



Health Policy Briefing

July 9, 2018

President to Announce Supreme Court Nominee Tonight

President Trump spent last week interviewing eight potential nominees to replace Anthony Kennedy on the Supreme Court. Latest reports indicate that the President has narrowed his list to three candidates.

Brett Kavanaugh, 53, is a District of Columbia Court of Appeals judge. He previously served as the staff secretary for former President George W. Bush. Due to his position on a federal appeals court in Washington, DC, Kavanaugh has a significant amount of experience dealing with cases involving the U.S. Department of Health and Human Services (HHS) and the Food and Drug Administration (FDA). Some conservatives have expressed concerns with an opinion written by Kavanaugh favorable to the Affordable Care Act's (ACA) individual mandate. Amy Coney Barrett, 46, is a 7th Circuit Court of Appeals judge, and is favored among social conservatives. She is a practicing Roman Catholic who clerked for Justice Scalia and faced significant opposition from Democrats in the Senate during her appellate court confirmation fight last year. Given her short time on the bench, Barrett has not authored any health care opinions yet. Raymond Kethledge, 51, is a 6th Circuit Court of Appeals judge. Kethledge is a Bush appointee who clerked for Justice Kennedy. He has considered a number of health care cases involving Medicare reimbursement challenges as well as health system/insurer antitrust suits.

Senate Democrats have promised a confirmation fight to block the nomination until after the November midterms. Republicans hold 51 seats in the Senate and will need at least 50 votes to confirm the President's nomination. It's unclear if Republican John McCain (Az.) will be able to return to the Senate for the vote, and Republican Rand Paul (Ky.) has reportedly told the President that he has reservations about Brett Kavanaugh. The official announcement is planned for Monday at 9 p.m. The process to replace Justice Kennedy is expected to consume the Senate's agenda between now and the midterm elections. At the same time, Congress must work to pass legislation to fund the government beyond September 30, the end of the fiscal year.

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Doc Caucus Urges CMS to Revise Low-Volume Threshold

The House GOP Doctors Caucus has written to Centers for Medicare and Medicaid Services (CMS) Administrator Seema Verma requesting that the agency reduce the number of physicians excluded from the Merit-based Incentive Payment System (MIPS) as CMS works to set participation thresholds for 2019. The lawmakers express concerns that limited physician participation in MIPS restricts the possible upward payment adjustments for high performers in the program.

For the 2018 performance year, CMS raised the low-volume threshold to exclude doctors with no more than \$90,000 in Part B charges or those who saw 200 Medicare beneficiaries or fewer. Approximately 60 percent of otherwise eligible providers were excluded from MIPS in 2018, largely based on the low-volume threshold.

The Doctors Caucus requests that CMS adjust the low-volume threshold for MIPS eligible clinicians in 2019 to fully realize the extent of payment adjustments envisioned in the law. Under statute, physicians in MIPS could be subject to payment adjustments of up to seven percent for the 2019 performance year. However, the smaller the number of clinicians that participate in the program, the smaller the potential range of program scores and the fewer incentives available. The letter points out that high performers are expected to receive an aggregate upward adjustment of 1.1 percent for 2019 based on their 2017 performance, despite the law allowing for adjustments of up to four percent. The lawmakers argue that MIPS needs to utilize the maximum incentives allowed in order for the program to reach its full potential. CMS is expected to include 2019 updates for the Quality Payment Program, which includes MIPS, in the upcoming Physician Fee Schedule rule.

House to Vote on Medical Device Tax Repeal This Month

The House of Representatives is planning to vote this month on legislation to repeal the Affordable Care Act's (ACA) medical device tax. The 2.3 percent tax on medical device sales is scheduled to take effect in 2020. There is bipartisan support for repeal of the tax, which the Congressional Budget Office (CBO) estimates would reduce federal revenues by approximately \$20 billion over the next decade. The legislation -- H.R.184 - Protect Medical Innovation Act of 2017-- is sponsored by Rep. Erik Paulsen (R-Minn.).

White House Halts Risk Adjustment Payments

The Trump administration has recently announced its decision to stop collecting and paying out money under the ACA's risk adjustment program, which provides billions of dollars in annual payments to insurers covering a disproportionate share of patients with expensive medical needs. CMS states that a recent ruling by the federal trial court in New Mexico prevents the agency from making further collections or payments under the program until the litigation is resolved. The agency believes that the court ruling bars CMS from collecting or making payments under the current risk adjustment methodology, which uses a formula based on statewide average premiums. The insurance industry has decried CMS' decision, arguing that it will cause significant market disruption that will lead to premium increases. CMS Administrator Seema Verma said that CMS has asked the court to reconsider its ruling.

E&C Health Names New Chief Counsel

House Energy and Commerce Committee Chairman Greg Walden (D-Ore.) announced that Josh Trent has been named Chief Counsel for the Health Subcommittee. Trent has been a member of the subcommittee's staff for four years, most recently serving as Deputy Chief Counsel. Prior to joining the committee, he worked for Sen. Tom Coburn (R-Ok.). Trent will replace Paul Edattel, who left Energy and Commerce last month.

Court OKs 2005 Medicare Payment Rule

A federal trial court has issued a ruling to uphold a 2005 regulation from CMS that established a new formula for calculating disproportionate share hospital (DSH) payments. Several hospitals had argued that they lacked sufficient time to comment after the agency corrected an error in its description of the Medicare reimbursement adjustment for disproportionate share hospitals. The district court ruled that CMS adequately explained its rulemaking intentions, finding that inconsistent information provided at different points in the rulemaking process did not render the rulemaking invalid. The decision suggests that it may be more difficult for providers to challenge rulemaking, especially in regard to DSH payments, in the future.

Upcoming Congressional Hearings and Markups

House Energy and Commerce Health Subcommittee hearing “Opportunities to Improve the 340B Drug Pricing Program;” 10:00 a.m., 2123 Rayburn Bldg.; July 11

House Energy and Commerce Digital Commerce and Consumer Protection Subcommittee hearing on drug impaired driving; 1:00 p.m., 2123 Rayburn Bldg.; July 11

House Foreign Affairs Africa, Global Health, Global Human Rights, and International Organizations Subcommittee hearing on tuberculosis in Southern Africa; 2:00 p.m., 2200 Rayburn Bldg.; July 12