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McDermottPlus Check-Up

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

THIS WEEK'S DIAGNOSIS: Speaker Pelosi released her long-awaited drug pricing bill, and the House Energy and Commerce Committee questioned drug companies' financial motivations during a hearing this week.

CONGRESS

+ **SPEAKER'S OFFICE RELEASED DRUG PRICING BILL.** House Speaker Nancy Pelosi (D-CA) has released her long-awaited drug pricing bill (H.R. 3) after an initial draft was leaked last week. The major provisions of the Pelosi proposal include:
    - Medicare prescription drug price negotiation for 25-250 brand-name drugs;
    - A maximum price for negotiation set at no more than 1.2 times the volume-weighted average price of six other countries;
    - An inflationary rebate, in which manufacturers would have to pay a rebate back to the Treasury if they increased the price of Part B or D prescription drugs above the rate of inflation;
    - The creation of a $2,000 cap on out of pocket drug costs for Part D beneficiaries; and
    - Investment in research for treatment and cures.

    With the Speaker's plan now public, the reaction from other Members of Congress, the Administration, and health care stakeholders becomes critical. Pelosi may face pushback from progressives who think the bill does not go far enough, or from moderate Democrats who think it goes too far. What is most interesting though is how the Administration and Senate Republicans who support the Finance Committee's drug pricing package react to the Pelosi bill. The President tweeted favorably about the bill shortly after it was released. We also took a closer look here at the significant overlaps between the Pelosi and Finance proposals, including provisions to cap out-of-pocket drug costs for Medicare beneficiaries, provisions to reform catastrophic coverage and how it is paid for and provisions to include inflationary caps on prescription drug price increases. Clearly, there is plausible ground for an agreement. What is less clear is whether there is political will.

+ **HOUSE PASSED SHORT-TERM CR.** The House of Representatives passed a short-term continuing resolution (CR) that would fund the government through November 21, 2019 at current levels. The CR also contains funding extensions for a number of health care programs, which either have already expired or will be expiring at the end of the fiscal year (September 30, 2019). Among the health care programs addressed in the CR are Community Health Centers, the National Health Service Corps, Medicaid

Disproportionate Share Hospital payments, Medicaid funding for Puerto Rico, and the Medicaid Drug Rebate Program. The CR passed the House with a vote of voted 301-123 and now awaits a vote in the Senate.

+ **ENERGY AND COMMERCE LAUNCHED INVESTIGATION INTO ROLE OF PRIVATE EQUITY IN SURPRISE BILLING.** The House Energy and Commerce Committee, led by Chairman Frank Pallone (D-NJ) and Ranking Member Greg Walden (R-OR), initiated an investigation into the role of private equity firms' ownership, policies and practices relating to third-party medical providers. According to the committee's press release, the investigation will focus initially on private equity firms with an ownership interest in physician staffing and emergency transport companies to determine if there is a link between these ownership interests and instances of surprise medical bills. The demand letters request sensitive and proprietary operational and financial information, which if leaked, could be detrimental to the parties. There has been a flurry of recent activity regarding surprise billing in both chambers of Congress (read our comparison chart of the different proposals here), with additional action expected this fall. Progress on the issue remains elusive, but political and stakeholder pressure to act continues to mount.

+ **ENERGY AND COMMERCE HEARING EXAMINED DRUG COMPANIES' FINANCIAL MOTIVATIONS.** The Energy and Commerce Consumer Protection and Commerce Subcommittee held a hearing to examine how pharmaceutical companies use market forces to protect profits at the expense of consumers. Members of the committee expressed support for increasing competition within the prescription drug market while also promoting innovation. The conversation focused primarily on product hopping, a practice in which pharmaceutical companies release a new drug very similar to an existing drug, but with a longer patent life. The result is longer patent exclusivity, which many lawmakers claim enriches drug companies and hurts patients. There was broad consensus among members of the committee that current drug prices are too high, but that any remedy must preserve incentives for companies to innovate. Read our full summary of the hearing here.

+ **DEMOCRATS INTRODUCED LEGISLATION TO BLOCK PUBLIC CHARGE RULE.** Senator Mazie Hirono (D-HI) and 26 other Senate Democrats introduced a bill on September 17 to block a recent Trump Administration rule that adds the use of public benefits to the list of considerations immigration officials can use to deny green cards to immigrants. Health officials have warned that the rule will lead immigrants to forgo health care services resulting in poorer public health. While the bill is unlikely to go anywhere in the Republican-controlled Senate, the Administration's public charge rule is also facing ongoing legal challenges from states and immigration groups.

ADMINISTRATION

+ **DEPARTMENT OF TRANSPORTATION CREATED AIR AMBULANCE BILLING TASK FORCE.** The Department of Transportation (DOT) Announced the Air Ambulance and Patient Billing Advisory Committee, a group of 13 stakeholders that will advise the Secretary on air ambulance billing. The FAA Reauthorization Act of 2018 directed the creation of the task force, and the House Ways and Means Committee sent a letter to the DOT in July encouraging the move amidst Congress' work to address surprise billing. The surprise billing proposal that passed out of the Senate HELP Committee in June caps out-of-

network charges for air ambulances at the median in-network rate for a geographic area. The Energy and Commerce proposal directs the Department of Health and Human Services to issue a rule requiring air ambulance providers to submit a description of their charges to insurers, separating the cost of air travel from the cost of the emergency and medical services. The taskforce is supposed to submit a report to the House Transportation and Infrastructure and Senate Commerce, Science and Transportation committees within 180 days.

COURTS

+ **JUDGE BLOCKED ADMINISTRATION'S SITE-NEUTRAL POLICY.** As part of last year's 2019 hospital outpatient payment update, the Centers for Medicare and Medicaid Services (CMS) sought to extend deep reimbursement cuts for clinic visits at certain grandfathered non-hospital facilities (the so-called site-neutral payment policy). The provider community, led by hospital trade associations, sued, and a federal judge invalidated the provision, ruling that CMS overstepped its authority. Although the court vacated the cuts, it is not at this time requiring CMS to issue back payments, as requested by hospitals. Instead, the court is requesting reports from both sides by October 1, 2019, to see if further briefings on a remedy are needed. While this represents a substantial victory for hospitals, the victory may be fragile. CMS could – and may – appeal the decision to a Court of Appeals, and Congress could enact legislation extending the cuts or giving CMS the missing authority to do so.

+ **COURT OF APPEALS SET DATE FOR ASSOCIATION HEALTH PLANS CASE.** The U.S. Court of Appeals for the District of Columbia will hear oral arguments on November 14, 2019 in a case involving the Trump Administration's association health plan (AHP) rule. In March, a lower court blocked the rule, which sought to broaden the definition of an employer under the Employee Retirement Income Security Act and allow dissimilar firms to create association health plans within a state. The lower court held that the rule undermined the Affordable Care Act, though the Administration maintains in its appeal that AHPs expand coverage and will not destabilize the small-group market.

STATES

+ **TENNESSEE RELEASED MEDICAID BLOCK GRANT PROPOSAL.** Tennessee released a Medicaid waiver proposal that would convert the federal share of the state's Medicaid funding for most services into a block grant. The amount would be calculated based on discrete member categories that have a history of different expenditures (blind and disabled, elderly, children and adults) and adjusted annually for inflation. It is important to note that although this funding restructuring is being framed as a block grant, it really acts more as a traditional per capita cap. If actual enrollment in any of the four categories exceeds the category's average enrollment during the base period, then the state's block grant amount will be adjusted to reflect the increase. Additionally, although the state is excluding outpatient prescription drugs from the block grant formula, it is proposing to adopt a closed formulary that has at least one drug available per therapeutic class. A similar proposal was included in a Massachusetts 1115 waiver, which CMS denied in 2018. The Tennessee waiver is currently in the state public comment period and has not yet been submitted to CMS. The state public comment period will be open from September 17, 2019, through October 18, 2019.

NEXT WEEK'S DOSE

One more week to go before the government funding deadline. We'll be watching the budget negotiations, hearings on the public health risks of e-cigarettes and Pelosi's drug pricing bill, and the Medicaid and CHIP Payment and Access Commission's September meeting.

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