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## What Obama's Re-Election Means For Health Care Policy

Law360, New York (November 06, 2012, 12:00 AM ET) -- When he assumed the Office of the President in 2009, President Obama focused as a policy priority on tackling the monumental issue of ensuring access to affordable health care. This focus resulted, after an arduous and hard-fought battle in Congress, with the enactment of the Patient Protection and Affordable Care Act, often referred to as "Obamacare" or the ACA. This controversial law already has survived a U.S. Supreme Court challenge largely intact, and the next major hurdle to overcome is how this law will be changed in the coming years in light of other equally important federal budget issues, a ballooning federal deficit, and fundamental changes to Medicare and other entitlement programs to address further systemic cost containment and delivery system and payment reforms.

With a second term in office, President Obama faces an equally challenging choice regarding continuing ACA implementation. The president is facing monumental pressure to reign in federal spending and get the nation's fiscal house in order, while simultaneously trying to persuade a skeptical public that Obamacare, major portions of which only now are being implemented and will fully kick in starting in 2014, will lower health care costs and lead to better care. Should President Obama view his re-election as a mandate for full-speed-ahead ACA implementation? And will the president and his new administration be able to work more closely with Congress to tweak the law given the hyper-partisan atmosphere in Congress and in light of the much broader debate over the federal budget and deficit?

In order to better understand these issues, we must look at events that will transpire in both the near term (i.e., post-election day through the inauguration on Jan. 20, 2013) and the long term once President Obama begins his second term and the 113th Congress begins work. These issues must be considered in the broader context of the looming "fiscal cliff" that will hit on Jan. 2, 2013, if the current Congress and the Obama administration fail to reach agreement on either a short-term delay to the so-called sequestration process and the expiration of the Bush-era tax cuts, or a long-term, comprehensive budget deal that puts the nation on more sound fiscal footing. What follows is a brief summary of what is likely to transpire in the next few months with the national health care debate, as well as going forward into President Obama's second term.

### **The Short-Term Outlook: Nov. 7, 2012, Through Inauguration Day**

Regardless of the outcome, what unfolds over the next 11 weeks in Congress and within the Obama administration will be scrutinized and debated by scholars for years for what these competing branches of the federal government succeeded or failed to achieve in that time.

In the near term, with another four years in power, the Obama administration will almost

certainly press ahead with issuing regulations to implement key components of the Affordable Care Act that the Office of Management and Budget (OMB) has held back for political reasons until after the November election date passed. In Congress, a "lame duck" legislative session will commence with a slew of potential business on the table, including negotiations with the Obama administration to overcome, or at least delay temporarily, the nation's arrival at the Jan. 2, 2013, fiscal cliff. At the same time, the administration and Congress must identify specific funding programs to cut to meet the \$1.2 billion target under the "sequester" — if there is a willingness to delay the sequester from going into effect.

At the state level, in the coming weeks, several states will make their election regarding implementation of health insurance exchanges — a cornerstone of Obamacare's insurance market reforms. Under the ACA, states have the option to establish their own exchange, partner with HHS, or adopt a federally run exchange. Until now, a number of governors have withheld making a final decision on which approach to adopt pending the outcome of this election, and now confront a Nov. 16 deadline by which to submit a blueprint to the HHS for review and certification. President Obama's re-election means that, at least for now, Obamacare will remain largely intact, and the process of rolling out insurance exchanges must proceed. So although some states may adopt a federally run exchange, other states are likely to proceed with implementing a state-based exchange lest they be perceived as ceding control to the federal bureaucracy.

On the regulatory front, the Obama administration is expected to release several rules implementing key ACA components that have been held up until after the election. Most likely, what will come out of OMB in the short term will be more policy-oriented rules implementing the ACA. Examples include the risk adjustment methodology for the ACA's premium risk mitigation programs, which is intended to afford states flexibility in collecting data for state-level risk adjustment programs. States operating risk adjustment programs may propose an alternative methodology for approval by HHS. Another possible candidate would be HHS guidance concerning the essential health benefits provisions of the ACA, which will determine the minimum level of care that health plans must cover through health insurance exchanges. The Office of Personnel Management will likely issue a rule on new, multistate insurance offerings that will be of significant interest to payers, state regulators, and consumer and small business advocates. The OMB also could release the long-awaited final rule implementing the Physician Payment Sunshine Act. This rule is particularly important as pharmaceutical companies, medical device manufacturers and biotech companies are struggling with what information they must collect starting on Jan. 1, 2013.

Turning to the other end of Pennsylvania Avenue, Congress, which has been in recess since late September in order to pursue their own re-election campaigns, will spend the time between now and Christmas trying to back away from the Jan. 2, 2013, fiscal cliff. The fiscal cliff combines the expiration of the Bush-era tax cuts coupled with the automatic implementation of approximately \$2.1 billion in spending cuts to federal agencies and the Department of Defense enacted as part of the 2011 Budget Control Act. ML Strategies, Mintz Levin's government relations and consulting subsidiary, has described four approaches that Congress and the Obama administration could pursue to deal with this crisis.

- Congress and the Obama administration could do nothing. This is the worst case scenario where Congress and the president fail to enact legislation dealing with sequestration and the expiring tax cuts, electing instead to leave the issue for the 113th Congress to address next year. This approach likely will cause deep pain to the U.S. economy, potentially reversing the steady economic recovery that has transpired in recent months.

- Congress and the Obama administration could arrive at a so-called "grand bargain" along the lines of the Simpson-Bowles recommendations from the National Commission on Fiscal Responsibility and Reform. Although ideal, this approach is considered a long-shot given the magnitude of the effort, the compromises required, and the short time available in the lame duck session.
- Congress and the Obama administration could agree to delay, at least temporarily, the deadline for sequestration to kick in and the expiration of the tax cuts. Some pundits believe this to be the more likely scenario, although it sets up a convergence of events posing a substantial challenge to the newly elected 113th Congress. Specifically, the fiscal year 2013 budget continuing resolution, which Congress enacted in September 2012, expires in March 2013, while the current debt ceiling is expected to be reached in late February 2013. Moreover, Congress still must finalize appropriation bills for the balance of fiscal year 2013 (assuming these were not otherwise addressed during the lame duck session).
- Congress and the Obama administration could agree to a one-year "down payment" to afford Congress time to regroup in 2013 to devise a long-term legislative plan to tackle the deficit. This approach likely would entail a patchwork of spending cuts, program savings and revenues totaling approximately \$109 billion, and would delay the nation's arrival at the fiscal cliff by one year.

Contemporaneously with the lame duck session, the OMB and Congress must begin in-depth negotiations regarding the actual process for implementing sequestration in the event a legislative solution is not otherwise reached. Federal agencies are looking at a \$1.2 trillion cut to their budgets (with an additional \$1 billion in defense cuts) adopted as part of the 2011 compromise to raise the national debt ceiling under the Budget Control Act. Even at this late date, few specific details have emerged from the OMB regarding which specific programs will face the budget ax. Although the OMB published a report in September that estimated how much federal programs would need to be cut in order to meet the \$1.2 trillion goal, it did so only after the GOP-lead House pushed legislation compelling this report. The OMB and congressional appropriators will need to make the final decisions on specific program cuts in the next several weeks unless Congress and the administration can come together on an alternative approach that would delay the sequester from kicking in.

Congress also could take up a package of other priority legislation, which might move either as stand-alone bills or as part of an omnibus bill. Among the more popular candidates is changing Medicare's Sustainable Growth Rate (SGR), which controls Medicare spending on physician services. Congress has repeatedly delayed an annual March first downward adjustment to the SGR since its enactment under the Balanced Budget Act of 1997. Many physician groups are pushing for permanent reform to the SGR — the so-called "doc fix" — so that Medicare physician payment rates are no longer subject to annual adjustments. Finding a means to cover the cost of the doc fix, which could be substantial, will be closely tied to the lame duck deficit reduction negotiations.

### **The Long-Term Outlook for Obama's Second Term: Post-inauguration Day**

Given that many key ACA components go into effect in the next few years, 2013 promises

to bring a host of new regulations and agency guidance to implement those provisions. More details and the process for rolling out the health insurance exchanges will be among the first matters to unfold in 2013. Whether states opt to implement their own exchanges, partner with HHS on an exchange, or rely on a federally run exchange, the actual mechanism must be in place in early 2013 in preparation for the October 2013 enrollment period for the 2014 plan year. Other provisions that are effective in 2014 include the individual mandate, subsidies for private insurance premiums, and the (now elective) expansion of state Medicaid programs to allow low-income individuals with incomes up to 133 percent of the federal poverty level to enroll.

Several key ACA funding provisions commence starting in 2013 and 2014, several of which are likely to be incorporated into a larger budget compromise. For example, beginning after Dec. 31, 2012, manufacturers and importers of taxable medical devices will be required to report and pay to the Internal Revenue Service the 2.3 percent excise tax on the sale of the device. Many believe this tax would be eliminated as part of a larger budget compromise. Indeed, last June the House passed a bill to repeal the tax that the Senate is unlikely to pass by the end of this year. But one could reasonably expect a GOP-controlled House to continue to push for this repeal.

Another potential area for adjustment is the health insurance premium tax credit that individuals and families can use starting in 2014. This premium tax credit (really a subsidy) is intended to aid consumers to afford health insurance coverage purchased through an insurance exchange. As it currently stands, the ACA provides subsidies for individuals earning up to 400 percent of the federal poverty level to help purchase insurance.

This health insurance premium assistance subsidy already is the subject of multiple legal challenges due to an issue with the way Congress drafted the law. Under the ACA, the IRS is responsible for administering premium assistance subsidies in the state-run insurance exchanges, but the statute does not specifically authorize the IRS to do the same for federal insurance exchanges. The Obama administration glossed over this statutory discrepancy in the rule implementing the IRS's authority to administer the subsidies, which resulted in multiple lawsuits challenging this interpretation. Political pundits have identified this premium assistance issue as a potential mechanism by which Obamacare opponents (primarily Republican governors) could delay or otherwise undermine ACA implementation. By addressing this specific ACA component as part of the broader budget debate, President Obama would deactivate that threat to the law.

The expansion of Medicaid coverage to individuals earning up to 133 percent of the federal poverty level is yet another potential area that President Obama may look to in order to reach a comprehensive budget compromise, and will see significant activity in the coming year. Under this program, states that opt into the ACA's Medicaid expansion will be required to extend coverage to newly eligible individuals beginning in 2014. Up until the election, opponents of the expansion — primarily Republican governors — have argued that it will cost states billions if they opt to participate and have announced that they will not participate, while the vast majority of states have yet to announce their intentions. Now that Obamacare is expected to remain essentially intact, it is possible more states will elect to participate in part as a result of pressure by insurers to expand the risk pool.

--By Alexander Hecht and Stephen R. Bentfield, Mintz Levin Cohn Ferris Glovsky and Popeo PC

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