

HEALTH LAW UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Budget Control Act Foreshadows Medicare Cuts

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The recent passage of the Budget Control Act of 2011 (the “BCA”)¹ may have resolved the debt limit crisis, but it signals potentially bad news for the healthcare industry. Although the BCA does not impose any of the immediate program cuts to Medicare and Medicaid that several of the unsuccessful budget proposals would have enacted, it is likely to effectuate longer-term reductions to Medicare spending.

The BCA raises the federal debt ceiling by at least \$2.1 trillion and reduces the federal deficit by at least that amount over a 10-year period. The BCA establishes a two-step approach to achieving the deficit reduction. First, approximately \$900 billion in deficit reduction is achieved by applying immediate caps on discretionary spending. Second, the BCA creates a bipartisan committee, composed of 12 members of Congress (“Joint Committee”), whose members are to be appointed by the majority and minority leaders of the House and Senate. The Joint Committee is tasked with producing a plan to reduce the federal deficit by \$1.5 trillion (in addition to the initial \$900 billion achieved through the discretionary caps).

There are no specific guidelines for how the Joint Committee must reduce the deficit or any mention thus far of specific programs that will be targeted. However, many in the healthcare industry speculate that the Joint Committee will consider entitlement reforms, including cuts to Medicare and Medicaid. Further, many of the changes that were part of the unsuccessful debt ceiling proposals are likely to be brought up again before the Joint Committee. These proposals included, among other measures: raising the Medicare eligibility age to 67; additional means-testing for Medicare premiums; a reduction in the level of federal financial participation for Medicaid programs; and cuts to Medigap, such as requiring enrollees to pay a deductible or co-payment and prohibiting benefits for the combined deductible and the first 50 percent of the annual out-of-pocket costs.

If the Joint Committee is not able to reach an agreement and present legislation to Congress to achieve at least \$1.2 trillion (which is less than the total \$1.5 trillion that the Joint Committee must ultimately achieve) in spending cuts by November 23, 2011, or if Congress does not pass the plan into law by December 23, 2011, a “sequestration” process will be automatically triggered to enforce cuts across all discretionary programs (including Medicare) in order to reach the target \$1.2 trillion. Although the sequestration would have a direct impact on funding for federal healthcare programs, the BCA mandates some degree of protection. First, the Medicaid program is exempt from the sequestration process. Second, although the across-the-board cuts would apply to Medicare, the BCA limits the amount that could be sequestered from Medicare programs to no more than 2 percent for a fiscal year, beginning in fiscal year 2013 through 2021, with a uniform percentage reduction across all Medicare programs.

Based on the recent lack of consensus among Congress with regard to settling the budget, many consider it likely that the sequestration process will be triggered, either because the Joint Committee will

¹ P.L. 112-25 (August 2, 2011).

not be able to reach agreement in achieving a \$1.2 trillion savings or because Congress will not approve the Joint Committee's proposal. Therefore, providers are preparing for a 2 percent Medicare reduction but are left wondering how these cuts will be imposed and what effect they will have on revenues. In the case of Medicare, the budget savings are to come from individual provider payment cuts.² For example, the 2 percent reduction in Medicare payments to a hospital would be taken from the hospital's individual claim for a service. Because the reduction would be applied to provider payments, as opposed to cuts to Medicare benefits and services on the whole, some industry analysts maintain that the 2 percent reduction will not have the devastating effect on healthcare companies that some fear, particularly for large, publicly-traded companies. Opinions differ, however, and ultimately the effects of likely Medicare cuts resulting from the enactment of the BCA remain to be seen.

If you have questions, please contact any of the attorneys in our Healthcare Practice Group listed below.

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²See section 256(d) of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 USCS § 906(d).