislation Congress considers. How the Senate’s presiding officer, for example, might rule on a point of order alleging that a given bill or amendment violates this provision, is unclear. This question would likely require additional clarification by the Senate, no doubt made after close consultation with its Parliamentarian.

The Act does not establish fast track parliamentary procedures governing initial floor consideration of an IPAB-implementing bill in the U.S. House of Representatives. That means that it could not be forced to the floor by individual Members in conflict with the schedule of the majority party leadership. Should the House choose to act on such legislation, it would presumably do so under its usual procedures, most likely by adopting a special rule reported from the House Committee on Rules to establish terms for considering the bill.

Initial Senate Floor Consideration

The special parliamentary procedures established by the Act create an environment for Senate floor consideration of an IPAB-implementing bill which is similar to that which exists after the Senate has chosen to invoke cloture on legislation.

Under most parliamentary circumstances, a motion to proceed to consider legislation in the Senate is fully debatable.²² Under the special procedures established by the Act, however, once an IPAB-implementing bill is on the Senate Calendar of Business, a non-debatable motion to proceed to its consideration is in order.²³ If the Senate chooses to take up the implementing bill by adopting this motion, consideration of the implementing legislation is limited to a total of 30 hours equally divided between the two party leaders, and a non-debatable motion to further limit debate is in order. This is a departure from Senate practice under its Standing Rules, during which debate on legislation is generally limited only by unanimous consent or by invoking cloture.²⁴

²² A motion to proceed to consider is non-debatable in the Senate under certain limited circumstances, including under specific procedural statutes such as the Congressional Budget Act, when made during the Morning Hour, and when dealing with treaties, nominations and conference reports.

²³ The Act does not specify who can make the motion to proceed, and under the chamber's Standing Rules, any Senator may in theory lodge such a motion. By long-standing practice, however, Senators almost always defer to the majority leader or his designee to make such scheduling motions.

²⁴ For more information on cloture, see CRS Report 98-425, *Invoking Cloture in the Senate*, by Christopher M. Davis.

Likewise, under the regular procedures of the Senate, debate on amendments is unlimited and there is no general requirement that amendments be germane.²⁵ Any amendments offered to the implementing bill in the Senate under the special procedures established by the Act, however, must be germane, and debate on each amendment is limited to one hour, equally divided between the bill manager and the offerer of the amendment. Debate on second-degree amendments, debatable motions, and appeals is limited to 30 minutes each, similarly divided.²⁶ The party floor leaders may yield time they control under the overall 30-hour cap to Senators during the consideration of any amendment, debatable motion, or appeal, should they choose to do so; however, debate on any may not exceed one hour.

Not only must amendments be germane, but, as is noted above, the procedure established by the Act bars the consideration of any amendment (including committee amendment), which would cause the bill to result in a net reduction in the total Medicare program spending in the implementation year that is less than the applicable savings target established for that year and contained in the IPAB proposal. This limitation can only be waived by a vote of three-fifths of Senators chosen and sworn, and successfully appealing a point of order under this provision carries the same super-majority vote requirement.

After 30 hours of consideration, the Senate proceeds to vote on any pending amendments and then, once they are disposed of, on the measure itself, as amended, if amended. Prior to final passage, a motion to table or to reconsider is in order, as is a demand for a live quorum call.

²⁵ The Senate requires germaneness of amendments when offered to general appropriations bills, under some statutory rules (such as the Congressional Budget Act of 1974), to any legislation considered post-cloture, and when Senators agree to such a requirement by unanimous consent. Although the time for debate on amendments is unlimited in most circumstances, a non-debatable motion to table an amendment is in order in the Senate, and the effect of adopting such a motion would be to kill the amendment.

²⁶ If the bill manager favors the amendment, motion, or appeal, then the time in opposition will be controlled by the Senate minority leader or his designee.

Automatic “Hookup” of House and Senate Bill

The Act’s special parliamentary procedures include provisions that are intended to facilitate the exchange of implementing legislation between the House and Senate.

The expedited procedures governing the Senate apply to a bill received from the House only if the same bill has been introduced in the Senate. In addition, the expedited procedures apply in the Senate only if the bill received from the House is related only to the programs under the Act and has satisfied the same fiscal targets as the IPAB-implementing bill. Such limitations are intended to prevent the special fast track procedures from being used to obtain expedited Senate consideration of unrelated legislation or legislative provisions.

In particular, the Act establishes “hookup” procedures to ensure that the chambers will, in the end, act on the same measure. If, before voting on its own implementing bill, a chamber receives an implementing bill passed by the other chamber, that engrossed legislation will automatically be amended by the text of the second chamber’s bill and become the measure the receiving chamber votes on for final passage. If, after passing its own measure, a chamber receives an implementing bill passed by the other chamber, the vote on the receiving chamber’s bill shall be considered to be the vote on the measure received from the other house as amended by the receiving chamber’s implementing bill.

Consideration of a Conference Report or Amendment Exchange

The Act also establishes special parliamentary procedures for the expedited consideration of conference reports or amendments between the chambers intended to resolve bicameral differences on an IPAB-implementing bill. In the Senate, where the process of going to

conference may be subjected to filibuster, the Act does not appear to expedite this process, which would presumably occur under normal Senate procedures. The Act limits consideration of a proposed resolution of differences, whether in the form of a conference report or amendments between the chambers, to 10 hours of consideration in each chamber, equally divided between Senate party leaders, and in the House, between the Speaker of the House and its minority leader. Debate on any amendment under these procedures is limited to one hour and on second-degree amendments, motions, and appeals, to 30 minutes each. Here also, the expedited procedures apply only if the legislation is related only to the program under the Act and satisfies the same fiscal targets required of the IPAB bill.

Consideration of Veto Message

Should the President veto an IPAB-implementing bill, debate on the veto message in the Senate, which would under normal circumstances be unlimited, is confined to one hour, equally divided. There is no similar provision established for the House of Representatives, and it would presumably consider such a veto message under its regular parliamentary mechanisms.²⁷

PROCEDURES FOR CONSIDERING JOINT RESOLUTION DISCONTINUING THE INDEPENDENT PAYMENT ADVISORY BOARD PROCESS

Section 3403 of P.L. 111-148 establishes a second “fast track” parliamentary mechanism for consideration of legislation discontinuing the automatic implementation process for the recommendations of the Independent Payment Advisory Board described above.

²⁷ See CRS Report RS22654, *Veto Override Procedure in the House and Senate*, by Elizabeth Rybicki.

Under the terms of the Act, in order to qualify for consideration under “fast track” procedures, a joint resolution discontinuing the process must meet several conditions:

- It must be introduced in 2017 by not later than February 1 of that year.
- It may not have a preamble.²⁸
- It must have the title, “Joint resolution approving the discontinuation of the process for consideration and automatic implementation of the annual proposal of the Independent Medicare Advisory Board under section 1899A of the Social Security Act.”
- It must have the sole text, “That Congress approves the discontinuation of the process for consideration and automatic implementation of the annual proposal of the Independent Medicare Advisory Board under section 1899A of the Social Security Act.”

Introduction, Referral, and Automatic Discharge

Under the terms of the Act, such a joint resolution may be introduced by any Member in either chamber. When introduced, the joint resolution is referred to the Committees on Ways and Means and on Energy and Commerce in the House, and to the Committee on Finance in the Senate.

In the Senate, if the Committee on Finance has not reported this joint resolution (or an identical joint resolution) by the end of 20 days of continuous session after its introduction, the committee may be discharged from its further consideration of the measure upon a petition signed by 30

²⁸ A preamble is a series of “whereas” clauses at the beginning of a measure describing the reasons for and intent of the legislation.

Senators.²⁹ The committee could also mark up and report the joint resolution, although it is not required to do so, but if it does, it may not report amendments to it.

House Floor Consideration

The Act does not establish special parliamentary procedures governing initial floor consideration of a joint resolution discontinuing the IPAB-implementing process in the House of Representatives. Should the House choose to act on such legislation, it would presumably do so under its regular procedures, most likely by adopting a special rule reported from the House Committee on Rules. Passage of the joint resolution in the House does, however, require a supermajority of three-fifths of Members, duly chosen and sworn, the same as in the Senate.

Senate Floor Consideration

At any time after a qualifying joint resolution has been placed on the Senate's Calendar of Business, it is in order to make a non-debatable motion to proceed to its consideration. Such a motion to proceed may be made even if one has been previously been rejected. As with the IPAB-implementing bill procedure described above, the Act does not specify who may make this motion.

Points of order against the joint resolution and its consideration, with the exception of points of order established by the Congressional Budget Act of 1974 or any budget resolution enacted pursuant to the Budget Act, are waived. If the Senate agrees to the motion to proceed,

²⁹ Days of continuous session are calculated by counting every calendar day, including Saturdays and Sundays, and pausing the count only at times when either chamber has adjourned for more than three days pursuant to a concurrent adjournment resolution.

consideration of the legislation is “locked in”; the joint resolution remains the unfinished business of the Senate until it is disposed of.

Debate on a joint resolution discontinuing the automatic IPAB-implementing process and on all debatable motions and appeals in connection with the measure is limited to 10 hours in the Senate, with the time divided between the majority and minority leaders or their designees. A non-debatable motion to further limit debate is available.

No amendment (including committee amendment), motion to postpone, motion to proceed to the consideration of other business, or to recommit the joint resolution, may be made. At the conclusion of consideration, and after a single live quorum call, if requested, the Senate votes on the joint resolution. Passage of a joint resolution discontinuing the automatic IPAB process requires a supermajority of three-fifths of Senators, duly chosen and sworn.

Automatic “Hookup“ with Other Chamber

As with the special procedures established for considering IPAB-implementing bills described above, the Act also establishes “hookup” procedures to facilitate the consideration in one chamber of a joint resolution passed by the other. If, before the passage by one house of a joint resolution discontinuing the IPAB-implementation process, that house receives an identical joint resolution from the other, that engrossed joint resolution will not be referred to committee, but will become the one on which the receiving chamber takes its final vote. Such provisions are designed to ensure that the House and Senate act on the same legislation.

ADDITIONAL CONSIDERATIONS FOR POLICYMAKERS

Legislation May Face a High Bar

Both the implementing bill and the joint resolution described above are law-making forms of legislation, which must be signed by the President or enacted over his veto to become effective. Should either type of measure be vetoed by the President, overriding the veto would require a super-majority vote of two-thirds in both chambers for the measure to become law. The arguable and perhaps intended effect of the procedures in the Act is to favor the continuation of the IPAB and its recommendations even in the face of significant opposition in both chambers of Congress. This is why some observers have argued that statutory disapproval mechanisms of the type contained in the Act shift the power balance to the executive branch and away from Congress.³⁰

Do the Fast Track Procedures Guarantee Congress Can Act?

Supporters argue that the fast track procedures relating to IPAB make it far more likely that a congressional majority will be able to succeed in sending a bill to the President which they support. Others argue that, while the parliamentary procedures governing consideration of an IPAB implementing bill are expedited, they do not in themselves guarantee that Congress will agree on a bill and present it to the President for his consideration. Because it is not possible to “force” the House and Senate to agree on the same bill text, whether Congress can pass an implementing bill which would supersede the recommendations of the IPAB, they argue, remains within the control of Congress itself. Questions may also exist about whether the expedited procedure governing Senate consideration of an IPAB implementing bill precludes all opportunities for opponents to delay such a bill’s progress.

³⁰ See, for example, Rep. Claude D. Pepper, remarks in the House, *Congressional Record*, vol. 134, July 7, 1988, p. 17071.

Either Chamber May Change the Parliamentary Procedure

The “fast track” parliamentary procedures established by the Act for the consideration of both types of IPAB legislation are considered to be rules of the respective houses of Congress even though they are codified in statute. As such, Congress has traditionally viewed them as subject to change in the same manner and to the same extent that any House or Senate rule can be altered by the Members of that chamber. In other words, Congress is not required to amend or repeal the statute to change the procedures. The House or Senate can change the procedures by unanimous consent or by suspension of the rules. The House may also adopt a special rule reported by the House Committee on Rules. In practice, however, as has been noted, altering the statutory procedures in the Senate is potentially difficult if there is not unanimous consent to do so.

Questions Exist About the Mechanics of the Procedures

As is described above, the terms of the Act attempt to “entrench” the procedures themselves against change by requiring a super majority to amend them, as well as to discontinue the automatic IPAB-implementation process. The Act also purports to restrict the ability of future Congresses to enact certain policy changes related to Medicare in other legislation, not just the IPAB-implementing measure. How these entrenching provisions will be reconciled with the well-established constitutional right of each chamber of Congress to make the rules of its own proceeding,³¹ and how or if one Congress can broadly regulate the actions of a future Congress in this way, will likely only be clarified in practice.

Questions about the enforcement of these provisions are highlighted when one imagines how the consideration of IPAB legislation might play out in a future Congress. As has been noted, the

³¹ U.S. Constitution, Article I, sec. 5.

House of Representatives normally brings major legislation to the floor under the terms of a special rule reported by its Committee on Rules. This is likely to be the method used by a future House of Representatives to consider IPAB-implementing legislation or other bill dealing with rates of Medicare spending.

A special rule establishes unique terms for the consideration of a specific measure and routinely waives all points of order against the measure in question and its consideration. As such, it is unclear if there will be any parliamentary opportunity for a House Member to make a point of order against some future IPAB-implementing bill, for example, that the legislation violates the Act's stricture on changing targeted rates of Medicare spending. While one can certainly envision a Member making a rhetorical argument to that effect, a special rule which waives all points of order against such a bill and its consideration would effectively preclude enforcement of these terms of the Act. For example, a "rider" discontinuing the automatic IPAB process entirely, if included in the conference report on an appropriations bill would similarly be unreachable by points of order if the report were considered under such a special rule or under the House's suspension of the rules procedure.

Questions about the enforcement of the Act's provisions similarly exist in the Senate. Again, traditionally, "fast track" procedures like those contained in the Act have been, in practice, more binding on the Senate than on the House, because the Senate views itself as a "continuing body" having rules that are continually in force. Additionally, altering such statutory procedures has arguably been more difficult in the Senate than in the House, because to change its rules (including statutory rules) the Senate must effectively get all its Members to agree to waive them by unanimous consent or muster a super-majority vote to suspend or to limit debate on a proposal to amend them.

Unlike other statutory fast track procedures now in force, the Act establishes wide-ranging procedures which purport to regulate the consideration of not just one bill, but any legislation violating the Medicare spending goals established by IPAB. To what extent a future Congress will view itself as bound by these broad terms, how the Senate's presiding officer will rule on certain points of order established by the Act, among other questions, will likely require additional clarification by the House and Senate in close consultation with each chamber's Parliamentarian.

CONCLUSION

I am happy to answer any questions you may have about my testimony. Additionally, my colleagues and I at the Congressional Research Service are available to provide additional analytical and research assistance to the subcommittee as it continues its examination of this subject.