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Will the 2014 Mid-Term Election Results Affect the Future of the Home Care Industry?

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In his work Precepts, Hippocrates wrote that "Healing is a matter of ***time***, but it is sometimes also a matter of ***opportunity***". These sentiments are befitting of our law-making process as well as time and opportunity will play a significant role when it comes to the creation and evolution of statutes that will remedy the imperfections of an enormously complex healthcare delivery system in the United States.

As such, 2015 stands to be another important year for healthcare in the halls of Congress. The tenor of the healthcare debate will be reshaped in 2015 by a slim Republican majority in the Senate, which joins the House majority, to reassert Republican priorities. Certainly the makeup of Congress will inject new energy into efforts to repeal the ACA. While symbolic attempts to repeal the ACA will garner floor speeches, hearing statements and a possible showdown in the Senate or with the President, the repeal of this law is extraordinarily unlikely as any major controversial challenges to the repeal of this law will have to be embraced by at least a certain number of Senate Democrats in order to avoid a filibuster and to override the President's ability to veto the ACA's repeal.

Nevertheless, with the ACA as a backdrop, members of Congress are queued to take up major pieces of healthcare legislation in the first session of the 114th Congress including a permanent fix to the Sustainable Growth Rate (SGR) and the potential funding reauthorization of the Children's Health Insurance Program (CHIP). However, there are two sides of the legislative equation that have to be reconciled in order to move any bill in Congress today; an agreement on the desired policy elements and how to pay for them.

In this environment, the largest threat to the home care industry is not that it will be the subject of a blunt policy instrument to pay for other health policy reforms; instead the largest threat is that the home care industry will fail to take an active role in defining how it is an essential part in saving money in order to effect true healthcare reform.

While The Public Elections are Over, Internal Elections Within Congress are Ongoing

The change in Senate majority, along with retirements, will reshape the leadership of Congressional Committees that have jurisdiction over healthcare issues. Typically, seniority plays a predominant role in who is selected to lead these Senate Committees while there is more leeway for Members of the House of Representatives to jump ahead of the line and take the chairmanship of various committees over more senior Members.

Only one Chairmanship with significant jurisdiction over healthcare will remain unchanged. Rep. Fred Upton (R-MI) will continue to serve as the Chairman of the Energy & Commerce Committee in the House. Shortly after the election, Rep. Upton released a statement on his priorities for the 114th Congress, which started off on a bi-partisan note, mentioning the "21st Century Cures" initiative (http://energycommerce.house.gov/cures) that he is leading with Democratic colleague Diana DeGette (D-CO). After a year of roundtables, comment periods and hearings, the initiative is likely to manifest itself in a bill to be introduced in Q1 2015. 21st Century Cures is primarily focused on streamlining regulations to offer the most opportunities for innovation in personalized medicine and the development of new cures at both FDA and NIH. At the same time, the broad scope of their focus also includes the delivery of healthcare and leveraging digital health resources that may have applicability to the delivery of healthcare services to individuals in their homes. Upton's Committee will also be involved with both the SGR fix and the CHIP reauthorization.

Prompted by the retirement of Henry Waxman (D-CA), the Democrats are locked in a power struggle for the Ranking Member position, as both Rep. Frank Pallone (D-NJ) and Rep. Anna Eschoo (D-CA) vie for the position as the Ranking Member. It will be a contentious internal election for the Democrats, as reflected by the fact that Minority Whip Steny Hoyer (D-MD) is endorsing Pallone, while fellow Californian and Minority Leader Nancy Pelosi (D-CA) is endorsing Eschoo.

Rep. Dave Camp (R-MI) is retiring at the end of the 113th Congress, opening up the powerful tax committee for a new Chair. Rep. Paul Ryan (R-WI) is the most likely candidate to ascend to the position, but he is opposed by Rep. Kevin Brady (R-TX) (who currently chairs the W&M Health Subcommittee) who has announced that he will be seeking the chairmanship. Ryan's views on healthcare were brought to the forefront in his role as Budget Committee Chair during an intense period of deficit reduction activity, during which time he became viewed as a Republican thought leader on health reform. He also teamed with Sen. Coburn (R-OK) on the Patient's Choice Act, an ACA replacement bill. While Ryan's "wonky" reputation may be associated with cost-saving measures, it is important to note he also took a favorable view of long-term care in the home setting in the Patient Choice Act.

Sen. Orrin Hatch (R-UT) will take over as the chair of the Senate Finance Committee. Hatch's Committee will be responsible for addressing the SGR fix as well as taking up CHIP reauthorization later in the year, putting him at the center of the

two most likely legislative vehicles. Hatch has seen his share of SGR fixes over the years, and was part of the bi-partisan/bi-cameral negotiations to craft a permanent SGR fix policy. He also has a long history working across the aisle to reauthorize CHIP, and once teamed up with Sen. Ted Kennedy (D-MA) as lead co-sponsor of the legislation. Hatch has stated that one of his top priorities will be to repeal the Medical Device Tax, setting up a contentious but likely bi-partisan vote.

When Senator Max Baucus (D-MT) left the Senate for an appointment as the Ambassador to China earlier this year, the Finance Committee Chairmanship was assumed by Sen. Ron Wyden (D-OR). Wyden has a reputation for a fierce intellect, interest in health care and tax reform and ability to find common ground with his Republican colleagues.

With a slim majority in the Senate, Republicans will still need to work with Democrats to get things done. Wyden will continue to play an important role both as a foil to attempts to repeal ACA and as a collaborator on alternative solutions to improve health care. He has teamed with both Senator Hatch and Senator Alexander, who is poised to take over the Senate HELP Committee, to co-author tax and health reform legislation.

First Order of Business – The SGR Fix

In 2011, the Congressional Budget Office estimated that a permanent SGR fix, doing nothing more than freezing rates, would cost nearly $300 billion over a 10 year budget window. Today, due to reduced costs for medical services and the machinations of the SGR and CBO scoring, holding physician reimbursements at their current rate would cost "*only*" $131 billion over 10 years. The reduction in the CBO score provided Congress with an undeniable opportunity to address a permanent SGR fix. For lack of a better term, SGR went on sale, and still is… for now.

House and Senate healthcare leaders acted in a welcomed bipartisan and bicameral effort to agree on a replacement policy that provided stability and improvements to the current reimbursement model, and a pathway for physicians to participate in alternative payment models. CBO scored the bill at only $138.4 billion.

The task of coming to terms on how to pay for the landmark legislation has proved to be a much more difficult process than crafting the policy. In the 113th Congress, Sen. Wyden argued for the use of overseas contingency operations (OCO) funds available due to the drawdown of the war in Afghanistan and other overseas operations, however that was not palatable to Republicans who 1) did not view OCO funds as real savings available for other purposes and 2) wanted to draw any offsets for the SGR fix from within Medicare or other health programs. There were also arguments made to not pay for the SGR at all, because the wildly fluctuating CBO score is the accounting fallout of SGR's inherent flaws but those suggestions were not in line with prevailing fiscal principles.

The current SGR patch is set to expire at the end of March 2015. Permanent SGR reform in the 114th Congress will most likely not focus on policy design (although there will be opportunities) nearly as much as it will focus on the $138+ billion needed to offset the costs. With Republicans controlling both the House and Senate, the arguments to use non-Medicare/healthcare funds, or to not pay for SGR reform at all, will have no weight.

If a permanent SGR fix is to occur this Congress, and there is no guarantee that it will, then there

will be offsets drawn primarily from the Medicare program. After ACA offsets, multiple SGR patch offsets, sequestration and many rounds of deficit reduction talks, Congress is left with only difficult choices.

As a result, cost sharing for home health, post acute market basket freezes and reimbursement cuts have been discussed by MedPac, included in the Simpson-Bowles report, proposed by Congressional Committees and have come up in White House deficit reduction talks. It is an ugly menu of options, but unless something more palatable can be presented, fending off cuts will be extremely challenging. Therefore, it continues to be necessary for the various members of the home care industry be able to demonstrate to Congress that it can help save the Medicare program money to help pay for the SGR fix by emphasizing home health, instead of diminishing it.

Second Order of Business - CHIP Funding Reauthorization

Funding for CHIP was reauthorized by ACA through FY 2015, which means that funds will be exhausted for the program by the end of September, setting up another vigorous healthcare debate for the summer. Like SGR reform, CHIP funding reauthorization is expected to gain support from both sides of the aisle. The silver lining for CHIP funding reauthorization – and what will differentiate the process significantly from SGR reform – is that the cost of reauthorization is significantly lower.

In its July report to Congress, MACPAC recommended a 2 year reauthorization for the CHIP program funding the program through FY 2017. The estimated CBO score for a 2 year authorization is $0-5 billion; a much more attainable offset (see MACPAC explanation below).

MACPAC June 2014 Report to Congress

CBO estimates that this recommendation, to provide federal CHIP allotments for FY 2016 through 2017, would increase net federal spending by $0–5 billion above the agency's current law baseline. The federal costs of providing CHIP allotments for two more years would be largely offset by reductions in federal spending for Medicaid and subsidized exchange coverage—sources of federally subsidized coverage in which many children are assumed to enroll if CHIP funding were to be exhausted under current law. CBO's estimate also reflects congressional budget rules that require the agency to assume in its current law spending baseline that federal CHIP funding continues beyond FY 2015 at $5.7 billion each year.

With a reasonably low score, and a history of bi-partisan support, CHIP is poised to be one of the success stories of the 114th Congress. There will be a desire to limit the scope of the CHIP bill, however as a viable legislative vehicle, it will inevitably attract policy riders. Subsequently the health policy discussion spurred by reauthorizing funding for CHIP will be robust, and the opportunity should not be missed to engage health care leaders in Congress and the Administration on the value of home health care, and specifically pediatric home health issues.

Defining Home Health Care in the 114th Congress

With significant statutory deadlines driving consideration of at least two major healthcare legislative vehicles, the potential need for hundreds of billions in offsets, new leadership at the helm of Congressional healthcare committees and two full sessions of Congress ahead, time and opportunity may be on the side of legislative progress.

The value of home health care in remedying the imperfections of our health care system does not lie in the dollar savings that can be garnered from a reimbursement cut. The value lies in leveraging the home care setting to provide high quality care, facilitate care coordination and effectively manage chronic disease in order to control health costs and improve outcomes.

Congress is looking for policy options to improve our health system, but it is also looking for options other than cost-sharing and market basket freezes to meet their cost saving needs. By focusing on the intersection of program integrity and cost savings, the home health care industry can promote the modernization of its reimbursement policy at the same time mitigating the risk that a blunt reimbursement cut be included as an offset for another legislative priority. ■

About the authors

David McNitt is a non-lawyer partner in the Oldaker Group, located in Washington DC. Mr. McNitt's practice focuses on federal regulatory and legislative matters across a diverse portfolio of issues including, but not limited to, health care policy and the federal budget. Mr. McNitt has represented the federal interests of healthcare systems, life sciences companies, healthcare associations, technology companies, universities and non-profits before Congress and federal agencies.

David Matyas, Esq., is a member of Epstein Becker & Green's Washington DC office where he practices in the firm's Health Care Fraud and Government and Commercial Reimbursement Practice Groups and concentrates on legal and regulatory matters arising under Medicare, Medicaid, and other third-party payment programs. Mr. Matyas serves as a member of the Board of Directors for the Community Health Accreditation Program (CHAP), a non-profit accrediting body for more than 5,000 community-based health care organizations (home health, hospice, home medical equipment).

In 2009, The Oldaker Group and Epstein Becker & Green formed National Health Advisors, LLC which offers a broad range of specialized services for clients, strategically focused on advocating and implementing public policy solutions for numerous sectors of the health care industry.