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McDermottPlus Check-up

McDermott+Consulting is pleased to introduce the McDermottPlus Check-up, your regular update on healthcare policy from Washington, D.C.

This Week's Diagnosis: The House and Senate cancelled scheduled votes this week in anticipation of Hurricane Florence making landfall on the East Coast. The cancellations included a bipartisan bill to address the opioid crisis, but there was plenty of activity early in the week to report. Major developments are summarized below. For those of you reading on the East Coast, stay safe!

CONGRESS

+ **HOUSE UNANIMOUSLY PASSES HEALTH BILLS.** Several bills approved last week by the House Ways and Means Committee were approved this week by the full House by unanimous consent, and are now headed to the Senate. Two bills have a Senate companion: H.R. 6561 (Senate companion S. 3338) and H.R. 3635 (Senate companion S. 794). The Senate can be particular about which bills it advances, but expect the attention and pressure to start building on the other side of the Capitol.
    - o H.R. 6662, the Empowering Seniors' Enrollment Decision Act, which codifies the Special Enrollment Period offered to Medicare Cost Plan enrollees in regulation to ensure seniors have adequate time to make enrollment decisions.
    - o H.R. 6690, the Fighting Fraud to Protect Care for Seniors Act of 2018, which establishes a three-year pilot to test the use of smart card technology to strengthen Medicare program integrity;
    - o H.R. 6561, the Comprehensive Care for Seniors Act of 2018, which directs the Secretary of Health and Human Services to issue a final regulation on the Program of All-Inclusive care for the Elderly (PACE).
    - o H.R. 3635, the Local Coverage Determination Act of 2018, which addresses the process through which Medicare Administrative Contractors make local coverage determinations (LCDs), such as requiring MACs to publicly post proposed LCDs online.
+ **HEALTH BILLS SAIL THROUGH E&C.** As noted last week, the House Energy and Commerce Health Subcommittee held both legislative hearings and mark-ups on the bills listed below. When the House wants to move bills, they can certainly move quickly. Within one week, these bills went from Subcommittee hearing to being approved by the full Committee. Look for these to come to the House floor soon.
    - o Advancing Care for Exceptional Kids Act, which provides enhanced federal matching for certain care coordination services in Medicaid;
    - o A bill to clarify the authority of state Medicaid Fraud and Abuse Control Units;

- A bill to extend the Money Follows the Person demonstration in Medicaid for five years;
- A bill to prohibit "gag clauses" in Medicare and private health insurance plans;
- A bill to codify the Centers for Medicare and Medicaid Services (CMS)-operated Healthcare Fraud Prevention Partnership.

+ **E&C Health Subcommittee Hearing on Barriers to Value-Based Care.** The Energy and Commerce Health Subcommittee held a hearing on ways to increase the use of value-based arrangements in Medicare. The hearing examined regulatory and statutory barriers, including the Stark Law and recent Medicare Shared Savings Program Proposed Rule, to the adoption of such models. The hearing showed interest from Congress in facilitating the adoption of alternative payment models and is similar to what we have seen from the Administration through requests for information on the Stark Law and Anti-Kickback statute. Stakeholders interested in performance-based risk should be thinking through these potential opportunities and weighing in with Congress and the Administration on specific solutions.

+ **House Rules Committee Takes Up Employer Mandate Legislation.** The House Rules Committee met this week to review H.R. 3798, Save American Workers Act, legislation that would extend the moratorium on the employer mandate penalties, replace the employer mandate's current 30 hour threshold for full-time employment with a 40 hour threshold, and delay the Cadillac Tax on high cost employer-sponsored plans for one additional year. The bill also would repeal the tax on indoor tanning services. The Congressional Budget Office (CBO) has estimated the bill could cost more than $50 billion over 10 years. The White House supports the legislation saying in a release that the bill would "repeal, delay or replace several harmful provisions of Obamacare." There currently is no companion bill in the Senate, where the price tag is likely to be a barrier to movement before the end of the year.

Administration

+ **Stakeholders Comment on Proposed Physician Pay Changes.** Monday marked the comment deadline for the Medicare Physician Fee Schedule and Quality Payment Program Proposed Rule. While the agency has reportedly received thousands of comments (which is not uncommon for the annual payment rule), the biggest focus appears to be on the proposed changes to evaluation and management (E/M) coding and payment. Recall that the agency proposed creating a single blended payment rate for E/M level 2 through 5 visits and a series of add-on codes for complex patients as well as proposed documentation reforms. While most stakeholders support the proposal to reduce associated documentation requirements, opposition to a single blended payment rate has been fairly widespread. More than 80 bipartisan Members of Congress lent their voice to the opposition and sent a letter urging the Agency to engage with stakeholders to develop an alternative approach. With stakeholder opposition and congressional pressure mounting, the Agency may be forced to revisit the E/M proposal in the final rule.

- **340B LAWSUIT…AGAIN.** Several major hospital associations filed a new, more targeted, 340B lawsuit following on the heels of a rare bipartisan, bicameral Congressional letter to the Health Resources and Services Administration (HRSA). Recall that the letter calls on HRSA to move forward on regulations and guidance implementing the 340B program. The new lawsuit alleges HRSA's delay in issuing a rule related to ceiling prices is "unreasonable" based on the Administrative Procedures Act (APA). The rule, which would provide more transparency on the manufacturer's calculation of ceiling prices for covered outpatient drugs among other things, has repeatedly been delayed, most recently with HRSA deferring the effective date to July 1, 2019. The lawsuit and congressional letter add significant pressure to the Administration, specifically HRSA, to take action in the 340B space.

Advisory Committees

- **MACPAC SEPTEMBER MEETING.** The Medicaid and CHIP Payment and Access Commission (MACPAC) met this week on a variety of topics, including hospital payment, work and community engagement requirements, Medicaid drug coverage, managed care oversight, therapeutic foster care, and opportunities for multistate collaborations in Medicaid. While all of these issues are important, the focus on Medicaid work requirements is the most timely. Four states have applied for and received waivers from CMS to include a variety of work requirements for certain Medicaid recipients. Arkansas, of course, is in the middle of a lawsuit around its work requirements. An additional three states have applications pending with CMS on adding Medicaid work requirements. MACPAC weighing in on work requirements adds another (credible) voice to the growing crowd around the utility and legality of adding work requirements for certain Medicaid recipients.

Next Week's Dose

- Expect the opioid legislation to be brought to the floor as early as Monday. Additionally, the Senate HELP Committee is holding another in its series of hearings on health care costs – this one focused on how transparency can lower spending and empower patients. Finally, the Senate Judiciary Committee is expected to vote on the Supreme Court nominee next Thursday.

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