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Health Providers Gird For Battle Over Deficit Cuts

By **Rachel Slajda**

Law360, New York (November 07, 2012, 6:08 PM ET) -- With the election over and the Affordable Care Act here to stay, health care providers are gearing up for a bruising battle over physician payment rates and cuts to Medicare and Medicaid as Congress turns its attention toward reducing the deficit.

Congress is expected to tackle deficit reduction in its lame-duck session beginning next week, aiming to cut \$1.2 trillion from the deficit in order to avoid a massive, across-the-board cut known as sequestration. With Medicare, Medicaid and the Children's Health Insurance Program together accounting for about a fifth of the federal government's spending, it's unlikely these programs, especially Medicare — the biggest — will escape cuts.

"Congress will be seriously examining Medicare and Medicaid spending," said Eric Zimmerman, co-chair of McDermott Will & Emery LLP's life sciences government strategies team.

Experts lamented the high levels of uncertainty that have been roiling the provider community over the past few years. Just this year, the health care sector has had to contend with whether the ACA would survive the U.S. Supreme Court and then the presidential election. Now, there's the question of what happens to Medicare and Medicaid over the next several weeks and months.

"There's always been uncertainty for providers," Zimmerman said. "But this is an order of magnitude bigger than I've ever seen. There's a higher potential for seismic change."

Bringing added pressure to the health programs is the stance of the Republican party, which still controls the U.S. House of Representatives and will retain that control next year. House Speaker John Boehner said Wednesday that allowing the Bush tax cuts to expire for the top 2 percent of income earners, as Democrats have suggested, is a nonstarter.

Likewise, he said cuts to defense spending would also meet resistance in the Republican House. Without tax increases and without cuts to defense, which makes up another 20 percent of spending, more of the balance will have to come from cuts to nondefense spending like Medicare. Although Boehner didn't mention Medicare specifically, he called entitlements the root of the deficit problem and said any agreement must include structural reforms to entitlement programs.

If Congress fails to reach a deficit-reduction deal and the sequester goes into effect, Medicare payment rates will see a 2 percent cut. Industry groups representing hospitals, nurses and doctors have pushed hard against letting that happen, saying it would cost 766,000 jobs in the health care sector over the next decade.

On the other hand, that's less than the average 8 percent cut other agencies are facing, and a more balanced approach than the sequester might see even more cut from Medicare, Zimmerman said.

At the same time Congress is scrambling to cut spending, the latest extension of Medicare physician payment rates is set to expire at the end of the year. If allowed to happen, payment rates would drop by about 27 percent.

Congress has nearly always averted these cuts — which are scheduled under what's known as the sustainable growth rate — for months at a time, thanks in part to pressure from physician groups.

But extending the current rates this time will cost an estimated \$18.5 billion. With lawmakers looking to cut spending wherever they can, some experts see a strong possibility — perhaps the strongest since the SGR went into effect — that the cuts, at least partially, will be allowed to happen.

"It sounds like it will be a real possibility," said Stephen Weiner, chair of the health law section at Mintz Levin Cohn Ferris Glovsky & Popeo PC.

Provider groups are hoping to permanently replace the SGR with something that jives better with Medicare's move away from fee-for-service payments. In a post-election statement Wednesday, the American Medical Association said it planned to work with Congress this session to find that permanent solution.

"It is time to transition to a plan that will move Medicare away from this broken physician payment system and toward a Medicare program that rewards physicians for providing well-coordinated, efficient, high-quality patient care while reducing health care costs," AMA President Jeremy Lazarus said.

Lazarus told Law360 that the AMA is lobbying to get a permanent fix — with a transition period to test new payment methods — passed next year, or even in the lame-duck session.

The AMA in October wrote to congressional committees laying out the basic principles for a system it said doctors' groups could support. A new system must be flexible, allowing doctors and practices to choose a payment system that works for them, the AMA said. Medicare must invest in infrastructure that will allow doctors to make the switch to new methods of health care delivery and payment.

The AMA also said it wanted changes to be encouraged with rewards and incentives, rather than penalties.

But repealing the SGR entirely will cost even more money. The Congressional Budget Office has estimated the cost at up to \$376.6 billion over 10 years.

"You need new revenue to correct the SGR," Weiner noted.

--Editing by Elizabeth Bowen and Katherine Rautenberg.

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