POWERS PYLES SUTTER & VERVILLE PC
ATTORNEYS AT LAW

1501 M Street NW | Seventh Floor
Washington, DC 20005-1700
Tel: (202) 466-6550 | Fax: (202) 785-1756

MEMORANDUM

To: **American Society of Transplant Surgeons**

From: **Peter Thomas, Adam Chrisney and Theresa Morgan**

Date: **March 18, 2010**

Re: **Legislative Update on Healthcare Reform and SGR fix**

The Democratic-lead Congress continues to struggle to enact health reform legislation but the end appears to be near, however the final vote comes out. Faced with unified opposition from the Republican Party and in the face of growing concerns for the elections in November, Congressional Democrats are scrambling to finds ways to enact comprehensive reforms. Since their loss of a super-majority (60 votes) in the Senate with the election of Republican Senator Scott Brown in Massachusetts, Congress and the White House have engaged in a series of procedural maneuvers to increase the possibility of enacting healthcare reform and the Medicare physician fee schedule fix in the coming weeks.

Recent action to fix the SGR physician payment formula seems promising as the Senate passed two extensions of the fee fix in a two-week period, one for a month extension and another granting a seven month extension. On March 10, the Senate passed the American Workers, State, and Business Relief Act (HR 4213) which delayed the impending 21 percent cut to Medicare physician fees until October, amongst other priorities. The bill also allows non-hospital-based physicians and other health professionals who bill Medicare and Medicaid through a hospital to receive electronic health record incentives. However, the next step in the House is unclear, as means to paying for the bill are also under consideration in paying for health reform legislation. Without further action, the physician fee cut is scheduled to go into effect on April 1. Faced with the probability of further delay, the House agreed on March 17th by voice vote to grant another one-month extension to the physician fee fix, but this bill would have to proceed through the Senate before April 1 to be enacted.

Meanwhile, the President hosted two healthcare reform events in the White House in recent weeks and released an outline of changes to the predominant bill pending in the Senate. The President stated that he was willing to have the plan pass without bipartisan support if necessary and he argued that prolonging the debate for another year would not change the fundamental differences in perspectives that Republicans and Democrats have on healthcare reform. With this decision, the President essentially decided to press forward with an attempt to pass a comprehensive health reform bill rather than scale back the scope of the effort.

The loss of the Democratic super-majority in the Senate has left House Democratic leaders little choice but to move forward with healthcare reform using a process known as "reconciliation," allowing them to circumvent the filibuster rules in the Senate. The budget reconciliation process places tight limits on which issues can be included in the reconciliation bill and Republicans have vowed to challenge all parts of the package that do not meet strict budgetary rules. Unfortunately, this may place in jeopardy the inclusion of the House bill's extension of immunosuppressive drug coverage under the Medicare program.

In addition, the Senate Parliamentarian, who judges the appropriateness and germaneness of Senate debate and bill consideration, recently announced that the President must sign the Senate-passed bill before the Senate can act on a House budget reconciliation package making changes to the Senate bill. As a result, House Democrats have resorted to first approving a "shell" bill in the House Budget Committee to start the final process of passing health reform. The House Rules Committee will then take up the shell bill after a required 48-hour delay at which point Democrats will substitute the shell bill with language making corrections to the Senate-passed overhaul bill.

To complicate matters further, the Rules committee is expected to create a "self-executing" rule for the floor debate that would declare the Senate bill passed in the House without a vote once the House either approves the rule and/or the shell bill with the corrections. However, House members are uneasy with such a process as well as the contents of the Senate bill and, in particular, with the special deals made to obtain certain Senators' votes. This process, therefore, remains in flux. While these legislative maneuvers appear necessary at this point to secure enough votes for passage, they clearly do not sit well with those concerned about proper legislative process.

In separate action, CBO recently released a preliminary estimate of the current health reform plan, incorporating projected fixes to the Senate bill by the House. This final bill is expected to cost $940 billion over 10 years and save the federal government $130 billion over the first 10 years and $1.2 trillion over the second decade. It is also expected to extend the Medicare Trust Fund by 9 additional years and close the "donut hole" in Part D prescription drug coverage. The excise tax on high cost plans in the healthcare overhaul will be implemented in 2018 as planned but indexed to the consumer price index, instead of CPI plus one percentage point. This appears like a minor point perhaps but it is critical to the support or opposition from the unions.

Throughout this process, it is clear that Democratic leaders must methodically work their way through a complicated legislative process that has left them with few legislative options for passing this huge Democratic legislative priority and with little margin for error in solidifying support within their own party. Further, this delicate maneuvering on such a complex legislative package comes at a time, with new elections looming at the end of the year, when the American public is demanding transparency and accountability in health care negotiations. It is not yet clear whether the push to enact comprehensive health care reform will ultimately reward or seriously erode the Majority party in the coming elections.