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Health Policy Briefing

March 31, 2014

Senate to Vote on House-Passed SGR Reform; PPACA and Budget Issues Up in House

House Sends One-Year "Doc Fix" Bill to Senate for a Monday Vote

Last Thursday the House bypassed long-term Medicare reform of the Medicare physician sustainable growth rate (SGR) and instead voted under suspension of the rules to pass H.R. 4302, legislation to provide a one year patch, putting off a payment reduction until March 31, 2015. If approved by the Senate on Monday and signed into law as expected, the "Protecting Access to Medicare Act of 2014" will again delay the 24% cut to physicians scheduled to begin on April 1st and instead provide a 0.5% increase through calendar year 2014 and freeze the final rates through March 31, 2015. In general, members on both sides of the aisle expressed disappointment that the bipartisan/bicameral long-term reform of the Medicare SGR payment platform was again put off until the 114th Congress convenes. **Rep. Joe Pitts (R-PA)** said he sponsored the bill because "it is my earnest hope that this is the last patch we will have to pass…." **House Minority Leader Nancy Pelosi (D-CA)** said that taking up the temporary fix in place of a more permanent solution was a "missed opportunity." Nonetheless, **House Energy and Commerce Committee Chairman Fred Upton (R-MI)** said that the action does not prevent the House from getting a permanent fix done, but it is the "best we can do now". The Congressional Budget Office (CBO) estimated on a preliminary basis that the one year extension of physician pay rates would cost $11.2 billion through fiscal year (FY) 2015 and $15.8 billion over ten years. The legislation also includes several health-related extenders and riders which the CBO estimated would cost $14.4 billion through FY 2015, but save $1.2 billion over ten years. Of note, the bill does not include spending or revenue provisions offsetting the above costs. Among the add-ons: one amendment would delay until October 1, 2015, the beginning of FY 2016, the proposed action by the Centers for Medicare and Medicaid Services

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(CMS) to implement the latest revision of the International Classification of Diseases (the 10th Revision (ICD-10) of the Medicare diagnostic code billing system); CBO said another provision would result in a $4 billion savings over ten years by directing CMS to establish an annual 0.5% Medicare physician payment savings target, in particular by considering changes to the RVS Update Committee (RUC) billing codes that among other things have resulted in the fastest growth and been used multiple times for a single treatment; another provision would require physicians to document the use of Health and Human Services (HHS) and specialty group guidelines in ordering CT scans with non-compliance resulting in possible preauthorization requirements; Medicare payments would also be cut for physicians who do not use equipment with "dose optimization" features; two new mental health grant programs would be established; another provision would delay until April 1, 2015 the use by recovery audit contractors (RAC) of the so-called "two-midnight" rule which helps them determine the legitimacy of the length of hospital stays; another amendment would repeal section 1302(c) of the Patient Protection and Affordable Care Act (PPACA) which places a $2,000 cap on the allowable deductible for small group insurance plans covering one person and a $4,000 cap for family policies; other provisions spell out the terms of a number of so-called Medicare "extenders" and other policy changes (see Appendix I). The House's SGR patch bill, which delays the consideration of possible offsets for long-term SGR reforms until after the November elections, will be taken up Monday in the Senate, subject to a no-amendment 60 vote threshold according to **Senate Majority Leader Harry Reid (D-NV)**. He put the need for the temporary fix on the Senate Finance Committee who he said did not come up with a means to pay for permanent reform. **Senator Orrin Hatch (R-UT)**, Ranking Republican of the Senate Finance Committee, introduced S. 2122, legislation that would provide for long-term SGR reform and offset the CBO estimated cost of $180.3 billion over ten years by mitigating the PPACA's penalty for failure to meet the individual mandate. The similar bill passed by the House, H.R. 4015, is still pending in the Senate. **Senate Finance Committee Chairman Ron Wyden (D-OR)** said last week that he was still working with members to come up with an offset that is agreeable to all parties.

House and Senate to Consider Additional Health Legislation

The Senate is also scheduled to take up H.R. 3979, the House-passed legislation that would exempt volunteer firefighters and other emergency responders from being counted as employees under the PPACA's employer mandate. The House will also take up another PPACA-related bill, H.R. 2575—the "Save American Workers Act of 2014," that would redefine "full-time employee" for purposes of the law's employer mandate as an employee who is employed on average at least 40 hours of service a week, thus changing the current 30 hours of service a week rule. In addition, the House Budget Committee is scheduled to meet and consider a budget resolution for FY 2015 that is expected to conform to the overall $1.014 trillion spending level contained in the Bipartisan Budget Act of 2013 for health and other defense and non-defense discretionary programs.

PPACA Health Reform Update

Administration Allows PPACA Exceptions and Touts Last Minute Enrollment

CMS issued new guidance under the PPACA last week that expands a hardship exemption which will allow individuals who faced "exceptional circumstances" while attempting to enroll via the law's exchanges to "enroll" by April 30th and pay their premiums without becoming subject to the law's penalty for failure to obtain minimum essential health coverage. Among the exceptional circumstances are those faced by abused spouses who file separate IRS tax returns and who the IRS announced will now be allowed to apply separately for individual tax credits. CMS will also continue to process paper applications received by April 7th for individuals previously "in line" to enroll before the March 31st deadline. The ruling came despite statements by HHS Secretary Kathleen Sebelius before the House Ways and Means Committee that the Administration would not extend the March 31st deadline. House Speaker John Boehner (R-OH) lamented the Administration's extensions, calling them one in a long list of actions "manipulating the law for its own convenience." The latest actions took effect despite the Administration's own statements that "enrollment" had already reached 6 million; a figure that House Republicans said overstated the number of individuals who have actually paid their premiums and become eligible for health insurance coverage. Several Senate Democrats who remain concerned about the problems experienced during the rollout of Obamacare, including Senators Mark Begich (D-AK), Heidi Heitkamp (D-ND), Mary Landrieu (D-LA), Joe Manchin (D-WV) and Mark Warner (D-VA), are supporting PPACA amelioration legislation that would, among other things: raise the employer mandate threshold from 50 to 100 employees; add a high-deductible, copper-level plan to the current range of exchange plans; increase the law's small business tax credit threshold from 25 to 50 employees; require state insurance regulators to develop models for marketing insurance across state lines to test whether the strategy would boost insurer competition and consumer choice; and restore the funding for not-for-profit health insurance cooperatives.

PPACA Provisions Contested in Court

The U.S. Supreme Court heard arguments last week in the Hobby Lobby Stores/Conestoga Wood Specialties cases in which the closely-held private employers are contesting the PPACA's women's preventive services provision requiring employer coverage to include contraceptive drugs and devices at no cost to employees. The plaintiffs argue that the provision impinges on their right to exercise their religious-based objections which they say is in violation of the Religious Freedom Restoration Act (RFRA). The U.S. Department of Justice (DOJ) argued that secular, for-profit corporations have never been accorded such a right to exercise religion. Of note, in a similar case brought by the Roman Catholic Archdiocese of Atlanta, the U.S. District Court for the Northern District of Georgia rendered an opinion in favor of the plaintiffs which permanently enjoins the federal government from enforcing the PPACA provisions requiring the organization to facilitate employee health plan coverage of contraceptive drugs and devices, sterilizations and related counseling. The U.S. Court of Appeals for the District of Columbia also heard arguments in Halbig v. Sebelius in which the plaintiffs contend that individual subsidies can only be made available in health insurance exchanges established by "a state", as the law specifically says, and not in the federally established exchange which serves as the default exchange for individuals in states that do not set up their own exchanges. The defense argument centered on the "intent" of the law to provide subsidies in both cases and a former Senate Finance Committee staffer testified to that effect. However, as reported, two of the three judges expressed skepticism that the plain language should be read more broadly than it actually does.

Medicare/Medicaid/PHSA Corner

FDA Proposes Update on Medical Device Classification

The Food and Drug Administration (FDA) issued a proposed rule, pursuant to the FDA Safety and Innovation Act (FDASIA) that would update the current classification of medical devices, including mobile health devices. Comments are due by June 23.

HHS Releases HIPAA Tool to Assess Security Risk

The HHS Office of the National Coordinator for Health Information Technology and the Office for Civil Rights announced the availability of a downloadable app which small and medium-size medical practices can use to aid them in all aspects of assessing information security risk and to help provide the documentation needed under the Health Insurance Portability and Accountability Act (HIPAA) for the prevention of any breach of protected health information.

Upcoming Health-Related Hearings and Markups

House Energy and Commerce Subcommittee on Health: will hold a hearing titled "Examining Concerns Regarding FDA's Proposed Changes to Generic Drug Labeling;" 2:00 p.m., 2123 Rayburn Bldg.; April 1.

House Committee on Veterans' Affairs Subcommittee on Oversight and Investigations: will hold a hearing titled "VA & Human Tissue: Poor Practice and Lack of Tracking Endangers Veterans;" 10:00 a.m., 334 Cannon Bldg.; April 2.

Senate Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies: will hold a hearing on proposed FY 2015 appropriations for the National Institutes of Health; 10:00 a.m., 192 Dirksen Bldg.; April 2.

House Energy and Commerce Health Subcommittee: will hold a hearing on the Helping Families in Mental Health Crisis Act of 2013. 10:30 a.m., 2322 Rayburn; April 3.

House Veterans' Affairs Health Subcommittee: will mark up pending legislation; 9:00 a.m., 334 Cannon Bldg.; April 4.

Health Legislation Recently Introduced

H.R. 4282 (GRADUATE MEDICAL EDUCATION), to amend the Public Health Service Act to authorize grants for graduate medical education partnerships in states with a low ratio of medical residents relative to the general population; CASTOR of Florida; to the Committee on Energy and Commerce, March 21.

S. 2150 (DRUG RESEARCH), to advance the public health by encouraging independent innovators to pursue drug repurposing research and develop new treatments and cures by providing appropriate intellectual property protections for those innovations, and for other purposes; BLUMENTHAL; to the Committee on the Judiciary, March 24.

H.R.4287 (DRUG RESEARCH), to advance the public health by encouraging independent innovators to pursue drug repurposing research and develop new treatments and cures by providing appropriate intellectual property protections for those innovations, and for other purposes; CASTOR of Texas; to the Committee on the Judiciary, March 24.

H.R.4288 (OPIOID OVERDOSE DRUGS), to provide certain protections from civil liability with respect to the emergency administration of opioid overdose drugs; NEAL; to the Committee on the Judiciary, March 24.

S. 2154 (CHILDREN'S HEALTH), to amend the Public Health Service Act to reauthorize the Emergency Medical Services for Children Program; CASEY; to the Committee on Health, Education, Labor and Pensions, March 25.

S. 2157 (MEDICARE/MEDICAID), to amend titles XVIII and XIX of the Social Security Act to repeal the Medicare sustainable growth rate and to improve Medicare and Medicaid payments, and for other purposes; WYDEN; read the first time, March 25.

H.R. 4290 (CHILDREN'S HEALTH), to amend the Public Health Service Act to reauthorize the Emergency Medical Services for Children Program; MATHESON; to the Committee on Energy and Commerce, March 25.

H.R. 4299 (DRUG CLINICAL TESTING), to amend the Controlled Substances Act with respect to drug scheduling recommendations by the secretary of Health and Human Services and with respect to registration of manufacturers and distributors seeking to conduct clinical testing; PITTS; jointly, to the committees on Energy and Commerce and the Judiciary, March 26.

H.R. 4302 (MEDICARE/MEDICAID), to amend the Social Security Act to extend Medicare payments to physicians and other provisions of the Medicare and Medicaid programs, and for other purposes; PITTS; jointly, to the committees on Energy and Commerce, Ways and Means and the Budget, March 26.

S. 2166 (REFORM), to amend the Internal Revenue Code of 1986 to modify provisions relating to determinations of full-time equivalent employees for purposes of the Affordable Care Act; MANCHIN; to the Committee on Finance, March 27.

S. 2168 (REFORM), to amend the Internal Revenue Code of 1986 to modify the definition of large employer for purposes of applying the employer mandate; HEITKAMP; to the Committee on Finance, March 27.

S. 2173 (REFORM), to amend the Affordable Care Act to provide a permanent path for the direct enrollment of individuals in qualified health plans; LANDRIEU; to the Committee on Health, Education, Labor and Pensions, March 27.

S. 2174 (REFORM), to amend the Affordable Care Act to provide greater flexibility in offering health insurance coverage across state lines; WARNER; to the Committee on Health, Education, Labor and Pensions, March 27.

S. 2175 (REFORM), to amend the Affordable Care Act to enhance access for independent agents and brokers to information regarding marketplace enrollment; LANDRIEU; to the Committee on Health, Education, Labor and Pensions, March 27.

S. 2176 (REFORM), to revise reporting requirements under the Affordable Care Act to preserve the privacy of individuals, and for other purposes; WARNER; to the Committee on Finance, March 27.

Health Legislation Recently Introduced cont.

S. J. RES. 35 (REFORM), providing for congressional disapproval under Chapter 8 of Title 5, U.S. Code, of the rule submitted by the Internal Revenue Service of the Department of the Treasury relating to liability under Section 5000A of the Internal Revenue Code of 1986 for the shared responsibility payment for not maintaining minimum essential coverage; MCCONNELL; to the Committee on Finance, March 27.

H. RES. 527 (PUBLIC HEALTH), supporting the goals and ideals of National Public Health Week; ROYBAL-ALLARD; to the Committee on Energy and Commerce, March 27.

H.RES. 528 (DISEASE AWARENESS), expressing support for designation of March 2014 as National Multiple Myeloma Awareness Month; BACHUS; to the Committee on Oversight and Government Reform, March 27.

Appendix I

(for full bill text, see http://www.gpo.gov/fdsys/pkg/BILLS-113hr4302eh/pdf/BILLS-113hr4302eh.pdf)

TITLE I--MEDICARE EXTENDERS

TITLE II--OTHER HEALTH PROVISIONS