

Health Policy and Legislation Alert

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Key Medicare Issues to Watch in Lame Duck Session

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Washington, D.C. is currently focused on a September continuing resolution (CR) to keep the federal government funded, but it is worth looking ahead to the broader health care horizon and the key Medicare issues that await Congress under various lame duck session scenarios. A number of factors including the enactment of the Inflation Reduction Act, the status of Fiscal Year (FY) 2023 appropriations bills, and the mid-term November elections, will influence whether or not the lame duck session is a period of robust legislative activity. However, given the significance of the potential Medicare issues in play, it's worth identifying now what to watch in the coming weeks as Congress and stakeholders prepare for the lame duck session. This alert outlines key Medicare issues to watch when Congress returns from the upcoming mid-term elections.

Averting PAYGO 4 Percent Medicare Sequestration

Congress has routinely prevented triggering pay-as-you-go (PAYGO) sequestration on a bipartisan basis by including provisions that exempt legislation from the mechanism or retroactively "wiping the PAYGO scorecard clean." However, the *American Rescue Plan Act of 2021* (PL 117-2) was not excluded from Statutory PAYGO requirements, thus increasing the deficit on the scorecard by an estimated \$1.9 trillion. To prevent sequestration in early 2022, Congress passed the *Protecting Medicare and American Farmers from Sequester Cuts Act* (PL 117-71), shifting the balances to Fiscal Year 2022. Unless Congress takes similar legislative action this year, a PAYGO sequester (including a 4 percent Medicare reduction) could be triggered in early 2023.

In December 2021, Sen. John Kennedy (R-LA) introduced, but was unsuccessful in advancing, the *Protecting the American Taxpayer and Medicare Act* (S. 3344), which would avert PAYGO sequestration in 2023 by transferring FY 2022 debits to the FY 2023 scorecard. It is unclear whether Congress will revisit the issue as the year comes to a close.

Contact Information

If you have any questions concerning this alert, please contact:

M. Todd Tuten

Senior Advisor
ttuten@akingump.com
Washington, D.C.
+1 202.887.4203

Ileana Ros-Lehtinen

Senior Advisor
iros-lehtinen@akingump.com
Washington, D.C.
+1 202.887.4135

Louis T. Agnello

Counsel
lagnello@akingump.com
Washington, D.C.
+1 202.887.4212

Julie E. Nolan

Senior Policy Advisor
jnolan@akingump.com
Washington, D.C.
+1 202.887.4213

Heide Bajnrauh

Senior Policy Advisor
hbajnrauh@akingump.com
Washington, D.C.
+1 202.887.4206

Matthew Hittle

Senior Policy Advisor
mhittle@akingump.com
Washington, D.C.
+1 202.419.4687

Extending Medicare Telehealth Flexibilities Beyond the COVID-19 Public Health Emergency

The Consolidated Appropriations Act of 2022 (PL 117-103) extended recent expansions of Medicare's telehealth coverage for 151 days (roughly five months) after the end of the COVID-19 Public Health Emergency (PHE). As Secretary of Health and Human Services Xavier Becerra recently **extended** the PHE to October, Medicare telehealth flexibilities will revert to more limited coverage in March 2023 unless the PHE is renewed again or Congress takes additional legislative action. Extended provisions include the allowance for HSA-qualified High Deductible Health Plans (HDHP) to provide telehealth and other remote care services before the deductible is met.

There is potential for extending certain Medicare telehealth flexibilities longer than the extension in current law. The House recently passed the *Advancing Telehealth Beyond COVID-19 Act of 2021 (H.R. 4040)*, which would extend some flexibilities until December 31, 2024, but the outlook is unclear in the Senate. Without a clear end to the PHE in sight, lawmakers may not feel urgency to act on the issue this year. Moreover, the Administration may not be inclined to change the state of the PHE flexibilities before the end of the year given the far-reaching impacts that change would set in motion.

Mitigating Medicare Payment Cuts

This summer, the Centers for Medicare and Medicaid Services (CMS) released the Calendar Year (CY) **2023 Medicare Physician Fee Schedule Proposed Rule**. The regulation includes a 4.4% cut to the conversion factor used in determining payment for codes billed for care provided to Medicare beneficiaries, resulting in payment reductions for a wide range of providers.

Recently, Reps. Ami Bera (D-CA) and Larry Bucshon (R-IN) introduced the *Supporting Medicare Providers Act of 2022 (H.R. 8800)*, which would avert the 4.4 percent reduction. There is precedent for legislative action to mitigate the proposed cuts. In 2020 and 2021, Congress intervened by providing short-term funding to offset the payment reductions. Members of Congress will want to see the final rule, typically released in early November, before deciding whether relief is necessary.

Meanwhile, Clinical Laboratory Fee Schedule (CLFS) tests and services will see Medicare cuts of up to 15 percent on January 1, 2023, absent Congressional intervention. The reductions, originally enacted through the Protecting Access to Medicare Act of 2014 (PAMA), have been delayed several times. Sens. Sherrod Brown (D-OH) and Richard Burr (R-NC), along with Reps. Bill Pascrell (D-NJ), Scott Peters (D-CA), Richard Hudson (R-NC), Gus Bilirakis (R-FL) and Kurt Schrader (D-OR) have introduced the *Saving Access to Laboratory Services Act (SALSA) (H.R. 8188)*, which would permanently amend PAMA and seek to limit annual payment cuts and increases.

Extending Medicare Ambulance Add-On Payments

Currently, ambulance service providers and suppliers are reimbursed by Medicare at rates below the cost of providing services, requiring add-on payments (currently extended to December 31, 2022) to mitigate the gap in operating expenses. In the

Michael S. Barnard
Senior Policy Advisor
mbarnard@akingump.com
Washington, D.C.
+1 202.887.4036

Kendall B. Hussey
Senior Policy Advisor
khussey@akingump.com
Washington, D.C.
+1 202.416.5207

House, Rep. Terri Sewell (D-AL) has introduced *Protecting Access to Ground Ambulance Medical Services Act* (H.R. 2454), which would extend these payments for an additional five years. Sens. Catherine Cortez Masto (D-NV) and Susan Collins (R-ME) have introduced the companion bill (S. 2037) in the Senate. To date, there has not been much specific momentum for the legislation, but end of year packages can create unique opportunities for legislative action.

Medicare-Dependent Hospital and Low-Volume Hospital Programs

The Medicare-dependent hospital (MDH) and low-volume hospital (LVH) payment adjustment were created to provide payment support to small and rural hospitals. Authorization for the MDH program is set to expire on September 30, 2022, while the expanded criteria for the LVH designation also will sunset with the end of the fiscal year. Legislation to make both programs permanent has been introduced this session (S. 4009/H.R. 1887), but has yet to advance in either chamber.

Advancing Legislation to Address Mental Health and Substance Use Disorder

Mental health continues to be a key area of Congressional focus with respect to Medicare and more broadly. On June 22, 2022, the House of Representatives passed the *Restoring Hope for Mental Health and Well-Being Act* (H.R. 7666), which would reauthorize key Substance Abuse and Mental Health Services Administration (SAMHSA) and Health Resources and Services Administration (HRSA) programs to address the national mental health and substance use disorder (SUD) crisis. The Senate Health, Education, Labor and Pensions (HELP) Committee is expected to release its own legislation in the fall, driven largely by a number of expiring provisions (Screening and Treatment for Maternal Health and Substance Use Disorders Grant Program; grant programs for adolescent treatment and recovery services; Community Mental Health Services Block Grant (CMHS); Substance Abuse Prevention, Treatment and Recovery Services Block Grant (SAPT); Pediatric Mental Health Care Access Grant Program).

Senate Finance Committee Chair Ron Wyden (D-OR) stated that “there will still be room” for a separate mental health package in addition to the provisions enacted in the Bipartisan Safer Communities Act (P.L. 117-159). Leaders on three of the five package issue areas—strengthening the workforce (Sens. Stabenow (D-MI) and Daines (R-MT)); increasing integration, coordination and access to care (Sens. Cortez Masto (D-NV) and Cornyn (R-TX)); and ensuring parity between behavioral and physical health care (Sens. Bennet (D-CO) and Burr (R-NC))—have not released any draft language, but Chair Wyden has noted that white papers are forthcoming. End-of-year passage of the package would mark a major milestone for the legislative endeavor around mental health and SUD.

For more details, please see our [previous analysis](#) on mental health and SUD legislation.

Potential Insulin Action

In March, the House passed the *Affordable Insulin Now Act* (H.R. 6833). In the Senate, Sens. Susan Collins (R-ME) and Jeanne Shaheen (D-NH) have introduced *Improving Needed Safeguards for Users of Lifesaving Insulin Now (INSULIN) Act*.

While Majority Leader Chuck Schumer (D-NY) has said he plans to hold a vote soon on the measure, key GOP Senators indicated that they are not ready for a vote. Sens. Mike Crapo (R-ID), Pat Toomey (R-PA), John Barrasso (R-WY), Rob Portman (R-OH), Ben Sasse (R-NE), and Steve Daines (R-MT) have pushed for a hearing before the bill goes to the floor, and this issue remains dynamic headed into the end of the year.

Outlook

Republicans may gain control of one or both chambers of Congress, creating an interest among some policymakers on both sides of the aisle to clear the legislative decks at the end of the year. If Republicans are successful with gaining control of the House in the mid-term elections, a House GOP Majority is likely to immediately turn to its agenda in the next Congress, as outlined in Leader Kevin McCarthy's (R-CA) "Commitment to America," in 2023. Similarly, if Republicans are successful in gaining control of the Senate, Leader Mitch McConnell (R-KY) will lead the Senate's agenda for the next Congress.

It is also possible that Congressional Republicans refrain from partnering with their Democratic counterparts due to the enactment of two partisan reconciliation bills during the 117th Congress. Under such a circumstance, lame duck legislation would likely be focused on extending government funding into 2023, when House Republicans would be better positioned to advance their priorities in the Majority. End-of-year action could include increasing the debt ceiling, which Congress must address in 2023, expiring health care provisions, as well as any other health care issues that Congress decides not to include in a CR package this month.

While the current legislative landscape and related outlook remain dynamic, health care stakeholders will continue to closely watch developments on these key Medicare issues given the impact these potential cuts and policies have to patients, providers and communities across America.

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