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McDermottPlus Check-Up

McDermott+Consulting is pleased to provide the McDermottPlus Check-Up, your regular update on health care policy from Washington, DC.

THIS WEEK'S DIAGNOSIS: The Energy and Commerce Committee held a marathon mark-up of 25 bills, including 10 health care related bills. The No Surprises Act received an amendment that adds arbitration to the payment dispute process. The House voted to repeal the Cadillac tax. And, we finally have a Congressional Budget Office (CBO) score for the Senate's Lower Health Care Costs Act.

CONGRESS

+ **ENERGY AND COMMERCE HELD MARKUP OF EXTENDERS BILLS AND NO SURPRISES ACT.** The House Energy and Commerce Committee held a markup of and advanced 25 bills, of which 10 were health care related, and include reauthorization of expiring heath programs, the so-called health "extenders," and the No Surprises Act (H.R. 3630), which addresses surprise billing. The Committee adopted an amendment to the No Surprises Act that was offered by Representatives Raul Ruiz (D-CA) and Larry Bucshon (R-IN), and which reflected a delicately crafted compromise with the bill sponsors, Chairman Pallone and Ranking Republican Walden, allowing certain surprise billing payment disputes to enter into an arbitration process. In general, hospitals and providers favor arbitration, while plans favor benchmark rates. This compromise attempts to split the baby. The arbitration versus benchmarking debate will certainly continue through the August recess.

+ **CBO SCORES THE LOWER HEALTH CARE COSTS ACT.** The CBO released its score of S. 1985, the large and sweeping Lower Health Care Costs Act. CBO estimates that the bill overall would generate net savings of $7.6 billion, mostly from the surprise billing provisions, which CBO estimates would save about $24.9 billion over the same period. The savings primarily flow from in-network payment rates, lower premiums and a reduction of health insurance subsidized by the federal government, according to CBO's analysis. CBO has not yet scored the updated No Surprises Act from the House, which now includes the Ruiz amendment described above. This is expected to lead to lower savings than the Senate version.

+ **HOUSE VOTES ON THE CADILLAC TAX.** The House overwhelmingly voted to repeal the Cadillac tax, which is estimated to deprive the government of almost $200 billion in tax revenues over 10 years. The Cadillac tax has been suspended before, but only for a limited duration. The current suspension expires in 2022. Progress in the Senate is unclear given the overall cost. Other Affordable Care Act taxes include the medical device tax and the health insurance tax, which also have been delayed several times and are scheduled to go into effect on January 1, 2020.

- **ENERGY AND COMMERCE HELD HEARING ON FEDERAL EFFORTS TO COMBAT THE SPREAD OF ILLICIT FENTANYL.** The subcommittee hearing examined the increasing threat posed by fentanyl and the federal government's coordination and response. Witnesses included individuals from federal agencies combatting the crisis. Overall, the witnesses highlighted that the lack of data and interagency data sharing was a challenge to preventing the spread of fentanyl across the United States. The opioid crisis is still garnering congressional attention and may warrant further legislation before the end of the year.

ADMINISTRATION

- **1332 WAIVERS SHAKE-UP.** On July 15, 2019, the Centers for Medicare and Medicaid Services (CMS) released new templates and other resources to help states apply for Section 1332 waivers under the new guidance. However, on July 11, 2019, the Government Accountability Office (GAO) released a letter finding that the 2018 guidance is subject to the Congressional Review Act, which requires that it be submitted to Congress for review. This means Congress can overturn the rule if it reaches a simple majority in both the House and the Senate. Back in October 2018, CMS released updated guidance on the Trump administration's implementation and interpretation of the 1332 requirements. Specifically, the 2018 guidance changed the analysis of the definition of comprehensiveness and availability. CMS also released proposed models that states can adopt that fit under the new definitions. To date, states have generally used 1332 waivers to implement reinsurance programs and have not implemented a proposed model from the Trump administration. Keep in mind that with a Republican-controlled Senate, even a simple majority is a difficult task. If Democrats retake both chambers, however, action against these changes could be more likely.

- **REPEAL OF BAN ON BINDING ARBITRATION AGREEMENTS FOR LONG-TERM CARE FACILITIES.** CMS published the final rule "Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements," which, among other things, repeals the prohibition on long-term care facilities entering into pre-dispute, binding arbitration agreements with their residents. This final rule partially rolls back an Obama administration regulation that implemented the ban. However, in 2016 a federal judge issued a preliminary and permanent injunction on the Obama administration's rule enforcing the ban. This comes as the Senate Finance Committee focuses on oversight of nursing homes.

- **PROPOSAL TO COVER ACUPUNCTURE IN MEDICARE.** CMS is proposing coverage of acupuncture for Medicare patients with chronic low back pain who are enrolled participants either in clinical trials sponsored by the National Institutes of Health or in CMS-approved studies. Acupuncture is not currently otherwise covered under Medicare. This is part of CMS's larger effort to find and support alternatives to opioids for pain management. There is a 30-day comment period for this proposal with comments due August 14, 2019. While the initial coverage would be limited, it opens the door for new coverage and future expansion.

- **EXPANSION OF HEALTH SAVINGS ACCOUNTS.** The Internal Revenue Service issued guidance that expands the list of preventive care benefits permitted to be provided by a high deductible health plan. The change will allow insurers to begin providing coverage for chronic condition treatment, hypertension, diabetes and asthma before the deductible is paid. This action responded to an Executive Order that directed the agency to explore this issue.

+ **CMS ANNOUNCES NEW MSSP ACOS.** In a blog post in Health Affairs, CMS Administrator Seema Verma shared accountable care organization (ACO) participation information for the July 1 Medicare Shared Savings Program (MSSP) start date. The agency announced 41 new ACOs, 25 ACOs re-entering the program and 140 renewing ACOs. Verma stated that 48 percent of ACOs starting on July 1 are taking two-sided risk. This is the first cohort of ACOs beginning participation under an overhauled MSSP intended to more swiftly move provider organizations into two-sided risk arrangements. Another cohort is slated to begin January 1, 2020. Given the short turnaround time between the final rule and the July application deadline, we anticipate that the January cohort will provide a more accurate picture of the impact of the new rule on MSSP participation.

NEXT WEEK'S DOSE

Next week is the last week both the House and the Senate are in session. (The House leaves for August recess on July 26.) We wait to see if the House can advance anything before they leave or if it will wait until September. We will be looking for the Senate Finance Committee's prescription drug cost package.

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To subscribe to the McDermottPlus Check-Up, please contact Jennifer Randles.