



## Health Policy Briefing

December 17, 2018

### TX Judge Strikes Down ACA, Ruling Expected to be Appealed

A federal judge in Texas struck down the Affordable Care Act (ACA) on Friday, one day before the deadline to enroll in coverage for 2019. The case was brought by 20 GOP-led states that sought to overturn the law’s protections for pre-existing conditions. The Trump administration declined to defend the law in court. Judge Reed O’Conner ruled that the law’s individual mandate is unconstitutional, and that the mandate cannot be separated from the rest of the law – therefore, the rest of the law is invalid. He reasoned that the Supreme Court upheld the individual mandate as a tax. When Congress repealed the fine for failing to comply with the mandate, the penalty was no longer a tax and the mandate was therefore unconstitutional. He also characterized the mandate as essential to the rest of the ACA, arguing that Congress effectively invalidated the entire law when it repealed the individual mandate. The ruling is expected to be appealed, during which time the ACA will remain in effect. O’Conner did not issue an injunction to stop federal officials from enforcing the law in the meantime.

Following the ruling, President Trump took to Twitter to urge congressional leaders to pass a new health care law. Congressional leaders from both parties have stressed that the ruling will not impact premiums or plans for 2019 and called for actions to be taken to protect the nation’s insurance markets from disruption. House Democratic Leader Nancy Pelosi (D-Calif.) has promised that the House will act quickly to uphold protections for people with pre-existing conditions and to intervene in the appeals process when Democrats take control of the chamber in the new congressional session. Ways and Means Committee Chairman Kevin Brady (R-Texas) made similar promises, expressing support for affirming ACA provisions that allow children to stay on their parents’ insurance until age 26 and the prohibition against lifetime limits on insurance coverage.

Sen. Chuck Grassley (R-Iowa), the next chairman of the Senate Finance Committee, has stated his intent to hold hearings on the ACA next year, with a focus on maintaining insurance coverage should the law be overturned.

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## ***Dec. 21 Government Funding Deadline Approaches***

Negotiations are stalled between lawmakers and the White House on funding several major federal agencies ahead of the December 21 deadline to avoid a partial government shutdown. President Trump and congressional Democrats appear to be at an impasse, with neither party willing to compromise over funding for a border wall. Senate Democrats have agreed to \$1.6 billion for border security, but the President has demanded at least \$5 billion. Republicans are discussing options for another short-term continuing resolution (CR), and the President is reportedly considering making a proposal to Democratic leaders to delay the spending fight until next year. While the U.S. Department of Health and Human Services (HHS) is already funded, the Food and Drug Administration (FDA) receives its annual appropriations through one of the unfunded spending bills. The House is scheduled to hold its next votes on December 19 and plans to stay in session until it completes its work for the 115th Congress.

## ***Lame-Duck Health Bills Passed Last Week***

The House of Representatives passed the ***Improving Medicaid Programs and Opportunities for Eligible Beneficiaries (IMPROVE) Act*** (H.R. 7217) last week by a vote of 400-11. The ***IMPROVE Act*** is a bipartisan package of bills pertaining to the Medicaid program and aimed at improving care for children with complex medical conditions. It includes a new penalty for pharmaceutical manufacturers that knowingly misclassify branded products as generics to reduce their Medicaid rebate payments. The overcharge language was adopted from Sen. Chuck Grassley and Sen. Ron Wyden's ***Right Rebate Act of 2018*** (S. 3702). Grassley and Wyden are hopeful the bill will be approved by the Senate before the end of the lame-duck session. The ***IMPROVE Act*** incorporates H.R. 3325, the ***Advancing Care for Exceptional (ACE) Kids Act***, H.R. 5306, the ***Ensuring Medicaid Provides Opportunities for Widespread Equity, Resources (EMPOWER) and Care Act***, and H.R. 7149, the ***Protecting Married Seniors from Impoverishment Act***.

The House also passed S. 2465, the ***Sickle Cell Disease and Other Heritable Blood Disorders Research, Surveillance, Prevention, and Treatment Act of 2018***, which would reauthorize the Sickle Cell Disease Prevention and Treatment Demonstration Program; S. 3029, the ***PREEMIE Reauthorization Act of 2018***, to continue research and education programs aimed at preventing preterm births; H.R. 1318, the ***Preventing Maternal Deaths Act of 2017***, to expand federal efforts to track and prevent maternal mortality; and H.R. 6615, the ***Traumatic Brain Injury Program Reauthorization Act of 2018***, to reauthorize the CDC's traumatic brain injury initiatives and establish a national concussion surveillance system. S. 2465, S. 3029, and H.R. 1318 have been passed by the Senate and will now head to the President's desk for his signature.

The Senate passed the ***Building Our Largest Dementia (BOLD) Infrastructure for Alzheimer's Act*** (S. 2076) by voice vote last week. This legislation would provide more resources for state and local public health officials to increase early detection and diagnosis of Alzheimer's disease and to provide support for people living with Alzheimer's and their caregivers.

## *W&M Releases Revised Tax Package, Red Tape Health Care Bills*

House Ways and Means Committee Chairman Kevin Brady (R-Texas) released a revised lame-duck tax package last week. The revised legislation is an amendment to the original version of the bill that was released on November 26. The bill would delay or repeal several ACA taxes, including the medical device tax, which would be postponed until 2025. The ‘Cadillac’ tax on high cost health plans would be delayed until 2023, and the law’s fee on health insurers would be delayed until 2022. The tax on indoor tanning services would be permanently repealed.

Republican members of the panel also released a series of health care bills as a part of the Committee’s Medicare Red Tape Relief Project. The bills are aimed at increasing access to care in rural areas and improving the efficiency of the Medicare program. H.R. 7248, the ***Reducing Administrative Burden and Becoming Increasingly Transparent Act***, would give Medicare providers a vehicle to submit comments to the Centers for Medicare and Medicaid Services (CMS) every year on how to reduce administrative burden in each Medicare payment system. H.R. 7253, the ***Remove Extraneous Measures that Obstruct Value and Efficiency (REMOVE) Act***, would codify all measure removal factors for hospital and post-acute care (PAC) quality measures, including the newest measure removal factor #8 that weighs the benefits of a measure against the costs of reporting the measure. H.R. 7247, the ***Incentivizing Shared Risk in Medicare Advantage Act***, would clarify that a Medicare Advantage (MA) organization may establish a waiver process to exempt physicians that engage in financial risk arrangements with the plan. H.R. 7249, the ***Better Prior Authorization Notification Act***, would require notification to providers and beneficiaries that will be impacted by prior authorization. H.R. 7250, the ***Prior Authorization Improvement Act***, would require a study on the feasibility of existing technologies that can help streamline and reduce the burden of prior authorization requests in MA plans. H.R. 741, the ***Rural Hospital Regulatory Relief Act of 2017***, permanently extends the application by CMS of an instruction against the enforcement of certain physician supervision requirements with respect to outpatient therapeutic services in critical access hospitals (CAHs) and small rural hospitals. H.R. 5507, the ***Critical Access Hospital Relief Act*** repeals the 96-hour physician-certification requirement for inpatient CAH services under Medicare.

## *E&C, W&M Agendas Take Shape*

Rep. Frank Pallone (D-N.J.), Chairman of the House Energy and Commerce Committee for the 116th Congress, stated in an interview last week his plans to investigate the Trump administration’s management of the 2018 ACA open enrollment period, which saw a decline in sign-ups. Pallone also plans to pursue an ACA-stabilization measure, similar to a bill he introduced this Congress with the future Chairman of the Ways and Means Committee Richard Neal (D-Mass.) and likely Education and Workforce Chairman Bobby Scott (D-Va.). The legislation (H.R. 5155) would block the Trump administration’s expansion of short-term insurance plans. While protections for pre-existing conditions and ACA stabilization are also at the top of the agenda for Ways and Means, Rep. Neal commented last week that he would also be open to holding hearings on “Medicare for All” in the 116th Congress.

## *Schumer Announces Committee Leadership, Membership*

Senate Minority Leader Chuck Schumer (D-N.Y.) announced Senate Democratic committee [memberships](#) for the 116th Congress last week. All memberships have been agreed to by the Democratic Conference but are subject to ratification by the full Senate when the 116th Congress convenes in January. Two changes of note related to committees with health care jurisdiction: Sen.-elect Jacky Rosen (D-Nev.) will replace Sen. Michael Bennet (D-Colo.) on the Health, Education, Labor, and Pensions (HELP) Committee. Sens. Catherine Cortez-Masto (D-Nev.) and Maggie Hassan (D-N.H.) will take the seats of departing Sens. Claire McCaskill (D-Mo.) and Bill Nelson (D-Fla.) on the Senate Finance Committee.

### ***Pelosi Agrees to Leadership Term Limits***

Nancy Pelosi (D-Calif.) has agreed to hold a caucus vote next year that would limit Democrats serving in the top three leadership posts to three terms when in the majority. A fourth term would be allowed if the candidate has the support of two-thirds of the caucus. The rule would count the terms served when Democrats held the House majority from 2007 to 2011. The proposal will be debated and voted on as a part of internal Democratic Caucus rule changes by February 15. Pelosi's agreement to term limits secures the support of many of her critics, who were on the record in opposition for the Jan. 3 vote for Speaker of the House. Reps. Seth Moulton (D-Mass.), Tim Ryan (D-Ohio), Ed Perlmutter (D-Colo.), Filemon Vela (D-Texas), Bill Foster (D-Ill.), Linda Sánchez (D-Calif.), and Rep.-elect Gil Cisneros (D-Calif.), now plan on backing Pelosi, giving her the necessary majority to take the Speaker's gavel for the 116th Congress with the opportunity to continue until 2022 if the Democrats hold the majority.

In related news, Rep. Ben Ray Lujan (D-N.M.) will hold the title "Assistant Speaker" instead of "Assistant Majority Leader" next congress. Pelosi reportedly called for the change during a closed-door caucus meeting last week, and the motion passed unanimously by voice vote. Lujan most recently served as the House Democrats' Campaign Chairman during the 2018 midterm elections and was elected by House Democrats last month to serve as Assistant Democratic Leader during the 116th Congress – the number four spot in Democratic leadership.

### ***Mulvaney Tapped as Acting WH Chief of Staff***

President Trump has named Office of Management and Budget (OMB) Director Mick Mulvaney as Acting Chief of Staff. Departing Chief of Staff John Kelly, who has spent 17 months in the position, is scheduled to leave at the start of next year. Deputy OMB director Russell Vought will take over Mulvaney's responsibilities in the budget office, though Mulvaney will keep his title at OMB while serving in the White House until a permanent replacement is found. Trump is reportedly considering former campaign aide David Bossie, Treasury Secretary Steven Mnuchin, U.S. Trade Representative Robert Lighthizer, Energy Secretary Rick Perry, Acting Attorney General Matthew Whitaker, and Blackstone Group executive Wayne Berman for the post.

### ***Kyl to Resign at Year's End***

Sen. Jon Kyl (R-Ariz.) will resign from the Senate on Dec. 31. Kyl was appointed in September to fill the seat vacated by the death of Sen. John McCain (R). Kyl had previously implied that he only planned to serve in the Senate until the end of the year. Arizona Gov. Doug Ducey (R) will appoint a replacement in the near future. Outgoing Rep. Martha McSally (R-Ariz.), who narrowly lost a race for Senate in November, or Kirk Adams, Ducey's former Chief of Staff, are considered top candidates for the post. There will be a special election in November 2020 to serve the remaining two years of McCain's term.

## ***Upcoming Congressional Hearings and Meetings***

***House and Senate Committees on Veterans' Affairs Tracking Transformation: VA MISSION Act Implementation; 2:00 p.m., CVC 210; December 19***

**Recently Introduced Health Legislation**

*H.R.7233 — To amend the Public Health Service Act to authorize grants for graduate medical education partnerships in States with a low ratio of medical residents relative to the general population; Sponsor: Rep. Castor, Kathy [D-FL-14]; Committees: House - Energy and Commerce*

*H.Res.1175 — Supporting increased awareness of sepsis and the importance of early diagnosis and appropriate intervention; Sponsor: Rep. Matsui, Doris O. [D-CA-6]; Committees: House - Energy and Commerce*

*H.R.7247 — To amend title XVIII of the Social Security Act to clarify the authority of MA organizations to provide waivers from Medicare Advantage plans' prior authorization requirements; Sponsor: Rep. Brady, Kevin [R-TX-8]; Committees: House - Ways and Means, Energy and Commerce*

*H.R.7248 — To amend title XVIII of the Social Security Act to direct the Secretary of Human Services to solicit information from providers and suppliers of services on ways to reduce administrative and regulatory burdens under the Medicare program, to provide for transparency and public feedback for evaluating a post-acute care prospective payment system under such title, and for other purposes; Sponsor: Rep. Marchant, Kenny [R-TX-24]; Committees: House - Ways and Means, Energy and Commerce*

*H.R.7249 — To amend title XVIII of the Social Security Act to provide for certain prior authorization notifications by Medicare Advantage organizations; Sponsor: Rep. Reed, Tom [R-NY-23]; Committees: House - Ways and Means, Energy and Commerce*

*H.R.7250 — To direct the Secretary of Health and Human Services to conduct a study and submit to Congress a report on the feasibility of using certain technologies to facilitate the administration of prior authorization requirements under part C of the Medicare program; Sponsor: Rep. Kelly, Mike [R-PA-3]; Committees: House - Ways and Means, Energy and Commerce*

*H.R.7251 — To amend the Federal Food, Drug, and Cosmetic Act and the Securities Exchange Act of 1934 to prevent the inter partes review process for challenging patents from diminishing competition in the pharmaceutical industry and with respect to drug innovation, and for other purposes; Sponsor: Rep. Flores, Bill [R-TX-17]; Committees: House - Energy and Commerce, Financial Services*

*H.R.7253 — To amend title XVIII of the Social Security Act to minimize costs and burdens under the Medicare program by providing for consideration of the removal of certain measures applicable to inpatient hospitals and post-acute care inpatient providers and providing for meaningful measures; Sponsor: Rep. Smith, Jason [R-MO-8]; Committees: House - Ways and Means, Energy and Commerce*

*H.R.7259 — To amend the Internal Revenue Code of 1986 to exclude from gross income certain Federally-subsidized loan repayments for dental school faculty; Sponsor: Rep. Clarke, Yvette D. [D-NY-9]; Committees: House - Ways and Means, Energy and Commerce*

*S.Res.723 — A resolution congratulating the American College of Emergency Physicians on its 50th anniversary; Sponsor: Sen. Reed, Jack [D-RI]; Submitted in the Senate, considered, and agreed to without amendment and with a preamble by Unanimous Consent.*

*S.3737 — A bill to direct the Secretary of Veterans Affairs to carry out the Medical Surgical Prime Vendor program using multiple prime vendors, and for other purposes; Sponsor: Sen. Cassidy, Bill [R-LA]; Committees: Senate - Veterans' Affairs*

*S.3738 — A bill to amend the Federal Food, Drug, and Cosmetic Act and Securities Exchange Act of 1934 to prevent the inter partes review process for challenging patents from diminishing competition in the pharmaceutical industry and with respect to drug innovation, and for other purposes; Sponsor: Sen. Hatch, Orrin G. [R-UT]; Committees: Senate - Health, Education, Labor, and Pensions*

*S.3742 — A bill to amend the Public Health Service Act to require group and individual health insurance coverage and group health plans to provide for cost sharing for oral anticancer drugs on terms no less favorable than the cost sharing provided for anticancer medications administered by a health care provider; Sponsor: Sen. Smith, Tina [D-MN]; Committees: Senate - Health, Education, Labor, and Pensions*

*H.R.7266 — To require the Secretary of Health and Human Services to consider the Margaret R. Pardee Memorial Hospital as a covered entity for purposes of the 340B drug discount program; Sponsor: Rep. Meadows, Mark [R-NC-11]; Committees: House - Energy and Commerce*

*H.R.7272 — To amend titles XVIII and XIX of the Social Security Act to promote the ability of individuals entitled to benefits under part A or enrolled under part B of the Medicare program and individuals enrolled under a State plan under the Medicaid program to access their personal medical claim data, including their providers, prescriptions, tests, and diagnoses, through a mobile health record application of the individual's choosing, and for other purposes; Sponsor: Rep. Brooks, Susan W. [R-IN-5]; Committees: House - Energy and Commerce, Ways and Means*

*H.R.7287 — To amend title 38, United States Code, to provide for the eligibility of certain individuals exposed to burn pits for hospital care, medical services, and nursing home care furnished by the Department of Veterans Affairs, and for other purposes; Sponsor: Rep. Ruiz, Raul [D-CA-36]; Committees: House - Veterans' Affairs*

*H.R.7290 — To authorize a comprehensive, strategic approach for United States foreign assistance to developing countries to strengthen global health security, and for other purposes; Sponsor: Rep. Connolly, Gerald E. [D-VA-11]; Committees: House - Foreign Affairs, Armed Services, Intelligence (Permanent Select)*

*H.R.7292 — To require the Secretary of Health and Human Services to establish the Megan Rondini and Leah Griffin national sexual assault care and treatment task force, and for other purposes; Sponsor: Rep. Poe, Ted [R-TX-2]; Committees: House - Energy and Commerce, Ways and Means, Judiciary*

*H.R.7295 — To amend the HITECH Act to allow an individual to obtain a copy of such individual's protected health information at no cost in certain circumstances, and for other purposes; Sponsor: Rep. Foster, Bill [D-IL-11]; Committees: House - Energy and Commerce*

*H.R.7301 — To authorize assistance to train and retain obstetrician-gynecologists and sub-specialists in urogynecology and to help improve the quality of care to meet the health care needs of women in least developed countries, and for other purposes; Sponsor: Rep. DeLauro, Rosa L. [D-CT-3]; Committees: House - Foreign Affairs*

*H.R.7305 — To amend title XVIII of the Social Security Act to clarify payment rules for manual wheelchairs under part B of the Medicare program; Sponsor: Rep. Johnson, Sam [R-TX-3]; Committees: House - Energy and Commerce, Ways and Means*

*S.3751 — A bill to amend title XVIII of the Social Security Act to expand the use of telehealth services for remote imaging for chronic eye disease; Sponsor: Sen. Casey, Robert P., Jr. [D-PA]; Committees: Senate - Finance*

*S.3754 — A bill to prohibit price gouging in the sale of drugs; Sponsor: Sen. Blumenthal, Richard [D-CT]; Committees: Senate - Health, Education, Labor, and Pensions*