Washington Update: Health Care Reform
Top of the List For Next Congress
November 5, 2008

The Congress has been preparing for consideration of health care reform early next session. With the election of President-elect Obama and continued Democrat majorities in the House and the Senate, it is our expectation that health care reform will be considered as early as January, 2009.

For the last several months, key Members of Congress have been laying the groundwork on health care reform so that Congress can move the issue early in the session. We expect that comprehensive health care reform will include reauthorization of the State Children’s Health Insurance Program (SCHIP) and reforms to the Medicare program. The Democrats will use the March 31st SCHIP deadline as a way to accelerate and advance the debate on health care reform. In the Senate, bipartisan discussions have been held with Senators and staff on both the Senate Health, Education, Labor and Pension Committee and the Senate Finance Committee. At least one hearing is scheduled in November.

In December, the Congressional Budget Office (CBO) is expected to release an extensive array of health options and issues that will be accompanied by quantitative budget estimates, which will be used to guide Congress in deciding what is affordable and feasible. There is a high likelihood that government programs will be enhanced or expanded, although the current state of the economy, and fiscal limitations will be significant impediments to any major initiatives. Listed below is an overview of the key health care issues that will be considered in 2009.

Health Care Reform:

Congress will debate comprehensive health care reform. Preparations for a vigorous debate on health care reform have been underway for months. Senate leaders have been holding listening sessions with stakeholder groups and will likely start unveiling principles for reform in January and will begin serious deliberations as early as February. Senator Kennedy wants to champion a bipartisan health reform effort, which has been his goal during his entire career. The President’s FY 2010 Budget, that will be released in early February, will also provide a sense of the depth and breadth of the President-elect’s ambitions on health care reform.

During the campaign, Obama proposed an expansive health reform proposal that included expanding Medicaid and SCHIP, requiring that all children have health insurance and requiring that large employers offer coverage or contribute toward the costs of coverage. Under his proposal, small employers or individuals without access to other public programs or employer-based coverage could enroll in a new public plan, like Medicare, or choose from a range of approved private plans.

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The elements included in comprehensive health care reform will address a variety of issues, including:

- **Expanding Coverage** - Congress will consider how to expand coverage for those who do not have coverage. The key elements are likely to be insurance market reform to expand the number of covered lives and to offer affordable plans and subsidies to help those who do not have coverage and cannot afford coverage. President-elect Obama supports the establishment of a National Health Insurance Exchange to help small businesses and individuals obtain health coverage.

- **Reducing Health Care Costs** - As described below, it is likely that a health care reform package will include efforts to encourage adoption of health information technology, improve quality measurements, modify payments to reward value, provide more information to consumers on the costs and quality of health care services, including comparative effectiveness information. Also, there will be greater incentives to adopt health and wellness programs, including coordinated care for those with chronic illnesses.

- **Eligibility for Public Health Programs** - There are between 9 and 11 million Americans who are eligible for public health programs, such as SCHIP and Medicaid, but are not enrolled. This is likely to be part of the discussion of the SCHIP reauthorization legislation. Senators Kennedy and Hatch, as original authors of the SCHIP legislation, are expected to champion the reauthorization and expansion of the program. There was strong bipartisan support for expansion of SCHIP in the last Congress, and in 2009, the increased Democrat majority will provide even stronger support for increased funding and expansion of this program to provide children and their families with access to health insurance coverage. SCHIP must be reauthorized by April 1, 2009. In the 2007 “CHAMP bill,” House Democrats proposed almost $50 billion in SCHIP funding and improvements and will likely propose a similar amount in 2009. We expect Congress will steer away from unfunded mandates that put further burdens on State budgets. President-elect Obama supports expanding eligibility for SCHIP and would work with the Congress to expand the program to the degree that financial resources are available.

- **Financing for Health Reform** - During times of budget restraint, it is likely that Congress will want to offset any new costs from an expansion of existing programs or new programs with offsets from other areas. While there is strong support for greater savings through the adoption of cost efficiency activities, it is likely that more funding will be necessary. It is likely that Congress will look at the tax code for savings, such as eliminating the tax exclusion for health care benefits provided through employers for those individuals who earn more than $250,000. Other savings are likely to be found in the Medicare program through efforts such as rewarding performance, reducing payments for certain providers (such as Durable Medical Equipment (DME), Medicare Advantage, and certain providers updates as described below).

- **Medicare Reforms**: Congress will consider various Medicare reforms likely as a part of comprehensive health care reform, including:
  - **Physician Payment** - Unless Congress acts, physician payments will drop 21% on January 1, 2010, a prospect that has no chance of coming to pass. Current law provides that physician payments are calculated through the use of the so-called “Sustainable Growth Rate” (SGR) formula, a system that is intended to restrain
the growth in physician reimbursement rates to align with growth in the nation’s gross domestic product (GDP). However, Congress has intervened numerous times, to pass legislation to provide for an additional update for physicians. Congress will intervene to update physician payments, and will likely debate how the SGR should be reformed, although a permanent solution to the SGR formula would be very costly, and therefore Congress is likely to continue providing patchwork updates from year-to-year. CBO scored the physician payment update in the Medicare Improvements for Patients and Providers Act (MIPPA) that provided a 0.5% update for the last 6 months of 2008, and an additional 1.1% increase for 2009 at $9.4 billion. Congress will be hard-pressed to find the funding to prevent a 21% cut.

- **Therapy Caps** - MIPPA extended the exceptions process for Part B therapy caps (of $1810 annually) for occupational therapy and physical therapy/speech language pathology through 12/31/2009. To continue the exceptions process beyond 2009, Congress will need to extend the exceptions provision before its expiration. The six-month extension in MIPPA was scored at $1.2 billion over 10 years.

- **DMEPOS Competitive Bidding** - MIPPA delayed the implementation of the Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) competitive bidding program, for 18- to 24-months, and reduced reimbursement rates for items that were included in the program by 9.5% for 2009. There were strong objections voiced by the DMEPOS industry and by Members of Congress from both parties about the implementation of program. Congress’s Medicare advisory body, MedPAC, has suggested that there may be other more acceptable ways to reimburse for DMEPOS products. Congress therefore, may consider legislative proposals to revise the way Medicare reimburses providers for these products.

- **Oxygen payments** - Congress will consider revisions to oxygen payments.

- **Review of Updates for Various Providers** - Congress may review the methodology for various provider updates, such as Inpatient Hospitals, Outpatient Hospitals, Skilled Nursing Facilities, Home Health Agencies, etc. and may cut certain providers to provide the funds needed to increase updates for others.

- **Promote Quality of Care and Efficiencies** - The government’s purchasing power in Medicare will likely be used to launch quality and efficiency initiatives such as pay-for-performance efforts or bundling of episodes of care.

- **Elimination of the Medicare Disability Two-Year Waiting Period** - President-elect Obama has proposed the elimination of the two-year waiting period for persons who have been certified as disabled and to allow earlier eligibility for Medicare benefits.

- **Medicare Advantage (MA) Reforms:**
  - **Payments to MA and Private Fee-for-Service (PFFS) Plans** - There is support for the elimination of so-called “over-payments” to Medicare Advantage plans. In the 2007 “CHAMP bill,” the House proposed $50 billion in cuts to MA plans. Congress will review, and will very likely proposed reductions to MA payments. President-elect Obama supports eliminating “excessive Medicare Advantage plan payments.”
subsidies” and paying MA plans the same amount it would have cost to treat the same patients under the traditional Medicare program.

- **Special Needs Plans (SNPs)** - The authorization for SNPs expires 12/31/2010. Because plans must file letters of intent with CMS in March of the year before the plan intends to operate, SNPs will need to be re-authorized by March 2010, if Congress intends to allow SNPs to operate in 2011. Therefore Congress will likely include a short-term SNP reauthorization in the major legislative vehicle for Medicare.

- **Part D Prescription Drug Plans (PDPs) Reforms:**
  - **Government-negotiated Prices** - Many in Congress support the elimination of the “non-interference” clause to permit government negotiation of Part D drug prices as a way to save money for Medicare. During the campaign, President-elect Obama advocated for government negotiation of prices for Part D prescription drugs as well as for people enrolled in his proposed public insurance plan that would be established as a part of national health reform.
  - **Part D Prices/Rebates for Drugs Provided to Low-Income Beneficiaries** - Rep. Henry Waxman (D-CA) has been investigating Part D prices and price concessions with particular interest in how the government’s costs have changed since low-income beneficiaries’ drug coverage has been folded into the Part D program. While the exact mechanism is unknown, Waxman will introduce legislation to ensure that the government pays no more than Medicaid rates for Part D drugs provided to dual-eligibles and may also extend the requirement to drugs provided to low-income subsidy (LIS) individuals.
  - **Increased Assistance for Low-Income Subsidy (LIS) Beneficiaries** - Congress may consider providing additional assistance to LIS beneficiaries. In the 2007 “CHAMP bill,” the House proposed $3.3 billion in additional subsidies. Such assistance is likely, provided that funding can be secured.
  - **Elimination of the so-called “Donut Hole”** - President-elect Obama has proposed the elimination of the gap in coverage under the standard Part D drug benefit design.

- **Medicaid Reforms:**
  - **Increase Funding and Expand Eligibility** - To shore up the safety net, Congress will likely provide additional funding for State programs and will revise the program’s parameters to allow for expanded eligibility to additional populations.
  - **Increase the Federal Medical Assistance Percentage (FMAP) Rate** - State governors will advocate for an increase in FMAP to help States during the current challenging economy, with State revenues decreasing while the need for safety net services is increasing. Congress may provide $10 to 20 billion to increase FMAP about 2- to 4-percent for about 14 months; or may provide as much as $50 billion for States, with some portion set aside for Medicaid programs and the rest distributed through some kind of block grant program.
  - **Moratorium on Six Medicaid Rules** - The moratorium on implementation of the six controversial Medicaid rules expires on March 31, 2009. The rules involve issues such as: reducing or prohibiting Medicaid reimbursement for public and
teaching hospitals; narrowing Medicaid coverage for rehabilitation services, school-based administrative and transportation services and case management services; and restricting how states raise funds for Medicaid via intergovernmental transfers. Congress must again act, it wishes to further delay or eliminate implementation of these rules. We expect the Democrat majority to reverse these restrictions.

**Health Information Technology (HIT):**

- **Pass HIT Legislation** - Bipartisan legislation to facilitate the infrastructure needed for an interoperable HIT system and to spur the adoption of HIT systems by health care providers came very close to passage in the 110th Congress. Both the House and Senate are expected to introduce HIT legislation early in 2009, and Congress will make HIT a key priority. Because of the broad support for HIT and the potential improvements it would make to medical care, patient safety and the potential savings it would provide, we expect HIT will pass into law in 2009. HIT would facilitate health care reforms, including the movement toward bundled payments and value-based purchasing. When the final concerns of a very few key lawmakers can be assuaged, we expect HIT legislation to pass into law. President-elect Obama has stated that he would invest $50 billion toward adoption of medical records and other HIT.

**Transparency/Disclosure of Price and Quality Data:**

- **Increased Transparency/Disclosure of Price and Quality Data** - The Democrat-controlled House and Senate are likely to support some disclosure of UNIFORM price and quality data -- however, federal standards to establish the standards and definition of price would have to be developed before any disclosure could occur.

**Comparative Effectiveness Research:**

- **Legislation to Increase Comparative Effectiveness Research** - Congress may consider legislation to establish an entity that would coordinate research on the comparative effectiveness of medical products, services and therapies. President-elect Obama supports investments in comparative effectiveness research.

**Prescription Drugs:**

- **Develop a Regulatory Pathway for Approval of “Bio-generics”** - There is significant bipartisan support to develop a regulatory pathway so that “generic” versions of biological therapies, such as human growth hormone, could be reviewed for marketing approval for marketing approval by the Food & Drug Administration for safety and efficacy without requiring the entirety of testing that new products must complete. The issue has broad support in theory, however, the scientific complexity and safety issues will need to be fully addressed.
• **Drug Reimportation** - The increased Democrat majorities in the House and Senate will provide additional support for drug reimportation as a way to make drugs more affordable. President-elect Obama supports allowing drug importation.

**Pre-Dispute Arbitration Agreements:**

• **Legislation to Prohibit Pre-Dispute Arbitration Agreements** - Congress will likely re-introduce legislation that would prohibit pre-dispute arbitration agreements between long-term care facilities and residents. President-elect Obama supports ending the use of such agreements in consumer, employment, brokerage, and franchise contracts.

*We expect health care reform to be a significant topic of discussion during the next two years.*

*Please do not hesitate to contact us for further information on any of these items.*