PARAGON HEALTH INSTITUTE POLICY BRIEF

November 16, 2022

Health Care Policy in the Lame Duck

What Congress should and shouldn't do as the 117th Congress comes to an end

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As the 117th Congress ends, much focus is already on the make-up and agenda for the 118th Congress. However, there are several key health policy changes that will likely be considered in the current lame-duck session as part of a larger appropriations measure. Current appropriations are set to expire on December 16th. This policy brief will analyze which policies will likely be considered and how policymakers should or should not address these issues.

KEY TAKEAWAYS

COVID-19. *Congress should tie any supplemental COVID-19 funding to a clear and prompt end to the public health emergency.*

Medicare Sequestration. *Congress should not threaten patients and taxpayers by increasing Medicare spending and worsening the program's long-term solvency.*

Policy Riders. *Congress should focus on well-vetted solutions and refrain from enacting major reforms that have not gone through regular order.*

COVID-19 Policies

Public Health Emergency

The Biden administration continues to irresponsibly extend the COVID-19 public health emergency (PHE) despite the President's September comments that the pandemic is over.[i] At the same time, the administration submitted a request for $22.4 billion in additional COVID-19 response funding.[ii] Policymakers have understandably expressed concerns with simply continuing to write blank checks post-pandemic.[iii] Further, continuing the PHE artificially increases federal spending in Medicare through enhanced 20 percent add-on payments for COVID-19 inpatients and in Medicaid through maintenance-of-effort requirements that handcuff states from removing individuals who no longer qualify for Medicaid. These requirements have led to massive and unprecedented increases in Medicaid enrollment and spending. The program now enrolls more than one-in-four Americans at an annual cost approaching $800 billion.

Recommendation

Any COVID-related funding must be tied to a clear end to the COVID-19 public health emergency. Doing so would allow states to responsibly manage their Medicaid rolls, preserving the program for those who most need it. Allowing the expiration of the unnecessary 20 percent add-on payment for COVID-19 inpatients would likewise reduce unnecessary government spending, when policymakers should be looking to trim deficits to fight inflation.[iv]

Telehealth

During the COVID-19 pandemic, CMS used its emergency authority to extend many flexibilities to help patients avoid unnecessary in-person visits to health care facilities that could increase their chance of infection and to conserve capacity in the health care system. At the same time, telehealth can increase

access to care for patients in rural and underserved locations. However, there has been a recent surge of improper payments and fraud associated with telehealth.[v] CMS and Congress have worked to extend pandemic-era telehealth flexibilities (see 2023 PFS and OPPS rules). These flexibilities would largely end when the COVID-19 PHE is terminated.

Recommendation

Congress should not permanently extend telehealth in government health programs as we continue to gather evidence about telehealth's utility and cost-effectiveness. Policymakers should be careful to ensure that such changes, which should be temporary, are evidence-based and will preserve or improve health care quality without unnecessarily increasing spending or waste, fraud, and abuse in government health programs.[vi]

Medicare

Sequestration

The Statutory Pay-As-You-Go-Act of 2010 (Statutory PAYGO Act or PAYGO) requires that changes in direct spending or revenues that increase deficits be offset via "PAYGO" sequestration unless otherwise suspended by Congress. In other words, if Congress does not act, the President is required to reduce spending enough to offset the debit. Congress will often include language exempting legislation from Statutory PAYGO. However, the American Rescue Plan Act of 2021 (ARPA) could not include such a provision due to budget reconciliation rules. ARPA was projected[vii] to increase deficits by $1.9 trillion. While some Democrats tried to pass stand-alone legislation to exempt the legislation from PAYGO, no deal was reached. Congress, at the urging of industry, deferred PAYGO cuts from taking effect until the end of 2022 under the Protecting Medicare and American Farmers from Sequester Cuts Act.

Under sizeable pressure from the health industry, Congress may continue to avoid any accountability for that new spending, despite massive deficits and 40-year high inflation.[viii, ix] While PAYGO requires a full offset, the cut to Medicare benefit payments in a given year is capped under PAYGO at four percent. While some actions to avoid similar cuts in the past have been understandable given the COVID-19 public health emergency (PHE), this is not the case with ARPA. ARPA, which added more to the deficit than the CARES Act and significantly increased inflation, was wasteful and misguided because Congress had just enacted over $860 billion in COVID-19 assistance (thereby significantly reducing the need for extra relief funds), and passed during a time of rapid vaccine uptake and rapidly declining COVID-19 cases and mortality rates.[x]

Recommendation

Policymakers should resist pressure to simply waive PAYGO. Instead, Congress should allow these reductions to proceed because they were put in place to ensure a more sustainable fiscal future for federal programs. Contrary to arguments from industry, the four percent reduction will not be felt by beneficiaries. In fact, CBO estimates that Medicare payment outlays will nearly double between 2022 to 2032, from $991 billion to $1.94 trillion.[xi] Moreover, the 2022 Medicare Trustees Report has continued to sound the alarm on the solvency of the program because the Hospital Insurance Trust Fund is facing insolvency by 2028. If Congress does act and raise Medicare spending, any action should be offset by as much as required by law.

Other Medicare Payment Issues

Congress will also consider several Medicare payment policy issues. The 2023 Physician Fee Schedule (PFS) Final Rule will institute a legally required 4.5 percent payment cut.[xii] Congress has suspended these cuts twice in 2021 and 2022 due to the COVID-19 PHE (replacing them with a 3.75 percent and 3 percent payment increase, respectively). Congress will also consider potential reductions to the Medicare Clinical Laboratory Fee Schedule (CLFS) under the Protecting Access to Medicare Act of 2014 (PAMA) and the expiration of bonuses for qualifying participants in advanced Alternative Payment Models (APMs) under

the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA).

Recommendation

Congress should work to ensure any policies addressing PFS and CLFS reductions and alternative APM bonuses are fully offset. Furthermore, policymakers should work to ensure more permanent solutions to these issues, including winding down the delays to implementing responsible PFS updates and clinical laboratory payment rates as well as pursuing substantive MACRA reform. As the strains of the COVID-19 pandemic upon health care providers and suppliers have largely dissipated, so has the justification for Congress to use the pandemic as a rationale for boosting the health care industry.

Other Potential Policies

While many of the Medicare policies have expiration dates or automatic reductions that some argue raise their urgency, lame duck sessions are often used to horse trade on other policies that otherwise have not gone through regular order and thus have not been properly scrutinized. This session, with the change in the House majority, presents even greater pressures to act on expansive policies. Policymakers should analyze any such proposal carefully. Policies that have not gone through regular order often have not done so for good reason because they are controversial and could not garner the necessary consensus.

At the same time, there are certain issues where policymakers may find agreement. Below is a non-exhaustive list of possible issues that policymakers should analyze carefully. Policymakers should prioritize policies that address immediate concerns and have broad consensus and avoid those that raise spending, are pushed by special interests, and have not been properly vetted.

Fentanyl Scheduling

Congress extended a temporary scheduling order which placed fentanyl-related substances under schedule I of the Controlled Substances Act. With the opioid crisis continuing to strain the American health care system and harm countless American lives, Congress should work to immediately make this scheduling permanent.

FDA User Fee Riders

Congress recently passed a clean reauthorization of the FDA's user fee agreements. Many policy riders were dropped from inclusion. Some of these policies were technical in nature and had broad bipartisan support, such as policies to tweak the FDA's accelerated approval process or bolster clinical trial diversity. However other policies that aim to increase FDA regulations for diagnostic tests, cosmetics, and dietary supplements should not be part of legislation advanced through the lame duck session. They should go through regular order to ensure the best policy outcomes, not just the priorities of vested interests.

Pandemic Response

Improving pandemic response and reforming our public health agencies are laudable and necessary goals. In that vein, such policies should be publicly debated and thoroughly vetted. While there may be pressure to consider related legislation, such as the bipartisan PREVENT Pandemics Act, Congress should not rush this process.[xiii] The Pandemics and All-Hazards Preparedness Act (PAHPA) is set to expire next year, which will be a natural opportunity to substantially reform our public health agencies. Congress should wait to address these issues until it is fully focused on public health reform next year.

Mental Health

COVID-19 and the government policies of lockdowns and school closures undoubtedly exacerbated the nation's mental health crisis. Policies seeking to better address and improve access to mental health services are also likely to have broad support. However, these

policies will similarly have a natural opportunity to be considered in the 118th Congress, with the impending expiration of the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act of 2018 (SUPPORT Act). Policymakers should wait to take any major action on mental health until reauthorization of the SUPPORT Act in the 118th Congress.

Conclusion

Lame duck sessions are often used to pass substantive legislation. However, they can be used to hurry policies that have not undergone requisite deliberation. A successful lame-duck demands a challenging mix of discernment, patience, and fortitude. Congress should ensure that any policies enacted do not worsen the nation's fiscal trajectory or inflation. Congress should prioritize substantive policies that have consensus and address real-world issues facing Americans right now. Special interest wish lists should not guide the policies addressed in the lame-duck. Finally, any supplemental COVID-19 funding must come with a clear date to end the public health emergency.

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