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## HEALTH LAW

NEWSLETTER OF THE HEALTHCARE INDUSTRY PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

### E-Prescribing Mandate May Be Included in Medicare Package

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Provisions requiring physicians to e-prescribe in the Medicare program could well be included in the Medicare legislation that is likely to pass in June. E-prescribing (healthcare providers sending prescriptions electronically through a secure system to pharmacists) could reduce medical mistakes by making prescriptions easier to read, providing information on other drugs the patient is taking, and reducing the number of lost prescriptions. It has other potential benefits, such as reducing the patient's waiting time at the pharmacy and providing information on lower cost alternatives. Depending on how the e-prescribing mandate is crafted, it could save the government billions of dollars.

Senate Finance Committee Chairman Max Baucus plans to include e-prescribing in the Senate Democrats' version of the Medicare package. Although Senator Baucus' bill is still being finalized, he is expected to base the e-prescribing provisions on the Medicare Electronic Medication and Safety Protection (E-MEDS) Act sponsored by Representative Allyson Schwartz (H.R. 4296) and Senator John Kerry (S. 2408), which would:

- Give physicians one-time Medicare grants to help offset the startup costs of e-prescribing;
- Award bonuses to physicians for e-prescribing in Medicare;
- Reduce reimbursement rates for doctors who write Medicare prescriptions by hand instead of electronically after January 1, 2011; and
- Grant one- or two-year waivers to practices that face difficulties in acquiring and implementing e-prescribing technology, especially if such practices are rural, small, or solo practices.

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There is a great deal of interest in e-prescribing in Congress because it could save an estimated \$3 billion over ten years, and this savings could help offset some of the costly physician payment provisions in the Medicare package.

The driving force behind the Medicare package is the fact that physician reimbursement rates are scheduled to be cut by more than 10% at the end of June. There is a concern that the cut would cause physicians to drop Medicare patients, putting the Medicare program in jeopardy. Therefore, delaying the cut is a top Congressional priority. Despite the looming deadline, Congress is having a very difficult time passing a fix because many Democrats and Republicans disagree on how to pay for it.

Last year, the House of Representatives passed a Medicare package that, in large part, paid for the fix with deep cuts to Medicare Advantage, cuts the President has vowed to veto. The Senate leadership's attempt to craft a bipartisan compromise fell apart this week. Finance Committee Chairman Baucus now plans to draft a Democratic proposal over the Memorial Day recess and bring it directly to the Senate floor for a vote soon after they are back in session.

Congress faced a similar predicament late last year. A 10% cut was scheduled to take effect at the end of 2007 and bipartisan negotiations had broken down. Congressional leaders agreed to buy themselves more time to negotiate a Medicare package by delaying the cut (and providing for a modest update in the rates) for six months. There is some speculation that Congress will take a similar route this year, delaying the debate until 2009 when there will be a new Administration in place.

Nevertheless, there still is a good chance that e-prescribing will be included in the package in June. Congress is expected to include Medicare reforms that would offset the cost of the short-term fix. E-prescribing is an attractive option because it could save billions of dollars and is supported by Democratic and Republican members of Congress as well as the Administration. Furthermore, doctors may be willing to accept an e-prescribing mandate if it will ensure delay of the scheduled fee cut. In fact, the American Medical Association has indicated that it would not oppose an e-prescribing mandate if it does not go into effect until 2011.

On the other hand, there are two issues working against the adoption of an e-prescribing mandate. First, the existing ban on e-prescribing controlled substances would force physicians to maintain two different systems for prescribing medications.

However, staff at the Office of Management and Budget (OMB) is currently reviewing a draft rule, submitted by the Drug Enforcement Agency in February, that would ease the restriction and could potentially resolve this problem. The second issue is that privacy advocates, such as the Coalition for Patient Privacy, have asked Congress not to pass the e-prescribing mandate unless it includes a minimum of 11 patient privacy protections. It is possible that this issue could be resolved by incorporating some of the privacy provisions that Senators Patrick Leahy and Edward Kennedy have agreed to add to Senator Kennedy's Wired for Healthcare Quality Act, which promotes the use of Health IT. A Manatt newsletter article on that agreement was sent on Wednesday and may be accessed [here](#).

Manatt will continue to follow the issue of e-prescribing in the Medicare program.

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