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continuing uncertainty dominates the healthcare landscape

Almost a year after the Affordable Care Act was signed into law, there continues to be massive uncertainty associated with what the law will mean for both the provider and the consumer communities.

To a certain extent, this uncertainty is understandable, given the sheer scope of the legislation and countless new rules and regulations that need to be developed over its staggered implementation. But this predictable uncertainty has been compounded by a variety of emerging factors, including the widely publicized legal challenges regarding the legislation's constitutionality, the deepening fiscal crisis being reported by many states, and questions as to how much flexibility—through waivers and other strategies—the Obama administration will allow.

Rule-Making Challenges

The Congressional Research Service has identified more than 40 provisions in the legislation that require or permit the development of new regulations. Regulations that have already been issued in some form, to name just a few, include the dependent child regulation, insurance rules regarding issues such as rescissions and existing exclusion benefits, regulations related to grandfathered insurance plans, regulations regarding the medical loss ratios, and regulations relating to federal funding for Medicaid eligibility determination.

Generally, rules are first released as proposed rules with 90 to 180 days for comment, but because of the sheer volume and the need for near-term implementation guidance, many of the early regulations have been released either as intermediate final rules or as “requests for information,” as occurred with the medical loss ratio. The ability of interested and affected parties (e.g., physicians, hospitals, and patient advocacy groups) to influence the specific details in a final rule is an important safety valve, but it also extends the period of uncertainty until the rule-making agency determines the specifics of the final regulation.

As of early February, the first round of regulations defining what the Centers for Medicare & Medicaid Services (CMS) will accept as an accountable care organization (ACO) has still not been released. This is for a program that is due to begin in January 2012. If interested parties are to have any ability to influence the final form of these regulations, there will be precious little time left for groups to establish the various types of organizational structures that will be consistent with the ACO regulations.

Administration Flexibility

It is not yet clear how flexible the Obama administration will be in allowing for delays in implementing various provisions of the legislation or other requests for dispensations of the law. Several states have requested waivers in applying

the medical loss ratios for their individual and small group insurance markets. Maine and Idaho were the first in with waiver requests, but almost a dozen other states have followed them.

The administration showed some flexibility when it came to allowing limited benefit plans to continue in the short run. Whether it will show similar flexibility in regard to medical loss ratios will be an important indicator of how much the administration is willing to balance its interest in moving ahead with insurance reforms against concerns about disrupting existing insurance markets or benefit arrangements. Given the administration's response to the limited benefit plan requests, my presumption is that it will provide at least short-term waivers rather than risk disrupting too many insurance markets, but only time will tell whether this presumption is correct. In the meantime, this unresolved question increases the uncertainty facing both the states and the insurance providers writing insurance in their states.

Several states have been considering the possibility of reducing eligibility for Medicaid in response to the increasing fiscal stresses they have been reporting. However, these states will need to request permission to do so from the Department of Health & Human Services (HHS), which to date HHS has not been willing to provide. Under the Affordable Care Act, states can continue to lower payments to providers and limit some of the optional benefits provided under Medicaid, but they cannot reduce eligibility for Medicaid.

The stimulus bill provided for 18 months of increased funding to the states for Medicaid to help them deal with the increased demands on the program that resulted from the recession, but that money will end June 30, 2011. Some Democrats have indicated a willingness to extend the additional funding to 2014, but the Republicans, especially the House Republicans, have expressed no interest in that solution. The administration has said it will help the states find strategies for lowering Medicaid spending, but

none of the approaches it has proposed are likely to provide for "quick fixes," which is what the states need. The closer we get to June 30, the more intense the pressure is likely to become.

The Mandate

The lawsuits challenging the constitutionality of the insurance mandate pose the greatest uncertainty. Judges in both Virginia and Florida have ruled the mandate requiring the purchase of insurance is unconstitutional. The Florida judge, Judge Vinson, went a step further and declared the whole bill unconstitutional on the grounds that the insurance mandate is so integral to the legislation that it cannot be declared unconstitutional without unraveling the entire legislation.

Both of these issues ultimately will need to be resolved by the Supreme Court. The question is how quickly that will happen. Some states and several members of Congress have been pushing to move this issue directly to the Supreme Court, bypassing the appellate courts. The administration has expressed no interest in expediting to the Supreme Court, having argued instead in favor of the regular judicial process. Meanwhile, that has left some states taking the position that nothing should be done until the issue is resolved. Most states, however, appear to be moving ahead on the assumption that most if not all of the provisions will survive a court challenge. A few Republican senators have proposed legislation putting implementation on hold until the constitutional issues are determined, but that legislation is unlikely to go anywhere.

The Only Sure Thing

A sea of uncertainty surrounds the healthcare reform legislation, the rule-making, and the judicial challenges. But one thing is sure: Providers and insurance companies can expect significant changes in the future. Until then, it appears that providers and insurance companies will need to learn to live with uncertainty as a way of life—at least for the next several years. ●

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