

NOVEMBER-DECEMBER 2009 EDITION

Senate’s Patient Protection and Affordable Health Care Act Would Extend MMSEA LTACH Protections to December 29, 2011 (instead of 2012)

When Senate Majority Leader Harry Reid (D-NV) unveiled the Senate health care bill, entitled the “[Patient Protection and Affordable Health Care Act](#)” (the “Bill”), he announced that the Bill embodied the President’s health care goals of promoting quality, affordability and accountability, and called it a “tremendous step forward.” According to the Congressional Budget Office (“CBO”), the Bill would cost \$848 billion and would reduce the Federal deficit by \$130 billion over ten years.

The Bill contains a number of provisions that would impact LTACHs, including among others:

- extension of the Medicare Medicaid and SCHIP Extension Act of 2007’s (“MMSEA”) LTACH payment protection and LTACH development and bed expansion provisions *for a 1-year period* (through December 29, 2011) (see Bill Section 3106), instead of the 2-year budget-neutral extension lobbied for by ALTHA and NALTH and previously included in the Senate Finance Committee bill (see previous *GreisGuide* postings on this topic. [Posting 1](#) [Posting 2](#)). There is no similar extension of MMSEA in the House bill;
- a provision requiring LTACHs to submit quality reporting data to CMS beginning during the 2014 rate year (see Bill, Section 3004). Failure to submit quality reporting data would enable CMS to apply a 2% rate reduction to the annually adjusted standard Federal rate for discharges occurring during the rate year. Quality reporting data would be available to the public on CMS’ website;

- a provision requiring CMS to conduct a study on expanding its healthcare-acquired conditions payment policy to LTACHs and other hospitals excluded from IPPS payment, IRFs, hospital outpatient departments, SNFs, ASCs and health clinics (see Bill, Section 3008(b)). The report would be due to Congress by January 1, 2012, and would be accompanied by legislative recommendations. There is presently no timeline in the Bill for implementing the study’s findings and the application of the healthcare-acquired conditions policy in these settings; and
- a proposal to implement a five-year post-acute bundled payment pilot program to be established by January 1, 2013 (see Bill, Section 3023). The pilot would bundle payments for acute inpatient services, physician services, outpatient hospital services, post-acute care services (including LTACH, SNF, IRF and HHA services) and other services deemed appropriate by the Secretary of HHS.

Specifically, the payment bundle would cover patient episodes of care for the three days prior to admission to a short-term acute care hospital (“STACH”), the STACH length of stay and the thirty-day period after being discharged from the STACH. The Bill notes, however, that the Secretary of HHS may establish different patient episode lengths during the pilot.

As Senator Reid continues his efforts to piece together the sixty votes necessary in the Senate to advance the Senate’s healthcare bill and prevent a Republican-led filibuster, fiscally conservative “Blue Dog” Democrats and liberal Democrats continue their discussions regarding which Bill amendments to bring to the floor and which amendments to sacrifice for the sake of preserving forward momentum. Until all the “chips have landed,” and the Senate and House reconcile their respective bills during conference, it is unclear what changes to post-acute care will ultimately be made.

MedPAC to Recommend No Reimbursement Rate Increase for 2011 Rate Year: Projects 5.8% Medicare Margin for 2010 Rate Year

On Friday, December 11, 2009, the Medicare Payment Advisory Commission (“MedPAC”) released its draft recommendation to the Secretary of Health and Human Services (“HHS”) to forgo any market basket update to payment rates for LTACHs for the 2011 rate year (“RY”) (see [meeting transcript](#)). MedPAC found that profit margins on Medicare cases averaged 3.4% during RY 2008 and projected that Medicare margins will increase, on average, to 5.8% in RY 2010 with expected improvements in documentation and coding and recent changes to an updated classification system (i.e. MS-LTC-DRGs).

MedPAC evaluated the Medicare profit margin spread of LTACHs for RY 2008 and found there to be a wide spread in profitability, similar to that seen in short-term acute care hospitals, with the bottom quartile of LTACHs having margins of negative 8.2% or less, and the top quartile having margins of 11.8% or more. Margins for for-profit LTACHs were significantly higher than those of their not-for-profit counterparts. MedPAC found that lower per-discharge costs, rather than higher payments, drove the differences in financial performance between LTACHs with the lowest and highest margins. High margin LTACHs also had a shorter average length of stay and far fewer high cost outlier cases and payments.

MedPAC further noted that, with the exceptions of Select Medical’s recent IPO and the RehabCare/Triumph HealthCare merger, LTACHs have accessed relatively little capital and have raised minimal equity over the last year due, in large part due to the financial credit crisis. MedPAC explained that the current three-year moratorium on new LTACH beds and facilities that was imposed by MMSEA has reduced, although not eliminated, both the opportunities for expansion and the need for capital among LTACHs.

MedPAC also reported concern about the lack of reliable quality measures for LTACHs, and expressed

interest in exploring the development of quality measures. MedPAC plans to convene an expert panel to help identify meaningful measures and the data needed for measurement. It also plans intends to engage a contractor to assess the feasibility of risk-adjusted quality measurements, and expressed interest in working with LTACH chains and industry groups that collect and analyze proprietary quality data for purposes of improving both patient care and Medicare payment policy. MedPAC plans to further address its quality goals for the LTACH industry during its scheduled January 2010 meeting.

LTACHs May Wish to Consider Revising HIPAA Business Associate Agreements by February 17, 2010

Covered entities (i.e. LTACHs and other healthcare providers) and the business associates that assist them with the performance of functions and activities that involve access to protected health information (“PHI”), are now subject to much greater regulation of their information security practices as a result of the Health Information Technology for Economic and Clinical Health Act (“HITECH Act”). The HITECH Act was included as Title XIII of the Federal economic stimulus package, the American Recovery and Reinvestment Act of 2009 (“ARRA”), and represents the most expansive modification to the Federal privacy and security rules for health-related businesses since the 1996 enactment of HIPAA.

One of the most far-reaching effects of the HITECH Act is its extension of HIPAA security and privacy rules to “business associates” (see HITECH Act sections 13401 and 13404). Previously, business associates were required (under their business associate agreements with covered entities) to implement administrative, physical and technical safeguards that “reasonably and appropriately” protect protected health information (“PHI”). Business associates would be liable only for a breach of such security obligations arising under their business associate agreements with covered entities, but not as a result of a violation of HIPAA itself. The HITECH Act reversed this approach. Now, all of HIPAA’s security and privacy rules also apply directly to

business associates. This means that business associates may be subject to the same criminal and civil penalties as covered entities if they are found to be in violation of HIPAA's security or privacy rules.

The HITECH Act has been interpreted to require covered entities to amend all existing and any new business associate agreements by February 17, 2010 to ensure business associate compliance with HIPAA's privacy and security rules. Amending hundred of business associate agreements strewn across organizations may be a monumental task for some LTACHs. Other organizations that have a centralized repository of business associate agreements or utilize a data management system to warehouse these agreements will find the task more manageable.

The Act requires LTACHs to make at least two substantive amendments to their business associate agreements, including:

- Adding a provision requiring business associates to comply with the HIPAA security rule (a daunting task for most business associates); and
- Adding a requirement that business associates provide notice of a security breach to the covered entity. Although business associates were previously required to notify covered entities of a breach, the agreement should be amended to reflect the HITECH Act's new definition of a "breach," which is broadly defined as an "acquisition, access, use, or disclosure" of unsecured PHI that is not otherwise permitted under HIPAA "which compromises the security or privacy" of the PHI.

Other revisions are also recommended, including:

- Incorporating a timeframe by when business associates are required to notify covered entities of a breach (i.e., within 3 to 5 days of discovering the breach). Under the HITECH Act's [interim final regulations](#) published by HHS on August 24, 2009, a breach is "discovered" as of the first day

the breach is known or should have been known, based on the exercise of reasonable diligence; and

- Adding a provision requiring business associates to indemnify a covered entity and bear responsibility for the financial burden of a breach caused by a business associate, since costs associated with breach notification, remedial action, fines and civil monetary penalties have been increased substantially under the HITECH Act.

LTACHs may also wish to consider reviewing internal policies to determine which policies will need to be modified to comply with the HITECH Act.

In some cases, however, LTACHs are waiting to implement specific policy revisions until after final regulations have been adopted to ensure that any specific regulatory requirements are properly included. It is presently unclear when the HHS Office of Civil Rights will release additional guidance to covered entities or the form of such guidance (i.e., form of business associate agreement or F.A.Q.s).

The information above contains only a summary of the HITECH Act's relevant provisions and interim final regulations. Please contact me for additional information regarding the manner in which the HITECH Act may impact your LTACH.

In the Next Edition

- Information about RehabCare Group's merger with Triumph HealthCare; and
- Useful tips from [Comprehensive Pharmacy Services](#) addressing innovative ways to contain escalating pharmacy costs.

Other Recent GreisGuide Posts

- [Summit Park Hospital Opens New Acute Renal Dialysis Center](#)
- [The Art of the Deal: The Re-Emergence of Post-Acute M&A Activity](#) (PowerPoint presentation)

from the ALTHA Advocacy Meeting Dec. 4, 2009 discussing why post-acute care sector merger and acquisition activity is likely to increase in 2010)

- [Health Care Update: Senate Continues Debating Amendments](#)
- [LTACH Medical Director and Medical Center Employees Receive Fines and Probation for HIPAA Violations](#)
- [New York State Regulations Mandate Effective Compliance Programs for Providers](#)
- [EEOC Severance Agreement Guidelines Provide Tips for Employers and Employees](#)
- [Health Care Update: House Approves the Affordable Health Care for America Act \(H.R. 3962\)](#)
- [FTC Defers Red Flags Rule Enforcement to June 1, 2010](#)

Upcoming Events

- Jan. 13-15, 2010: [ALTHA 2010 National Clinical Conference](#)
- Feb. 11: [McGuireWoods 7th Annual Healthcare and Life Sciences Conference](#) (\$295 admission fee, but please contact me for a reduced rate)
- Feb. 17-19: [AHLA 2010 Long Term Care and the Law Conference](#)
- Mar. 25: [ALTHA Capital Markets Meeting](#)
- Apr. 28-30: [NALTH 2010 Annual Meeting](#)

Developing, Buying and Selling

Please contact me if you are interested in developing, buying, and/or selling LTACHs, IRFs, SNFs, HHAs, hospices, acute care hospitals, dialysis centers, ambulatory surgery centers, billing companies, management companies, and various other healthcare-related businesses.

Looking for Guest Columnists

Do you have an LTACH-related story or news that you want to share with peers? Please [contact me](#) if you are interested in reaching an audience of key executives in almost every LTACH across the country.

Questions and Comments

Please [contact me](#) if you have questions about the Newsletter or a weblog topic, if you would like to be removed from my distribution list, if you are interested in advertising on the weblog, or if you know of someone who would like to receive the Newsletter. More frequent content updates are posted regularly on the weblog, together with links to valuable business and legal resources, recently published articles, presentations, white papers, and details regarding upcoming events.

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