

Health Care Reform Bills Approaching Floor Action

With the introduction of H.R. 3962 – *The Affordable Health Care for America Act* – on October 29, 2009, House Democratic leaders released an \$894 billion health care reform package that is expected to expand coverage to an additional 36 million individuals. H.R. 3962 is largely a merged version of legislation passed earlier this year by the three House committees with jurisdiction over health care reform – Ways and Means, Energy and Commerce, and Education and Labor. Current plans are to bring the bill to the floor late next week.

Provisions in H.R. 3962 of interest to AAEM members include:

- ▶ **Physician Payment Reform**
Removes overhaul of the Medicare physician payment formula (SGR), which will be permanently reformed by separate legislation this year.
- ▶ **Medical Malpractice**
Establishes new voluntary state grant program designed to encourage states to implement alternatives (“early offer” or certificate of merit approach) to traditional medical malpractice litigation.
- ▶ **Application of emergency services laws**
Clarifies that nothing in this Act shall be construed to relieve any health care provider from the requirement to provide emergency services according to any State or Federal law, including EMTALA.
- ▶ **Emergency care coordination**
Creates an Emergency Care Coordination Center within the HHS Office of the Assistant Secretary for Preparedness and Response. Authorizes such sums as may be necessary for each of FY 2011 through FY 2015 to carry out the various activities of the Center.
- ▶ **Pilot programs to improve emergency medical care**
Establishes a pilot program for the design, implementation, and evaluation of innovative models of regionalized, comprehensive, and accountable emergency care systems. Authorizes \$12 million for each of FY 2011 through FY 2015 to carry out this program.
- ▶ **Trauma care centers**
Establishes a new program to strengthen the nation’s emergency room and trauma center capacity. Authorizes \$100 million for FY 2011 and such sums as may be necessary for each of FY 2012 through FY 2015 to carry out this program.

In this issue . . .	
Health Care Reform Bills Approaching Floor Action	1
House Democrats Introduce Medicare ‘Doc Fix’ Bill	2
Malpractice Proposals in Health Care Reform.	3
Appointment of CMS Chief Likely To Follow Passage of Health Care Reform	3
Harkin New Chair of Senate HELP Committee	4

In the Senate, the Finance Committee’s reported out its long-awaited health care overhaul proposal on October 13. In trying to get bipartisan backing, Chair Max Baucus (D-MT) had worked for months with a group of six Finance Committee members (the “gang of six” comprises Baucus, Jeff Bingaman [D-NM], Kent Conrad [D-ND], Mike Enzi [R-WY], ranking member Chuck Grassley [R-IA], and Olympia Snowe [R-ME]). One Republican, Olympia J. Snowe of Maine, voted for the bill. The rest of the committee’s Republicans reiterated their opposition in the committee report. (Cont’d page 2)

House Democrats Introduce Medicare ‘Doc Fix’ Bill

On October 29, Representative John Dingell (D-MI) introduced H.R. 3961, the *Medicare Physician Payment Reform Act*, which would permanently reform Medicare’s physician payment formula. The measure would eliminate the Medicare cost-control formula governing payments to physicians, known as the Sustainable Growth Rate (SGR), and replace it with updates based on inflation.

Without congressional action, physicians face a 21% payment cut on January 1, 2010 under the current Medicare physician fee schedule. In almost every year this decade when cuts have been required by the formula, a bill has been passed to stop them. But permanently halting the cuts will be expensive – the bill has no offsets, and, while a formal cost estimate has not been done, the Congressional Budget Office estimated in July that the cost of an almost identical proposal would be \$245 billion over 10 years.

The new formula in the bill would put an emphasis on primary and preventive care services. It also would take some drugs and services such as lab tests out of the calculation, which supporters of the bill say should not be treated as physician services. Such expenditures had

contributed, in part, to the rise in spending under the old formula and, as a result, the cuts that were demanded. Under the new formula, spending on most physician services would be allowed to grow at the rate of gross domestic product (GDP) plus 1%, but preventive and primary care services would be allowed to grow at GDP plus 2%.

The bill was referred to the Energy & Commerce and Ways & Means committees for consideration. House Majority Leader Steny H. Hoyer’s (D-MD) said Democrats were confident they had the votes to pass the bill.

Even if the House can pass the bill, its future in the Senate is uncertain. On October 21, the Senate voted down a procedural motion by 47 to 53 on a similar bill with 13 Democratic caucus members defecting from Majority Leader Harry Reid’s (D-NV) attempt to get a bill to the floor. However, this may not be a problem if House Democrats can attach the Medicare fix to its new health care reform bill – H.R. 3962 – with a procedural move before it goes to conference. Under conference rules, if one chamber includes a policy in its bill, it can be included in the conference report.

Health Care Reform Bills Approaching Floor Action (Cont’d from page 1)

As it now stands, the main provisions of the Finance Committee’s bill require individuals to get health insurance coverage, establishes a health insurance exchange enabling individuals and small businesses to comparison-shop for coverage, reforms the private insurance system, expands Medicaid to include those earning up to 133% of the federal poverty level, and – as an alternative to the public plan option included in the House and the other Senate Committee’s (Health, Education, Labor and Pensions [HELP]) bills – establishes state-based cooperatives to compete with private health plans. The \$856 billion cost of the bill is “within President Obama’s target of \$900 billion.”

Moderate Democratic senators have stopped short of endorsing the Baucus plan, and several said they were unwilling to commit to helping their party overcome a potential Republican-led filibuster. The plan has also failed to gain support from liberal Democrats and Republicans. Before legislation can move to the Senate floor, the bill that emerged from the Finance Committee will be melded with the HELP bill. In explaining what will follow, Senate Majority Leader Harry Reid (D-NV) said, “The first amendment will be a composite of the HELP Committee bill and the Finance Committee bill, working with the White House. And we will see if we can get 60 votes on that. If we can’t get the 60 votes we need, we’ll have no alternative but to do reconciliation.” The strategy of reconciliation is controversial and considered risky, but it could prevent a Republican filibuster and allow the bill to reach the full Senate for a yes-or-no roll call vote needing only a simple-majority vote for passage.

Malpractice Proposals in Health Care Reform

Senator Mike Enzi (R-WY) had asked Senate Finance Committee Chair Max Baucus (D-MT) to include in the committee's health care reform legislation a bill he cosponsored with Baucus in the 110th Congress. That bill, which never advanced, would have authorized grants to up to 10 states for experiments in reducing the number of medical malpractice claims that land in court. States would have been allowed considerable flexibility to develop alternatives to court, as long as they could show that the programs would not reduce access to medical malpractice insurance or prevent patients from resorting to lawsuits. While the Finance Committee's bill does not include the Baucus-Enzi bill, it does include a provision that overlaps an initiative put forward by President Obama in his September 9 address to Congress under which states would be eligible for grants to institute medical malpractice reforms aimed at reducing lawsuits and improving patient safety. The House bill has a similar provision, and many believe this is sufficient for medical malpractice is too controversial to include in health care reform bills already weighted down with myriad contentious issues.

In his speech, Obama said he would order the Department of Health and Human Services (HHS) to exercise the authority it already has to issue grants to states to experiment with alternatives to malpractice lawsuits. An HHS spokesperson said examples of states' demonstration projects could include certificate of merit programs that require individuals to obtain affidavits regarding the validity of their case, or disclosure models

that encourage doctors to disclose errors and apologize for them. The spokesperson said details of the administration's malpractice initiative would be outlined within a month.

The American Association for Justice (AAJ), a group that represents trial lawyers, said the focus of malpractice reform must be on reducing errors and improving safety. AAJ will wait to see the details of the demonstration projects put forward by HHS before deciding whether the programs would adequately protect patients' rights. In contrast, the AMA, which has long pushed for malpractice reforms and advocated for capping malpractice awards (which Obama opposes), welcomed the president's comments.

I don't believe malpractice reform is a silver bullet, but I have talked to enough doctors to know that defensive medicine may be contributing to unnecessary costs."

– President Barack Obama

Despite assertions of savings from proponents of reform, some analysts are less sure malpractice reforms would significantly bring down costs. Lewin Group vice president John Sheils said savings from medical malpractice reform is "a very tricky area" and the evidence does not seem to indicate "tremendous opportunities for savings." According to the Congressional Budget Office (CBO), limiting malpractice awards would have a "relatively small" effect on total health care spending. CBO also said the evidence about how malpractice influences defensive medicine "is not conclusive, and whether limits on malpractice torts have an impact on the practice of medicine has been subject to some debate."

Appointment of CMS Chief Likely to Follow Passage of Health Care Reform

In October 2006, Mark McClellan stepped down as head of the Centers for Medicare and Medicaid Services (CMS). Since then, the agency has not had a permanent administrator (Charlene Frizzera has been serving as acting administrator since January), and some observers find it puzzling that President Obama has not appointed someone officially to head up the agency – particularly in light of expectations that CMS will play a major role in implementing any health care reforms that are passed. The agency is the largest buyer of health care services in the United States and controls an annual budget of about \$700 billion. A reform measure could mean big changes in the programs under its jurisdiction – including substantial revisions to the Medicare physician payment system.

(Cont'd page 2)

Appointment of CMS Chief (Cont'd from page 3)

Despite the lack of an official administrator, health policy experts agree that CMS has been doing a good job this year, due in part to a strong supporting team that includes: Nancy-Ann DeParle, director of the newly created White House Office of Health Reform; and Jonathan Blum, director of the Center for Medicare Management and acting director of the Center for Health Plan Choices. DeParle is a former administrator of the Health Care Financing Administration, the predecessor to CMS, and was a member of the Medicare Payment Advisory Commission. Blum is a former Senate health aide and also worked for the White House budget office.

McClellan, who is now director of the Engelberg Center for Health Care Reform and a senior fellow at the Brookings Institution in Washington, D.C., pointed out that, while CMS will need a permanent chief to implement reforms, it does not need one to get Congress to pass them. He added, "There are a number of people in senior positions in the administration who are very much involved in CMS issues, so it's not like people are ignoring the agency. Because of the promise of health reform and Medicare and Medicaid in achieving that, this is a really important position for the administration, and I think they want to get it right."

Thomas Scully, who preceded McClellan at CMS, agreed that the administration may be waiting until a

health system reform bill is passed before nominating an administrator. "If you had a Senate confirmation right now, it would create a forum for chaos," Scully said. "If they had nominated someone earlier in the year, I think it would have been fine. But at this point, I think they're doing the wise thing and holding off until they pass reform."

Joe Baker, president of the Medicare Rights Center, a patient advocacy organization in Washington, D.C., said that, without a permanent director in place, other CMS officials have stepped up to lead the agency. "They're listening and responding, even without an administrator," Baker said. "I think they're filling from the bottom up rather than the top down, so work is getting done."

Still, some lawmakers would like to have a permanent administrator of CMS in place now. For example, Representative Bill Cassidy (R-LA) said he has questions about program fraud he would like addressed by the new director. In commenting on the situation, White House spokesperson Reid Cherlin said that the administration is "working hard to find the best fit to steer CMS during this critical period." He added, "In the meantime, the agency is running at 100% capacity and continuing to provide vital services for millions of Americans. We look forward to nominating an administrator soon."

Harkin New Chair of Senate HELP Committee

On September 9, Senator Tom Harkin (D-IA) accepted the chairmanship of the Senate Health, Education, Labor and Pensions (HELP) Committee. Harkin, who succeeds the late Senator Edward Kennedy (D-MA), indicated that his priorities would include health care, student loan, and food safety bills. He called his new role a "daunting prospect" but also a "great honor" to serve and carry on the legacy of Kennedy.

Harkin has made his mark on many HELP issues. As an advocate for workers and disabled people, he was the driving force behind the original *Americans with Disabilities Act* and its reauthorization. He chaired the committee's working group on prevention and public health, which was responsible for the section relevant to those issues (Title III) in the Committee's health reform bill, the *Affordable Health Choices Act*, approved in July.

Harkin said he will work closely with Senator Chris Dodd (D-CT), but he pledged to keep Dodd in charge of the panel's role in negotiations. Those negotiations have reached a critical juncture and, while Dodd has been a willing negotiator, he also has indicated that the time should come when Democrats must stop chasing recalcitrant Republican votes. Harkin has made it clear that he would not support an upending of the HELP health care reform bill.