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Gov't Shutdown Impacts: Health Care Edition

Law360, New York (October 15, 2013, 1:36 PM ET) -- As the shutdown of the federal government moves into its third week, the congressional calendar becomes all the more scrambled, delaying action on a number of issues of high priority to health care stakeholders.

Fall and winter are historically active times on Capitol Hill. In 2009, the Senate approved the Affordable Care Act on Christmas Eve. In 2003, the bill that established a Medicare prescription drug benefit cleared the House following an infamous three-hour vote the Friday before Thanksgiving, with the Senate following suit a few days later.

Early this year, as the crystal ball was dropping in Times Square, and 2013 was dawning, Congress worked to avert the last debt crisis and reach an agreement to increase the nation's borrowing ceiling in exchange for a combination of tax increases and spending cuts.

Though on paper, Congress should complete its work on all spending bills well ahead of Sept. 30, timely completion of appropriations bills has been extremely rare over the past decade. As a result, Congress typically spends the last two months of the year enacting massive appropriations packages that fund all or most of the government.

And when even that approach fails, Congress has opted for a continuing resolution that largely funds the government at the prior year's level. With the shutdown throwing the calendar into even greater disarray this year, action on a number of issues pertinent to health care stakeholders remains in the air.

Sustainable Growth Rate

In addition to completing its work on the budget, the year-end congressional frenzy also typically includes a Medicare-focused bill fueled by the need to prevent Medicare cuts to providers called for under the sustainable growth rate or SGR formula.

In addition to preventing the SGR cuts from occurring, these Medicare packages usually include a host of other Medicare provisions known as "extenders" that continue various policies that are scheduled to sunset.

Providers and their advocates have long pushed for a permanent repeal of the SGR formula. Buoyed by news early in the year from the Congressional Budget Office (CBO) that the cost of repealing the SGR — once estimated to near $300 billion over 10 years — had dropped to under $140 billion, advocates and champions in Congress have redoubled their push for a permanent repeal.

But after some momentum created in the first half of the year that culminated with the Energy and Commerce Committee reporting out a reform bill just before the August congressional recess, action has slowed with some stakeholders growing concerned. This is in part due to delayed action on the bill by other Congressional committees and in part by a CBO score in September that estimates the 10-year cost of that Energy and Commerce-cleared bill at nearly $176 billion.

This increase occurred largely because instead of holding payment rates steady over 10 years, Energy and Commerce provided a 0.5-percent annual increase during each of the five years during the transition period.

The House Ways and Means and Senate Finance Committees continue to work on their iterations of the legislation, which would importantly include the much-needed cost offsets or “pay-fors.” Both panels spent time over the summer looking into potential offsets, with Ways and Means even producing a draft bill that included several Post-Acute Care (PAC) reforms proposed by multiple stakeholders.

While there has been some talk that SGR might be able to move as part of a larger debt limit package, the consensus seems to be that the issue is not yet ready and is more likely to move in a later-year package.

If Congress is unable to reach an agreement on a permanent repeal and replacement of SGR this year, it most likely will move to enact another short-term fix to prevent providers treating Medicare patients from receiving a 24-percent cut in payment come January 2014. Congress knows the power of health care providers and senior lobbyists, and lawmakers would be loath to anger a sizable and active segment of the electorate.

While SGR may receive the bulk of health care-sector attention, stakeholders have high hopes for a number of other pending bills discussed briefly below, including some that have been several years in the work.

Compounding and Traceability

The time frame on a bill that would tighten federal oversight of compounding pharmacies and implement a national system for tracing pharmaceutical products across the supply chain is poised for movement once the shutdown passes.

A bipartisan bill negotiated with the Senate cleared the House on the weekend before the government shutdown and must now make it through the Senate. Though many are frustrated with the delay, the bipartisan agreement is expected to pass the Senate relatively quickly after government operations resume.

Device Tax Repeal

Repealing the medical device tax has factored into the ongoing shutdown debate, with Republicans advocating measures that would fund the government in exchange for various deals that included the repeal of the device tax. Repealing the tax created in the Affordable Care Act enjoys strong bi-partisan support in both chambers — the Senate bills counts 36 cosponsors and the House bill more than 260.

While many Democrats support repealing the tax, some influential members are less supportive, viewing it as the device industry’s contribution to the reform law that will benefit them in other ways.

Democrats are also are concerned about how to find an offset for the estimated $30 billion over 10 years the tax is expected to net. Additionally, there is concern that if the device tax is repealed, other industries impacted by ACA taxes will demand similar treatment.

Children's Hospital Graduate Medical Education

The long-delayed reauthorization of the Children's Hospital Graduate Medical Education (CHGME) — which helps pay for the cost of training pediatricians — is another bi-partisan piece of legislation delayed by the government shutdown.

Long delayed due to internal hospital debates as to whether and how much of the funding should go to children's psychiatric hospitals, an agreement was finally reached in late September, and the bill placed on the Senate Committee on Health, Education, Labor and Pensions' calendar for early October. While the shutdown also led to postponement of that markup, stakeholders are hopeful this will only be a minor delay.

And Then There Is Sequestration

While many health care stakeholders, particularly health care providers and academic research institutions continue to bristle at the across-the-board spending cuts known as sequestration and to advocate for its elimination, the current climate does not appear favorable to near-term action here. Following a two-month delay, the cuts took effect in March of this year and are to continue over the next nine years.

Many on both sides lambaste sequestration, yet replacing it with other sources of revenue would require agreement that has proven elusive to say the least. However, as of the deadline, House Republican leaders have been discussing potential easement of sequestration along with some entitlement reforms as part of a package to fund and thus reopen the federal government.

If sequestration holds into a second year with no signs of departing, one thing to keep an eye out for would be increased interest in legislation to exempt certain areas of the government from sequester. For example, the U.S. Food and Drug Administration Safety Over Sequestration (FDASOS) Act, which has picked up more than 50 bipartisan cosponsors in the House over recent months, would exempt industry user fees from sequestration.

The Prospect of Longer-Term Medicare, Entitlement and Tax Reform

Despite the fact that congressional sessions last two years, most observers recognize that the window to make progress on game-changing legislation is quite narrow. Immigration reform stakeholders, for example, are increasingly concerned that lack of movement since their summer Senate victory puts their cause more in doubt.

While some influential members of Congress continue to speak optimistically about taking on major entitlement and tax reforms, the more time and energy spent simply funding the government and paying the nation's bills makes what is already a historic challenge all the more daunting.

But House Budget Chairman Paul Ryan did raise this prospect recently in a high-profile Wall Street Journal op-ed[1], and a foundation laid by Finance Chairman Max Baucus and Ways and Means Chairman Dave Camp could prove useful, particularly as Baucus is retiring and Camp is entering his final year as committee chairman. And, as noted above, potential entitlement changes have emerged as an offering in exchange for funding and reopening the federal government.

Such a package would be unlikely to be the mythic "grand bargain" but could advance some oft-touted reforms like combining Medicare Parts A and B, reforming Medigap first-dollar coverage policies and means-testing Medicare premiums. These all are ideas either proposed or endorsed by the administration and noted specifically by Ryan.

Even modest changes to Medicare can lead to sizable battles. Yet, if enacted, they could advance long-hoped reforms and lay a foundation for future changes.

If 2013 ends without any action on entitlements and taxes, the reality of yet another hotly contested mid-term election in 2014 means there will be precious few months to get anything of substance done before both sides are focused squarely on campaigning. When you add to the mix an increasingly lame-duck administration and intensifying focus on the 2016 presidential election, the need for action by next summer becomes all the more essential.

Conclusion

Washington is full of prognosticators with batting averages that would make the 2013 Miami Marlins look sterling. If one thing is clear over the past few years though, it is that no one knows for sure how these big-ticket debates will be resolved. There is no panacea for health stakeholders and others impacted by these decisions beyond being prepared, proactive and — if need be — instantly reactive.

The highly fluid environment means decisions can change on a dime. What was dead yesterday may be the hot topic tomorrow and vice versa. The strongest opportunities — or threats — can likely be found in oft-touted reform proposals that score well as big money-savers, particularly as the SGR price tag increases, as well as measures that enjoy strong bipartisan support.

While the federal government may be shut down, advocates must remain fully engaged.

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[1] See http://online.wsj.com/article/SB10001424052702303442004579123943669167898.html

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