

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 House and Senate are back in session with two weeks to go until the government funding deadline and lots to do.

CONGRESS

- + **SPEAKER'S OFFICE DEVELOPING DRUG PRICING PROPOSAL.** A [leaked bill summary](#) shows that House Speaker Nancy Pelosi (D-CA) is developing her own proposal to address prescription drug prices. While the Speaker's office disclaimed the leaked version, saying it is out of date, the draft reveals several noteworthy Democratic policy options likely being discussed including Medicare negotiation, capping drug prices at an International Price Index, capping out-of-pocket costs for Part D beneficiaries, and establishing an inflation rebate for drugs whose prices rise too fast. The challenge for the Speaker's office will be to ultimately write a bill far-reaching enough to satisfy progressives, but not so aggressive that it will lose the support of moderate Democrats. At the same time, Pelosi needs President Trump to play ball on some of her provisions while not losing progressives who may feel that the President's support means the bill does not go far enough. It will not be an easy needle to thread.

- + **CONGRESS RETURNED FROM RECESS WITH A BUSY AGENDA**
 - **ENERGY AND COMMERCE HELD HEARING ON MATERNAL HEALTH.** The House Energy and Commerce Health Subcommittee held a hearing to consider four bills relating to maternal and child health: the "Mothers and Offspring Mortality and Morbidity Awareness Act" (H.R. 1897), the "Quality Care for Moms and Babies Act" (H.R. 1551), the "Maternal Care Access and Reducing Emergencies Act" (H.R. 2902), and the "Healthy MOMMIES Act" (H.R. 2602). The conversation focused primarily on social determinants of health, racial disparities and insurance coverage as drivers of maternal health. While Democrats on the committee argued for a federal law extending Medicaid for postpartum women, Republicans contended that this should be left to states. Maternal health has been an issue of growing concern among policymakers. The Department of Health and Human Services (HHS) has held a series of roundtables with experts to develop measures aimed at maternal health and recently awarded \$9 million to three states to develop new models to improve obstetric care in rural communities. Read our full summary of the hearing [here](#).

 - **SMALL BUSINESS COMMITTEE HELD HEARING ON PRIOR AUTHORIZATION IMPACT.** The House Committee on Small Business held a hearing to examine how utilization management programs, particularly prior authorization, affect small medical practitioners in a variety of settings. The conversation focused primarily

on the administrative burdens and delayed care associated with prior authorization, which has come under fire from the medical community. There was a broad consensus among members of the committee that the current prior authorization system is flawed and needs updating. Read our full summary of the hearing [here](#).

- **SENATE CANCELED MARKUP OF LABOR-HHS BUDGET.** The Senate Appropriations Health Subcommittee abruptly canceled its markup of the fiscal year 2020 spending package for the departments of Labor, HHS and Education, which was scheduled for September 10. The move was the result of a dispute over a proposed Democratic-backed amendment to block the Administration's recent rule preventing health care providers who receive Title X family planning grants from performing abortions or referring patients to abortion services. Republicans accused Democrats of injecting politics into what they believe should be a clean appropriations bill consistent with a recently struck budget compromise. Democrats leveled similar charges against Republicans who sought to include money to fund a border wall. The markup has not been rescheduled, though the committee announced on September 12 that the bill has a cap of \$187.7 billion, a one percent increase over last year, and the provision that funds the Food and Drug Administration (FDA) is set at \$23.1 billion. The cap was passed on a party line vote with no Democratic support, suggesting that passing the legislation needed to fund the government before the September 30 deadline may be a challenge.

ADMINISTRATION

- + **ADMINISTRATION CONSIDERS BAN ON FLAVORED E-CIGARETTES.** Following reports that hundreds of people have been sickened and at least six have died from an unknown vaping-related illness, the Trump Administration announced that it is considering a ban on all flavored e-cigarettes. The FDA is working on guidance that would prohibit all non-tobacco flavored e-cigarettes from being sold and require tobacco flavored vaping products to file for FDA approval by May 2020. The announcement comes amid mounting pressure from parents, health officials and members of Congress for the government to address the epidemic of e-cigarette use among teens and young adults. A handful of states, including New York, Massachusetts and California, are considering similar measures, and Michigan recently became the first state to ban the sale of flavored e-cigarettes. It is not clear if or how the Administration plans to address non-tobacco related vaping products like those containing CBD or THC.
- + **CMS RELEASED FINAL RULE TO REVOKE/DENY PROVIDER ENROLLMENT IN MEDICARE AND MEDICAID.** Last week, the Centers for Medicare and Medicaid Services (CMS) issued a [final rule](#) that gives the agency authority to revoke or deny provider enrollment in Medicare, Medicaid or the Children's Health Insurance Program (CHIP) under certain circumstances. In a [press release](#), CMS indicated that they are finalizing the rule to address various program integrity issues and vulnerabilities. The final rule requires Medicare, Medicaid and CHIP providers to disclose any current or previous affiliation with a provider or supplier that has uncollected debt, has been or is subject to a payment suspension under a federal health care program, has been excluded from Medicare, Medicaid or CHIP, or has had its Medicare, Medicaid or CHIP billing privileges denied or

revoked. The Secretary of HHS may deny enrollment based on such affiliation if he or she determines that it poses an undue risk of fraud, waste or abuse. CMS estimates that the new authority will lead to approximately 2,600 new revocations per year, resulting in a 10-year savings of \$4.16 billion.

COURTS

- + **ORAL ARGUMENTS SCHEDULED IN WORK REQUIREMENT APPEAL.** On October 11, 2019, the US Court of Appeals for the D.C. Circuit will hear arguments in the case to decide whether CMS overstepped its authority when it approved 1115 waivers allowing Arkansas and Kentucky to establish Medicaid work requirements. In March, a federal district judge ruled that both waivers were invalid because they did not promote Medicaid's central purpose of providing health coverage. Democratic presidents appointed two of the judges scheduled to hear the appeal, and many legal observers anticipate that they will side with the lower court. If so, it is likely that CMS and the states will appeal to the US Supreme Court next year.
- + **PLAINTIFFS FILED OPENING BRIEFS IN RISK CORRIDORS CASE.** Several issuers have filed opening briefs in a US Supreme Court case claiming the federal government owes approximately \$12 billion from risk corridor program required by the Affordable Care Act (ACA). Under the program, which was designed to encourage carrier participation in the new ACA markets, issuers who earned at least three percent less than expected were to be reimbursed by the government. However, Congress changed the policy in 2014 by attaching a rider to the HHS appropriations bill that required the program to be budget neutral. As a result, HHS was never able to collect enough money to fully repay the issuers over the course of the three-year program. The central question before the Court is whether the government can rely on a rider to an appropriations bill to repeal a statutory payment obligation. The Department of Justice is set to file its opening brief on October 21, 2019. Oral arguments have not yet been scheduled.

NEXT WEEK'S DOSE

We will be watching as government funding negotiations get underway in Congress, as well as continued developments on drug pricing and surprise billing.

For more information, contact [Mara McDermott](#), [Rachel Stauffer](#), [Katie Waldo](#) or [Emma Zimmerman](#).

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