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HEALTH CARE REFORM UPDATE
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Implementation of Health Care Reform Law

On Monday, November 29th Centers for Medicare and Medicaid Services (CMS) officials spoke at an "open-door" forum to outline the agency's near-term plans for accountable care organizations (ACOs), payment innovation, and new methods for providing care to the "dual eligibles"—Americans dually eligible for coverage under Medicaid and Medicare. Deputy CMS Administrator Jon Blum noted that CMS wants to encourage solo practitioners and small group practices to take part in ACOs. Richard Gilfillan, the acting director of the new Center for Medicare and Medicaid Innovation (CMI), noted that his office is developing an operating plan for testing new payment systems, and Melanie Bella, head of the Federal Coordinated Health Care Office, noted that her office is in the process of identifying ways that Medicare and Medicaid conflict as well as legislative and regulatory fixes to removing those barriers to care.

A federal judge in Virginia on November 30th threw out a challenge to the Affordable Care Act (ACA) brought by Liberty University and five individuals, including a state lawmaker. In his ruling, Judge Norman Moon of the Western District of Virginia said that the individual mandate was constitutional and a matter of regulation of interstate commerce allowed under the Commerce Clause of the Constitution. In the same ruling, Judge Moon also upheld the requirement that employers provide insurance as constitutional.

The Senate Commerce Committee held a contentious hearing on December 1st on so-called "mini-med" health insurance plans where Democrats and Republicans sparred with witnesses including a top official from McDonald's, which offers many mini-med plans to its employees. Mini-med plans offer limited benefits and are often misunderstood by those who choose them, which drew strong criticism from some Democratic members who claimed that they exemplify deception in the health insurance industry. Republicans and some industry officials staunchly defended the plans, claiming that although they are not ideal, they offer necessary insurance to Americans who would otherwise have no access to insurance. Republicans also noted that the Obama administration granted waivers for thousands of mini-med plans to be exempt from the new minimum benefit requirements in the ACA until the full law is implemented to justify their claims. On December 9th Health and Human Services (HHS) Secretary Sebelius issued new guidance on the plans that require health insurers offering the plans to notify customers in plain language and within 60 days that the plans offer limited benefits.

ACOs and antitrust violations were topics front-and-center on December 1st during a House Judiciary Committee hearing where members grilled officials from the Federal Trade Commission (FTC) and the Department of Justice (DOJ) on why they had not done more to break up health insurer market concentration. In particular, lawmakers expressed concern that ACOs, which are designed to award cost control and quality performance, might hinder competition and lead to anticompetitive practices by the

dominant players in the partnerships, notably larger hospitals or physician practices. To quiet some of the concerns, a top DOJ official offered an expedited review process for ACOs during the hearing by noting that the DOJ "intends to offer whatever guidance and clarity may be needed to ensure that providers pursue beneficial integrated ACOs without running afoul of the antitrust laws."

Top GOP Congressional leaders hosted 16 newly elected Republican governors on December 1st to discuss strategies to repeal the ACA as well as advance other GOP priorities. Despite broad consensus for the "repeal and replace" strategy, many of the GOP governors left the meeting insisting that they will still move forward with implementation of the law in a sensible and responsible manner as long as it is law. Ohio Governor-elect John Kasich noted that, although he favors repeal, a balanced budget must include a responsible Medicaid plan, and Tea Party favorite and Maine Governor-elect Paul LePage noted that many states, especially with the budget crisis, need the money to help cover their budget shortfalls. Following the meeting, HHS Secretary Kathleen Sebelius began reaching out to the new GOP governors and stressing state flexibility as they begin to implement the law. In her pitch, Sebelius noted that she had never worked with a Democratic majority before coming to Washington and that Republicans controlled the state legislature during her entire time as Kansas governor.

The Department of Treasury on December 2nd released additional guidance on the small-business tax credit authorized under the ACA in the hopes of making it easier to apply for and encourage employers to provide health insurance to employees. According to Obama administration estimates, approximately 4 million small businesses could qualify for the credit that would pay 35% of premium costs for eligible employees. According to some industry groups, including the National Federation of Independent Businesses (NFIB), there is doubt over how many companies could actually meet the requirements to receive the credit.

Many liberal advocacy groups have continued the fierce campaign to get incoming freshmen GOP Members of Congress who campaigned against the ACA to forego their new government-sponsored health insurance offered to them in their new positions. In their most recent attack, Americans United for Change called out Representative-elect Bill Johnson (R-OH) on December 3rd as "hypocritical" for declaring with fanfare that he was foregoing the Congressional health insurance plan. In their statement, the group noted that Representative-elect Johnson will still receive taxpayer-funded health care through the military as a retired U.S. Air Force Officer.

On December 8th another federal judge in New Jersey threw out a challenge to the ACA. The challenge was filed by New Jersey Physicians Inc., Mario A. Criscito and a patient identified only as Patient Roe, but U.S. District Judge Susan D. Wigenton granted a DOJ motion dismiss the case noting that they did not have the standing to file the suit. The physician group was attempting to argue that the individual mandate violated the Commerce Clause of the Constitution. The ruling in New Jersey marked the 12th time that a court challenge to the ACA had been dismissed.

On December 10th the California Public Employees' Retirement System (CalPERS), which provides health benefits to 1.6 million workers, retirees, and their families, sent a letter to HHS outlining the ways the ACA is helping improve coverage and lower costs for Californians. The letter, which was received with much enthusiasm by supporters of the ACA, outlined three areas that the new law is helping its members including reducing insurance premiums and extending dependent coverage.

On December 13th, after numerous setbacks in the legal challenge to the individual mandate of the ACA, health reform opponents scored their first major victory when a federal judge in Virginia ruled that the individual mandate was unconstitutional and "exceeds the constitutional boundaries of congressional power." Judge Henry Hudson ruled in the case brought by Virginia Attorney General Ken Cuccinelli (R). However, Judge Hudson declined to issue an injunction against the law's implementation until a higher court had the opportunity to rule on the case, and the DOJ immediately noted that they would appeal. Observers agree that, despite the path, the case will ultimately end up in the Supreme Court. Although more legal challenges are looming, the ruling was the first against the ACA while 12 other challenges have been thrown out, and

two others have upheld the law as constitutional. On December 16th oral arguments began in another high-profile legal challenge to the ACA in Florida where 20 states and the NFIB joined together to argue that the individual mandate is unconstitutional.

According to inside sources from both parties, Republican Senators negotiating the tax cut compromise with the President pushed back another an attempt by Democrats to repeal the new 1099 tax filing requirements in the ACA on December 13th. Democratic members had hoped to attach the provision to the sweeping tax cut bill that ultimately passed the Senate and the House, but Republicans allegedly took a hard-line stance against any "Christmas tree add-ons." Republicans have come out strongly against the new requirements and have proposed their own amendments to repeal the provisions, but disagreements have risen over offsetting the costs. The tax cut compromise, which is estimated to cost around $858 billion, included no offsets.

On December 16th HHS sent to the Office of Management and Budget (OMB) its proposed definition determining "reasonable" with regards to premium rate increases. The OMB review process is usually the final step before a formal regulation is made public. The ACA required HHS to define reasonable premium increases and provides states with additional resources to block those proposed increases that would be characterized as unreasonable.

HHS officials met privately on December 16th and 17th with representatives from 44 states to discuss the implementation of the ACA. Following the first day of meetings, many press outlets picked up information allegedly from an anonymous attendee that stated that the group discussed potentially delaying the creation of the health insurance exchanges. Under the ACA, if states cannot prove to HHS by January 2013 that they will have a functional exchange operating by 2014, the federal government will operate the exchanges for them.

On December 17th the White House held a private, closed-door meeting with CMS Administrator Don Berwick and a number of stakeholder groups, mostly physicians, to discuss the implementation of the health care reform law. According to a memo sent out regarding the event, this meeting will be the first of numerous get-togethers designed to solicit input on health care reform implementation. Republicans sharply criticized the private nature of the meeting.

Health IT (HIT) Initiatives

On December 7th the House passed "red flag" legislation previously approved by the Senate that exempts doctors from the anti-identify theft safeguards that banks and other creditors now must follow. The American Medical Association (AMA) lobbied hard for the legislation and insisted that, contrary to the definitions set by the FTC, physicians and other professionals such as dentists should not be creditors under the red flag rule.

The President's Council of Advisors on Science and Technology (PCAST) issued a report on December 8th that calls for universal language exchange as the government continues to build capacity for nationwide health information exchange. In their report, PCAST co-chairman, John Holdren and Eric Lander, endorsed the benefits of health IT. The report, addressed to the President and titled "Realizing the Full Potential of Health Information Technology to Improve Healthcare for Americans: The Path Forward," can be found here: http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-health-it-report.pdf. The Health IT Policy Committee of the Office of the National Coordinator for HIT (ONCHIT) began consideration of the recommendations during a December 13th meeting.

The College of Healthcare Information Management Executives (CHIME) released the results of a new survey on December 8th that showed that the percentage of Chief Information Officers who are confident that their organizations will be fully eligible by April 2011 to receive federal HIT incentive payments for

electronic medical records plunged to 15%. A similar CHIME survey in August showed that percentage at 28%.

On December 8th ONCHIT issued an announcement in the *Federal Register* soliciting public comment on a proposed survey of the efficacy of its own health IT workforce development program. The program in question revolves around the $112 million in grants under the American Recovery and Reinvestment Act (ARRA) to dozens of universities and community colleges for various IT workforce training and advanced-education programs.

The Centers for Disease Control and Prevention (CDC) released the preliminary results of a survey on December 8th that showed that the adoption of health information technology is growing among office-based physicians. According to the survey, over half of physicians reported using at least a partial electronic health-record system in their practices.

On December 9th a group of 104 physician organizations sent a letter to HHS Secretary Sebelius asking to revise a federal timeline that would penalize physicians in 2012 and 2013 if they had not adopted e-prescribing methods by 2011. In their letter, the physician groups argued for more time to come into compliance.

On December 14th CMS officials noted that incentive payments under the ARRA program to encourage electronic health record adoption could begin flowing in January 2011. In particular, the Medicaid programs in Iowa, Kentucky, Louisiana, and Oklahoma have indicated plans to start issuing their checks sometime between January and March. CMS also announced that Mississippi, Alaska, North Carolina, South Carolina Michigan, Tennessee, and Texas will likely be ready to launch registration for their programs in January.

The Commerce Department released a report on December 16th that calls for expanded online privacy protections. In the cover letter to the report, Commerce Secretary Gary Locke noted that the "Internet is becoming the central nervous system of our information economy and society."

On December 16th PCAST released a new report outlining how the 19-year old Networking and Information Technology Research and Development Program could better allocate its resources. According to the report, $4 billion would be better allocated to pure research in such fields as HIT rather than on developing IT products and infrastructure.

<u>Other HHS and Federal Regulatory Initiatives</u>

On November 29th CMS Administrator Don Berwick announced new management changes within CMS. As part of the changes, Julie Boughn—who has served as the chief information officer and director of the Office of Information Services (OIS) since May 2006—will be the new acting deputy director of CMI. To take Boughn's place, Berwick named Troy Trenkle, former director of the Office of e-Health Standards and Services (OESS), to be the acting director, and Karen Trudel, who was deputy director at OESS, will serve as its acting director. To close out the changes, Joe McCannon and Vish Sankaran were named as senior advisers.

On December 1st the bipartisan Chairmen of President Obama's deficit reduction chairmen released a final copy of their proposal titled "The Moment of Truth." The report, which was to be voted on by the 18-member commission, calls for sweeping changes to government spending and taxation including many changes to Medicare, Medicaid, and other entitlement programs involving health care. The proposal, widely criticized by members of both parties, was estimated to reduce the deficit by $4 trillion through 2020. Of the 18 commission members, the proposal needed an affirmative vote from 14 of those members in order to be turned into a formal legislative proposal for the White House and Congress. Despite stronger-than-expected support, the proposal only mustered 11 votes.

HHS unveiled on December 2nd a new health promotion and disease prevention agenda titled "Healthy People 2020." The agenda lays out certain 10-year goals on wellness promotion and disease prevention as well as a challenge for technology application developers to assist in those efforts. Health IT advocates applauded the application challenge and noted that technology is uniquely designed to promote community health. In the release, HHS noted that chronic diseases, many of which are preventable, are responsible for 7 out of 10 deaths in the U.S. and account for 75% of health care spending.

On December 2nd the influence Medicare Payment Advisory Commission (MedPAC) issued draft recommendations touching a variety of providers. In those recommendations, MedPAC suggested a net increase in inpatient and outpatient payment rates of 1% in FY 2012. MedPAC suggested the same modest increase for physicians but also expressed their deep frustration at congress' inability to pass a long-term fix to the Medicare physician payment rate, the so-called "doc fix." Although those groups were pleased, not everyone was happy. Most home health agencies were fuming after the release as MedPAC called for a co-pay for services, payment decreases, and additional measures to combat fraud and abuse.

On December 14th HHS Secretary Sebelius issued a new strategic framework to tackle providing care to the growing number of Americans with multiple chronic conditions. The initiative, titled the *Strategic Framework on Multiple Chronic Conditions*, is a public-private to coordinate responses to a growing challenge. In its release, HHS noted that more than a quarter of all Americans and two out of three older Americans have multiple chronic conditions, and treatment for these individuals accounts for 66% of the country's health care budget.

Attorney General Eric Holder and HHS Secretary Sebelius held a day-long summit in Boston on December 16th where they discussed with stakeholders a path forward on combating health care fraud and abuse. The two top officials insisted fraud fighting measures are paying dividends and claimed that efforts have recovered $4 billion along in Massachusetts over the past two years.

Other Legislative Initiatives

On November 29th Congress voted to delay for one month a 23% cut in Medicare physician reimbursement rates. The vote provided some cover for lawmakers who were struggling to find a longer term solution to the so-called "doc fix" and delayed the cuts until January 1, 2011.

On December 2nd the House passed, and sent to the President's desk, a childhood nutrition bill by a vote of 264-157. The bill makes fundamental changes to how the country provides meals to children in public schools and includes a completely offset $4.5 billion boost to meal programs in addition to a 6-cent-per-meal increase to the school lunch program. The legislation passed the Senate by unanimous consent without a vote, but a House Republicans strongly contested the bill with only 17 Republicans voting in favor. Many House Republicans protested the alleged cost and expanded government authority even though presumptive House Speaker John Boehner (R-OH), former chairman of the Education & Workforce Committee, made the motion to consider identical legislation in 2004.

On December 6th Senate Finance Committee Members announced with fanfare that they had signed off on a one-year, $19.2 billion bipartisan deal to delay Medicare physician payments cuts. Committee members immediately fast-tracked the deal and sent it to the Senate floor on December 8th, where it was approved and also approved by the House a day later. The President signed the legislation, delaying a major legislative battle for the lame duck, but warned lawmakers that they must seriously address a more permanent fix. The deal only extends the current rates one year, which means the issue is likely to return front-and-center during the next legislative session. The deal also included extensions of several other health related programs and was paid for by by a health care law adjustment that recoups funding from new health insurance subsidies.

On December 7th the House Republican Steering Committee voted to elect Representative Fred Upton (R-MI) as the next Chairman of the Energy & Commerce Committee. The fight for the gavel of the influential House Committee with broad jurisdiction over health care lasted weeks as current Ranking Member Joe Barton (R-TX), widely thought to be the more conservative member, sought a waiver to his term-limited-reign as the top Republican on the Committee. The presumptive Chairman immediately announced that conservative member Joe Pitts (R-PA) as Chair of the Health Subcommittee. Representative Pitts immediately issued a statement saying that his primary objective in his new job is dismantling 'Obamacare' while introducing market-based alternatives. While the Upton-Pitts announcement was viewed by some insiders as surprising, in a move that surprised very few, the Steering Committee selected current Ranking Member of the Ways & Means Committee, Representative Dave Camp (R-MI), to be the next Chairman of the powerful tax-writing committee also with jurisdiction over health care matters.