Congress returns from its Thanksgiving recess and works to prevent a government shutdown by passing an 11-week Continuing Resolution (CR) through February 18, 2022. Negotiations continue in the Senate on the Build Back Better (BBB) Act, and the Administration’s vaccine mandate for health care facilities faces legal roadblocks.

Congress
Congress Passes CR Lasting Through February 18, Without Health Care Extenders. The first deadline-driven action upon Congress’ return from the Thanksgiving recess was to pass a temporary funding measure to prevent a federal government shutdown on December 3—the expiration date of the previous CR. The seemingly straightforward process was delayed throughout the course of the week by disagreements between Democrats and Republicans over the length of the new CR, as well as threats from a group of conservative Republicans in protest of the Biden Administration’s vaccine mandates.

Appropriators released an 11-week CR the morning of December 2, providing stopgap funding through Friday, February 18, 2022. The same day, the House approved the CR by a vote of 221-212 and the Senate followed suit later in the evening by a vote of 69-28, sending the measure to President Biden’s desk and averting a government shutdown.

Notably for the healthcare community, the CR does not address various threats to Medicare payments, including those that could begin at year-end. If Congress does not act through another legislative vehicle this year, a negative 3.75% update to the Medicare Physician Fee Schedule and a 2% Medicare sequestration cut will go into effect January 1, 2022. A 4% decrease under statutory Pay-As-You-Go (“PAYGO”) rules is also expected to take effect in early 2022. The 2% and 4% cuts would affect all Medicare providers, in addition to physicians. Physicians face the additional 3.75% cut, bringing total potential reductions to Medicare payments for physician services to nearly 10% if Congress does not intervene. End-of-year funding measures often serve as vehicles to avoid payment cuts like these, and much of the healthcare community was hoping, if not expecting, Congress to use this CR to resolve these looming threats. The CR also does not address any other expiring health provisions, such as telehealth coverage extensions.

This so-called “clean” CR increases the likelihood that Congress may not take action on the looming reimbursement cuts before they take effect in the New Year, though there is still the possibility that Congress will act on a stand-alone measure to address these health care extenders this month.

While the Centers for Medicare and Medicaid Services (CMS) can direct Medicare Administrative Contractors (MACs) to temporarily hold claims if legislative action is pending, they cannot do so through February 18, 2022. There is more flexibility on timing for the across-the-board statutory PAYGO cut depending upon the time it takes for the Office of Management and Budget (OMB) to certify and implement it.

Senate Negotiations Continue on BBB. Following House passage of BBB on November 19, the $1.7 trillion legislation—which includes the social spending (or “soft infrastructure”) priorities of President Biden and Congressional Democrats—awaits consideration in the Senate, where its ultimate scope and outcome remain uncertain.

The House-passed BBB is expected to change considerably before reaching the Senate floor due to the need to have all 50 Senate Democrats—both progressives and moderates—on board to pass the bill. Further, Senate leadership must contend with the so-called “Byrd Rule,” which dictates what types of provisions can advance in legislation considered under the budget reconciliation process. Such decisions
are made by the Senate Parliamentarian, who has been meeting with Senators and is expected to begin issuing guidance and rulings in the coming days.

Senate Majority Leader Schumer (D-NY) has indicated that he would like to have BBB on the Senate floor the week of December 13, pending completion of the Parliamentarian’s work. Should Senate Democrats ultimately agree upon and advance a revised version of BBB, the legislation would need to return to the House for a final vote before reaching President Biden’s desk. Timing remains very uncertain at this time. If consideration of BBB is not completed this year, it can roll into 2022.

Administration

CMS Vaccine Mandate Faces Legal Roadblocks. Two U.S. District Courts issued preliminary injunction (PI) orders this week, barring CMS’ implementation of the Ominibus COVID-19 Health Care Staff Vaccination Rule (“CMS Vaccine Mandate”).

On November 29, the U.S. District Court for the Eastern District of Missouri, Eastern Division, granted a Preliminary Injunction (PI) enjoining CMS from implementing and enforcing its vaccination mandate for health care facilities in 10 plaintiff states—Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming—pending a trial on the merits of the case. The next day, the U.S. District Court in the Western District of Louisiana issued a separate order providing for a nationwide PI. The court noted that limiting its injunction to just those plaintiff states would not be sufficient, stating: “In addressing the geographic scope of the preliminary injunction, due to the nationwide scope of the CMS Mandate, a nationwide injunction is necessary due to the need for uniformity.”

The Biden Administration is appealing both rulings along with the injunction issued against the large employer mandate issued by the Occupational Safety and Health Administration (OSHA). While the ultimate fate of these rules is unclear, it appears that the injunctions will remain in place past the first compliance date of December 6. In the meantime, the Biden Administration on December 2 paused implementation and enforcement of the CMS mandate while these preliminary injunctions are in effect.

Biden Announces New Actions to Combat COVID-19 Variants. President Biden announced several new public health actions that attempt to combat growing concern over the emergence of the Omicron COVID-19 variant and the coming winter months. These actions include increasing access to and promotion of boosters for all U.S. adults, working to improve COVID-19 prevention and vaccination policies for school-age children, expanding free at-home testing, and increasing the supply of treatment pills for COVID-19 to prevent hospitalization and death. The Administration also plans to take significant steps to prepare for the emergence of future COVID-19 variants and other pandemic scenarios.

Quick Hits

- The Supreme Court heard oral arguments this week on cases that address Medicare disproportionate share hospital (DSH) payments and reimbursement
cuts to the 340B program. The latter case, in addition to the technical payment issues, also presented significant challenges to the *Chevron* deference legal doctrine, which could have significant implications for federal rulemaking. Decisions are not expected until summer.

- The Supreme Court also heard oral arguments this week on Mississippi’s 15-week abortion ban—a case that could have a significant impact on abortion protections under *Roe v. Wade*.

- The House Energy and Commerce Health Subcommittee held a December 2 hearing on the opioid epidemic and an interagency proposal to combat illicit fentanyl-related substances.

- The House Energy and Commerce Health Subcommittee announced a December 8 hearing on the future of biomedicine.

- CMS issued a Request for Information (RFI) to solicit stakeholder feedback that will be used to inform potential changes and future rulemaking to improve the organ transplantation system and to enhance the quality of life of those living with organ failure.

- CMS announced it will not move forward with the Seriously Ill Population (SIP) Component of the Primary Care First (PCF) Model, stating that the proposed SIP outreach method is unlikely to result in sufficient beneficiary uptake to allow for model evaluation.

**Next Week’s Diagnosis**

Negotiations continue among Senate Democrats on BBB, and between Democratic and Republican leaders on an agreement to address the debt ceiling, which the Treasury Secretary estimates could be reached by December 15, as Congress heads into its final, frantic weeks of legislative business for 2021.

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