

# Health Care Reform Update

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To our dedicated TPI clients, we felt it was time to offer an update on the state of the US Health Care System. We hope you enjoy the update. Please do not hesitate to call or write, should you have any comments, questions, or concerns.

Health Care Reform was enacted in two bills. The Patient Protection and Affordable Care Act (PPACA) became law on March 23, 2010. The PPACA was then amended by the Health Care and Education Reconciliation Act of 2010 (H.R. 4872), which became law on March 30, 2010. Phased out over four years, these bills were intended to introduce a comprehensive system of mandated health insurance. This system would include reforms designed to eliminate “some of the worst practices of insurance companies”. It was also designed to preserve private insurance and private health care providers, and to create subsidies to enable the poor to buy insurance.

On Tuesday, November 2, 2010, the Republican Party took control of 239 of the 435 seats in the House of Representatives for the next Congress, eliminating a previous Democratic majority. The gain of 63 seats was the largest for any midterm election since 1938. Republicans also gained 6 seats in the U.S. Senate, control of 25 State legislatures, and control of 29 State Governorships.

Health care reform has failed to become a bipartisan effort from its inception. The sudden shift of political power control has resulted in an attempt by the Republicans to repeal the 2010 bills. With this as the backdrop, let us review the current status of the original bills and some of the events that have been percolating behind the political scenes. Some of these events could potentially affect the integrity of the original health care reform legislation.

## **General Overview:**

Some sections of the Health Care Reform Act enacted in 2010 and 2011 are effective today. Failure to comply with these requirements may lead to penalties. Requirements include, but are not limited to: (1) grandfathered plans making the appropriate disclosures; (2) non-grandfathered plans continuing to offer coverage for adult children and eliminating cost-sharing for preventative health services; and (3) both grandfathered and non-grandfathered plans eliminating lifetime annual limits and waiting periods in excess of 90 days. These requirements are effective for plans beginning on or after September 23, 2010.

## **Innovator Grants:**

On February 16, the Department of Health and Human Services announced the award of grants to help a group of “Early Innovator” states design and implement the information technology infrastructure needed to operate Health Insurance Exchanges. The “Early Innovator” states are Kansas, Maryland, New York, Oklahoma, Oregon and Wisconsin. These states will share \$241 million in helping to establish the exchanges under the Patient and Affordable Care Act (ACA).

## **Alternatives to Institutional Care:**

The ACA has provided additional funding to help strengthen community living. The Health and Human Services announced that \$4.3 billion in new funds have been made available to help establish and expand community-based alternatives to institutional long term care. Nursing homes and similar institutions are

too often the first, or only, long term care choice for people with Medicaid. The goal of this new initiative is to give states additional resources to make community living a first choice. This initiative commences in October and will allow states to receive a six percent increase in federal matching funds to provide community-based attendant services.

### **Medicare Reimbursement:**

The passage of ACA allowed Congress to direct the Centers for Medicare and Medicaid Services (CMS) to implement a Value-Based Purchasing (VBP) program. The goal of the VBP is to revamp how Medicare services are paid out and to better reward value, outcomes, and innovations. Proposed regulations released by CMS in the January 13, 2011, Federal Register, give providers a first look at how CMS plans to implement VBP and provide quality incentives.

The VBP program generally applies to all short-term acute care hospitals. Beginning in 2013, CMS proposes that Hospital Operating Diagnosis-Related Group (DRG) payments will be reduced by 1 percent to create a VBP payment pool. The reduction will increase 0.25 percent per year to a full reduction of 2 percent in 2017. This reduction will be reallocated to hospitals in a budget-neutral manner and will be based on each hospital's total performance score under the proposed VBP measurement criteria. CMS proposed using the "Three Domains of Care" approach to assess quality, which includes clinical process of care measures, outcome measures, and patient experience survey results.

### **Home Health Agencies:**

On November 2, 2010, the CMS issued the final rule on the 2011 update for Medicare Home Health Prospective Payment System (PPS) rates. This rule, combined with the PPAC, has created far-reaching consequences facing home health agencies. The home health industry has been thrust into the government spotlight, with repeated reports from the Medicare Payment Advisory Commission about excessive profit margins and accusations of questionable business practices. As a result, the government has reformed health care with payment reductions and implementation of additional compliance requirements.

### **Medical Device Manufacturers:**

The Advanced Medical Technology Association (AdvaMed) is an entity that represents the medical device industry. In a briefing on February 2<sup>nd</sup>, AdvaMed officials presented the group's legislative and regulatory priorities for 2011. These priorities included the repeal of numerous ACA provisions, such as excise taxes on device manufacturers and the repeal of the Independent Payment Advisory Board (IPAB). The following day, Sen. Scott Brown (R-MA) introduced a bill to repeal the excise tax on medical device manufacturers.

### **Recent State Legal Actions:**

On December 13, 2010, Judge Henry Hudson of the Virginia Federal District Court ruled that Section 1501 of the Health Care Reform Act "exceeded the boundaries of congressional power." Commencing in early 2014, Section 1501 of the Act requires that uninsured Americans obtain health insurance coverage or be subject to certain penalties. The Virginia Attorney General is expected to request the United States Supreme Court to consider the constitutionality of the Health Care Reform Act.

On January 31, 2011, U.S. District Judge Roger Vinson of the Florida Federal District Court declared the Health Care Reform Act unconstitutional. Approximately twenty-six states have joined in the lawsuit. In response, the Florida Insurance Commissioner indicated that Florida would immediately stop

implementing certain, yet unspecified, provisions of the Health Care Reform Act. It is expected that the Florida ruling will be appealed to the United States Supreme Court after review by the Court of Appeals.

Two earlier rulings by judges upheld the constitutionality of the Act. The two cases involved private-sector plaintiffs, rather than states, but standing was not an issue in either case. Both federal judges ruled on the merits of the complaints and found that Congress acted within its authority under the Commerce Clause. No appellate court has adjudicated on the so called "Obamacare" lawsuit, which means that none of the rulings have the force of precedent.

### ***The Future of the Senate:***

On January 19, 2011, the House of Representatives voted to pass the 'Repealing The Job Killing Health Care Law Act'. If passed by the Senate and signed by the President, the Repeal Act would retroactively repeal the Health Care Reform Act. With a Democratic-controlled Senate, most expect that the Repeal Act will not be passed. Further, President Obama has promised to veto the Bill if presented.

On February 2, 2011, Senate Democrats successfully mounted a party-line defense and defeated a bid by Republicans to repeal the health care overhaul. Challenges to the law will continue. The vote was 47 to 51, with all Republicans voting unanimously for repeal, but falling 13 votes short of the 60 needed to advance their proposal. However, it is clear that control of the Senate is up for grabs this election cycle. Republicans will need three of four seats (depending on the outcome of the presidential race) to control the Senate. Democrats face a daunting initial landscape. There are only 23 Democratic Senate seats and only 10 Republican Senate seats up for election in 2012. Senator Kent Conrad's (D-North Dakota) retirement has had an effect on the electoral math. Senator Jim Webb's retirement announcement adds to Democratic problems in Virginia, where former Senator George Allen has already announced his intention to try to win back his old seat. The two next most vulnerable seats this cycle are held by Democrats in Nebraska and Montana.

### ***So, What Does the Future Hold?***

There is no doubt that the Supreme Court will eventually have to settle the questions of the individual mandate and severability. The question remains, but when they choose to resolve it is a mystery. Will it be before or after the 2012 elections? This is a question fraught with political consequences, for both President Obama and the Democrats still in Congress.

The future of Health Care Reform is a partisan concern and one that might very well remain in limbo until after the results of the November 2012 elections and a Supreme Court ruling is issued. In the meantime, the four year schedule of reforms will continue to be unleashed as originally planned.