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SELLERS DORSEY DIGEST

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NAVIGATION

Summary of Key Updates

Soon after signing a bi-partisan bill containing several Continuing Resolutions, President Trump tweeted that Republicans would withdraw from COVID-19 stimulus negotiations, likely delaying further hospital funding until after the November 3 General Elections. The House proposed bill contains a range of health care spending priorities including increased Medicaid matching funds, increased DSH payments, funds to assist state governments, money for testing and contact tracing, grants for community health centers, and over $1 billion for COVID-19 vaccine procurement and distribution (Modern Healthcare, October 6). In a change of course, the White House released a $1.8 trillion proposal that was met with criticism by both Democrats and Republicans. President Trump expressed that he would like a larger relief package and suggested China should pay for it. The White House is willing to make concessions to Speaker Pelosi (The New York Times, October 15).

CMS published additional guidance around its September 2, 2020 Interim Final Rule with Comment Period (IFC, 85 FR 54820) which requires all hospitals and critical access hospitals to report standardized information as specified by the HHS Secretary during the COVID-19 PHE. The guidance outlines a workflow describing the agency's enforcement strategy which culminates with the possibility of CMS termination for continuous non-compliance over the 14-week advisory and enforcement periods. Under the guidance, hospitals are only at risk for termination if they exhibit continued non-compliance with reporting, meaning that enforcement stops each time the hospital corrects its reporting gap (CMS, October 6). According to Dr. Birx, coordinator of the White House Coronavirus Task Force, about 86% of hospitals are currently reporting the required information (Modern Healthcare, October 6). In separate letters, Senate Democrats and Republicans have expressed their concerns to HHS Secretary Alex Azar and requested he take corrective action to address the change in new reporting requirements that could force some hospitals, especially safety net and rural hospitals, to return millions in Provider Relief Funds.

From October 5 through October 13, CMS has approved eight SPAs – one of which is a time-limited, COVID-19 response SPA. During this period, CMS has also approved two additional 1135 waivers and one 1915(c) Appendix K waiver.

Summary of Key Updates (continued)

On October 5, the Supreme Court denied a petition for certiorari in effect declining to review a CMS final rule that changed the payment calculation for Medicaid DSH Payments. The original plaintiffs challenged the final rule, which stated that "cost incurred" are net of third-party payments (e.g., Medicare and private health insurance), arguing that CMS overstepped its authority under the Medicaid Act and that the change is a policy change rather than a clarification. Moreover, by including the private insurance payments, CMS may eliminate hospitals from DSH eligibility which would place hospitals, including the plaintiff, in a vulnerable financial position. The lower courts used the historical Chevron deference which requires a federal court to defer to the federal agency's interpretation of an ambiguous or unclear statute so long as the agency's interpretation is not arbitrary, capricious, or obviously contrary to the statute (AHLA, October 9).

Federal Updates

News

- In October 7 remarks at an Aspen Ideas event, CMS Administrator Seema Verma noted that distribution of an eventual COVID-19 vaccine would “prioritize those that are most at risk,” particularly “nursing homes residents” and “seniors just in general.”
- CMS on October 8 announced star ratings for the Medicare Advantage (MA) and Part D plans for 2021. The average star rating for 2021 is 4.06 out of 5 stars up from 4.02 stars in 2017. According to the CMS press release, 77% of MA enrollees will be in plans with four or more stars in 2021, up from 69% in 2017, but, as *Modern Healthcare* reports, down four percentage points from 2020. The decline in MA plans that achieved four or more stars for 2021 has financial consequences for MA plans which can achieve bonus payments for achieving four or more stars.
- As reported in last week’s *Sellers Dorsey Digest*, CMS announced new repayment terms for Medicare accelerated and advance payments made to providers during the public health emergency that would grant providers and suppliers one additional year to start loan repayments. A further CMS communication related to these loans contextualizes the impact of these loans and the new repayment terms, noting that CMS has provided more than $98 billion in loans to 22,000 Part A providers, as well as more than $8.5 billion to 28,000 Part B providers.

Federal Regulations

- The Social Security Administration announced that social security and SSI benefits for approximately 70 million Americans will increase 1.3% in 2021 based on a cost-of-living adjustment (SSA, October 13).
- The Office of Management and Budget (OMB) received CMS’ final Home Health Rule on October 5, and stakeholders expect publication in the Federal Register by the end of the month. As in the proposed rule, the final rule will likely focus on telehealth, making some flexibilities permanent that had been implemented during the COVID-19 public health emergency.

Federal Litigation

- On October 13, SCOTUS rejected South Carolina's request to once again block Medicaid funding going to Planned Parenthood and other abortion providers. The suit stems originally from South Carolina Governor Henry McMaster's Executive Order 2018-21 stating that abortion clinics and affiliated physicians are deemed unqualified to participate in the State’s Medicaid program. Planned Parenthood South Atlantic (PPSAT) and Julie Edwards sued the State where ultimately the Court of Appeals for the Fourth Circuit determined that the State violated the Medicaid Act and the Fourteenth Amendment (Equal Protection Clause) by terminating Planned Parenthood from the State's Medicaid program. Stakeholders believe this could indicate that the court's conservative majority may be selective on

abortion cases – presumably limiting access as the court prepares to add Amy Coney Barrett as another conservative justice (SupremeCourt.gov, October 13; SupremeCourt.gov, January 3; Politico, October 13).

- The Trump Administration maintains its plan to implement a hospital price transparency rule on January 1, 2021 despite the hospital industry's continued opposition to the new regulations. Hospital groups wrote a letter in June to HHS Secretary Alex Azar requesting that the administration delay the effective date until after the courts rule on the rule's legality. Currently, oral arguments are scheduled in front of the U.S. Court of Appeals for the District of Columbia on October 15. The District Court ruled in the Trump Administration's favor in June 2020. The rule will require hospitals to make several chargemasters public, which HHS believes will combat inflated charges, thereby containing health care spend (Modern Healthcare, October 9).
- On October 6, SCOTUS heard oral arguments on the issue of whether states have the authority to regulate how much Pharmacy Benefit Managers (PBMs) pay their contracted pharmacies, specifically whether ERISA allows states to force PBMs to pay pharmacist at least their cost of acquiring a drug. If the court allows ERISA (federal law) to pre-empt the patchwork of state PBM regulations, then PBMs believe that drug prices will increase, and payer operations will become more burdensome. Conversely, AHIP (who is not a party to the case) submitted a brief that requests ERISA pre-empt states' laws to encourage national uniformity. The court is expected to deliver an opinion by the end of June 2021 at the latest. With the possibility of a 4-4 split decision, the 8th Circuit's decision would stand, or the court could choose to rehear the case (Modern Healthcare, October 6).

Letters

- In an October 7 letter to CMS, the National Association of Medicaid Directors (NAMD) requested an extension of the discretionary enforcement period for the Interoperability and Patient Access Regulation by a minimum of one year, noting the challenges state Medicaid programs face with their response to the public health emergency as well as the prospect of decreased legislative appropriations.

Waivers

- Section 1135
    - Pennsylvania
        - Allows for the provision of clinic services without the supervision of a physician or dentist.
        - Allows for the provision of Inpatient Psychiatric Services for individuals under Age 21 without the direction of a physician.
    - New York
        - Allows for the provision of Inpatient Psychiatric Services for individuals under Age 21 without the direction of a physician.
- Section 1915(c) Appendix K
    - Minnesota: Consolidates the following, previously approved authorities into a single waiver submission, and moves the effective date for all to March 13, 2020:
        - Temporarily modify service scope or coverage.
        - Temporarily expand allowable service settings.
        - Temporarily modify level of care processes.
        - Modify waiver amendment public notice requirements.
        - Add electronic delivery for some services.

SPAs

- Traditional SPAs
    - Alabama (AL-20-0010): Seeks an exception to the Medicaid Recovery Audit Contractor (RAC) program. This SPA has an effective date of November 30, 2020.
    - Arizona (AZ-20-0013): Proposes inpatient and outpatient hospital differential adjusted payments to facilities owned or operated by the Indian Health Services or tribes under PL 93-638. This SPA has an effective date of October 1, 2020.
    - North Dakota (ND-20-0015): Provides a yearly inflationary increase for personal care services reimbursement rates. This SPA has an effective date of July 1, 2020.
    - North Dakota (ND-20-0016): Provides a yearly inflationary increase for rural health clinic reimbursement rates. This SPA has an effective date of July 1, 2020.
    - North Dakota (ND-20-0018): Provides a yearly inflationary increase for targeted case management reimbursement rates. This SPA has an effective date of July 1, 2020.
    - North Dakota (ND-20-0019): Provides a yearly inflationary increase for EPSDT services reimbursement rates. This SPA has an effective date of July 1, 2020.
    - North Dakota (ND-20-0020): Provides a yearly inflationary increase for the following services: outpatient hospital, clinic, lab, DME, optometry, chiropractic, dental, diagnostic/screening/ preventative, ambulatory surgical centers. This SPA has an effective date of July 1, 2020.
- COVID-19 Response SPA
    - Washington, DC (DC-20-0007): Increases reimbursement for Adult Substance Abuse Rehabilitation Services by 20% to support additional costs related to delivery of services during the COVID-19 public health emergency. This SPA has an effective date of March 1, 2020.

State Updates

Click here to view Sellers Dorsey's state budget tracking summaries.

- Under pressure from the federal government, Nevada health officials on Friday rescinded a statewide order directing nursing homes to halt the use of two government-issued rapid coronavirus tests that the State had deemed to be inaccurate. The reversal came shortly after the U.S. Department of Health and Human Services sent a threatening letter on October 8 to Nevada officials. The document notes that swift punitive actions could be taken if the State does not promptly revoke its ban, which Administrator Brett Giroir, assistant secretary of Health and Human Services, called "unwise, uninformed, and unlawful" and a violation of the Public Readiness and Emergency Preparedness Act.
    - 23 of 39 positive antigen test results collected from nursing homes across Nevada were found to be false positives when confirmed by a more accurate laboratory test. The discovery prompted state officials to issue their directive on October 2, urging nursing homes to promptly pivot from antigen tests to other types of tests that look for viral RNA while the discrepancies were being investigated.
    - According to a new Nevada directive issued on October 9, the State's nursing facilities can resume use of BD's and Quidel's products. However, Nevada's department of health also recommended that all antigen test results, positive or negative, be confirmed by a laboratory test that relies on a slow but accurate and reliable technique called polymerase chain reaction (PCR). Officials noted that false negatives risk exposing healthy people in nursing homes to someone who is unknowingly contagious. On the other hand, false positives could prompt the

placement of a person who is well into a unit with sick people, thus increasing the chance of infection.

- In a report released by the Congressional Budget Office on October 8, the federal deficit for fiscal year 2020 which ended on September 30, more than tripled from last year, totaling an estimated $3.1 trillion. The report also identified that spending was 47% higher in 2020 than in 2019, with Medicaid spending reaching $39 billion from April to September, an increase of 19% compared to the previous year. The official deficit figure for fiscal year 2020 will be released later this month by the Treasury Department.

Private Sector Updates

- Humana's Medicare Advantage (MA) value-based payment model has increased preventative care. As of December 2019, Humana had 3.6 million individual MA members. More than 60% of those members used primary care physicians (PCPs) who had value-based care arrangements. Compared to members whose PCPs were in fee-for-service arrangements, members with PCPs in value-based care arrangements had 35,500 fewer hospital admissions and nearly 76,000 fewer emergency room visits. These reductions saved Humana about $4 billion in medical costs that would have been incurred if members were enrolled in Original Medicare (Health Payer Specialist, October 12).
- The gross profit margins of payers running group and MA plans increased by double-digit percentage rates during the first six months of 2020, according to a new Kaiser Family Foundation (KFF) analysis. KFF found that MA plans' gross margins increased by 41% for the year-over-year (YOY) period ending on June 30. In the group market, the gross profit margins jumped by 22% YOY for the first half of 2020. On the other hand, profit margins for individual Affordable Care Act (ACA) health care exchange plans remained stable during the first six months of 2020 but significantly improved when compared to the first years of the ACA. According to the KFF research, the average gross margins per member per month was $138 in the individual ACA market, a 2.8% decrease compared to the same period in 2019, suggesting that "insurers in the individual market remain financially healthy after a year and a half with no individual mandate penalty even while the coronavirus outbreak worsened" (Health Payer Specialist, October 12).
- Strategic Health Information Exchange Collaborative (SHIEC) announced a new Interim CEO, Lisa Bari, a former health information technology lead at CMS' Innovation Center. She will lead the HIE trade group on an interim basis while the board searches for a permanent replacement for Kelly Hoover Thompson, the group's former CEO. Earlier this year Lisa started working with SHIEC as a policy and advocacy consultant. At CMS' Innovation Center, Lisa spent more than three years working on interagency health IT, interoperability and artificial intelligence issues, including work on interoperability and information-blocking rules from CMS and HHS' Office of the National Coordinator for Health Information Technology (Modern Healthcare, October 9).
- CareSource, Ohio's largest Medicaid payer, recently eliminated 80 positions. This announcement coincides with a new RFP for Ohio Medicaid stressing value-based care, lower costs, and greater oversight. Other managed care plans have also announced job cuts, including Highmark Health, EmblemHealth, and Oscar Health (Health Payer Specialist, October 9).
- Anthem is facing another contract dispute in Kentucky with Molina Healthcare. Anthem obtained a restraining order to ban the State from sending out notices informing Medicaid recipients that it will no longer be a managed care insurer for the program. Earlier this year Anthem lost out on the Kentucky Medicaid contract awards and recently filed a lawsuit objecting to the contract awards, one of the recipients being Molina. Anthem alleged that the State did not follow its own rules for the RFP and overlooked Molina's hiring of Emily Parento, a former Kentucky state official who was working for Molina when the contracts were awarded (Health Payer Specialist, October 8).

- Hospital merger and acquisition deals have continued to decline, sinking to a 10-year low. During the third quarter, acute-care hospital transactions marked the fifth consecutive quarterly decline in volume. According to Eb LeMaster, a managing director at Ponder & Co, “sellers are trying to figure out where they stand [and] buyers are being more selective." Most of the recent transactions include large not-for-profit organizations and were between in-state or market adjacent parties. Hospital merger and acquisition experts predict activity to increase in the second half of next year (Modern Healthcare, October 8).
- Lyft announced an integration with Epic Systems Corp.'s electronic health record system which marksLyft’s latest step into the health care industry. Staff at participating hospitals will be able to use a patient's medical record to order Lyft rides if they need help traveling to or from non-emergency medical appointments. Currently Lyft has an integration with Allscripts. Lyft and Epic are now working together to provide scheduling services and measure patient outcomes in addition to helping patients order rides (Modern Healthcare, October 8).

Sellers Dorsey Updates

- Members of the Sellers Dorsey team attend, sponsor, and speak at events year-round, enhancing knowledge and relationships that help our clients realize opportunities. This month Sellers Dorsey is leading a panel at the MHPA Annual Conference and coming up after that you will find us supporting the NAMD Annual Conference and AAMC: Learn Serve Lead Conference, among others. Check out our Events page or contact us for more info!
- Sellers Dorsey is fortunate to have grown by more than 30 new staff in 2020! Among our new team members are impressive thought leaders from the worlds of Medicaid and health care business, along with talented project staff to ensure our clients succeed. Our team passionately supports clients’ efforts to make a positive impact on people’s lives through Medicaid and health care. Learn more about this incredible group!

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