

Post-Election Outlook: What's Next on Capitol Hill

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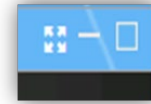
Post-Election Outlook: What's Next on Capitol Hill

December 8, 2020



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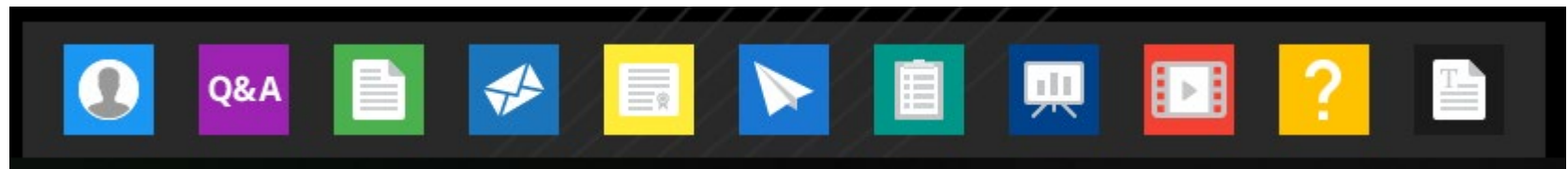
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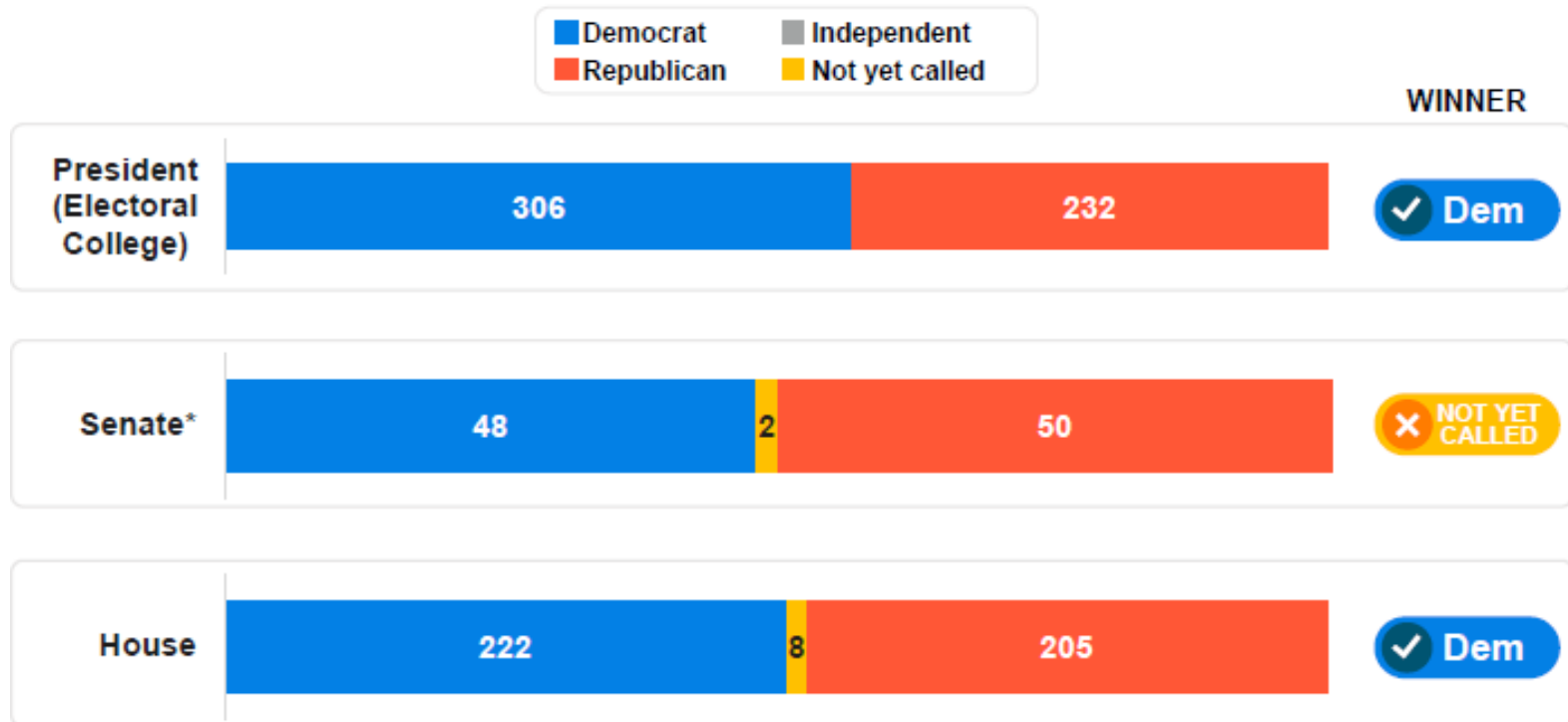
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Presentation Overview

- **Election Results**
- **Congressional Leadership**
- **Cabinet Nominations**
- **Lame Duck Session**
- **First 100 days of a Biden Administration**
- **Democratic and Republican Legislative Priorities**

2020 Presidential and Congressional Election Results



*Independent Senators Sanders (I-VT) and King (I-ME) caucus with the Democrats

SOURCE Associated Press

AP DATA AS OF 11/30/2020 12:58 PM

Incoming House Leadership

DEMOCRATS:

- Speaker of the House:
Nancy Pelosi (D-CA-25)
- Majority Leader:
Steny Hoyer (D-MD-5)
- Majority Whip:
James Clyburn (D-SC-6)
- Assistant Speaker of the House:
Katherine Clark (D-MA-5)
- Democratic Caucus Chairman:
Hakeem Jeffries (D-NY-8)

REPUBLICANS:

- Minority Leader:
Kevin McCarthy (R-CA-23)
- Minority Whip:
Steve Scalise (R-LA-1)
- Republican Conference Chair:
Liz Cheney (R-WY-1)
- Republican Policy Committee Chair:
Gary Palmer (R-AL-6)
- Republican Conference Vice Chair:
Mike Johnson (R-LA-4)
- National Republican Congressional
Committee Chair:
Tom Emmer (R-MN-06)

Incoming Senate Leadership

DEMOCRATS

- Senate Democratic Leader:
Chuck Schumer (D-NY)
- Senate Minority Whip:
Dick Durbin (D-IL)
- Assistant Democratic Leader:
Patty Murray (D-WA)
- Chair of Democratic Policy and
Communications Committee:
Debbie Stabenow (D-MI)
- Vice Chair of Conference (Co-Vice
Chair):
Elizabeth Warren (D-MA)
- Vice Chair of Conference (Co-Vice
Chair):
Mark Warner (D-VA)
- Chair of Steering Committee:
Amy Klobuchar (D-MN)

REPUBLICANS

- Senate Republican Leader:
Mitch McConnell (R-KY)
- Republican Whip:
John Thune (R-SD)
- Republican Conference Chair:
John Barrasso (R-WY)
- Republican Policy Committee
Chair:
Roy Blunt (R-MO)
- Vice Chair of the Senate
Republican Conference:
Joni Ernst (R-IA)
- National Republican Senatorial
Committee Chair:
Rick Scott (R-FL)

“Lame Duck” Session Issues

- **Fiscal Year 2021 Appropriations Funding**
- **COVID-19 Stimulus Package**
- **National Defense Authorization Act**
- **Expiring Program Authorizations or “Extenders”**

Overview of Biden's first 100 days as President

- **Filing the Cabinet**
- **Addressing the Coronavirus Pandemic**
- **Reversing Trump Administration Policies**
- **Advancing Legislative Priorities**

President-elect Joe Biden's cabinet picks

- **Secretary of State:** Antony Blinken
- **Secretary of Treasury:** Janet Yellen
- **Director of Homeland Security:** Alejandro Mayorkas
- **Office of Management and Budget Director:** Neera Tanden
- **Director of National Intelligence:** Avril Haines
- **U.S. Ambassador to the U.N.:** Linda Thomas-Greenfield

Potential Democratic Priorities in 117th Congress

- **Covid Relief**
- **Climate Change/Infrastructure**
- **Health Care Reform**
- **Political/Government Reform**
- **Immigration Reform**
- **Tax Reform**
- **Education Reform**

Potential Republican Priorities in 117th Congress

- **Preserving Trump Policies**
- **Immigration Reform**
- **2022 Elections**
- **Congressional Investigations**

Thank You





November 30, 2020

Anticipating The Biden Administration's Health Care Agenda

Faegre Drinker Consulting principal Nick Manetto and District Policy Group president Ilisa Halpern Paul authored an article for *Law360* titled "Anticipating The Biden Administration's Health Care Agenda," that breaks down the health care issues the 117th Congress are likely to address and the strategies they may use.

The authors noted how the outcome of the 2020 U.S. Senate election and the development of the pandemic will impact the health care agenda and negotiations used by the Biden administration. "A divided government will likely result in an aggressive use of regulatory tools by the incoming Biden administration to pursue policies unable to clear a Republican Senate," the authors said.

Regarding the COVID-19 pandemic, the authors outlined the following issues expected in the congressional health care agenda:

- Potential future rounds of provider relief funding and accountability associated with allocations.
- Possible expansion of the federal Medicaid match.
- Funding to support the response.
- Funding to develop and distribute FDA-approved COVID-19 vaccines.
- Policies to address costs of COVID-19-related care.
- Potential funding to support medical research of COVID-19.

Beyond the COVID-19 pandemic, the authors identified the following health care topics that Congress will likely address:

- The reauthorization of the U.S. Food and Drug Administration Prescription Drug User Fee Act and related user fee authorizations.
- Annual appropriations or spending bills that shape department and agency actions and priorities.
- Legislation to curb balance or surprise health care billing.
- Initiatives to address costs of prescription drugs.
- Legislation to sustain expanded access to telehealth.
- Regulations related to the Affordable Care Act.
- The expansion of Medicaid.

The authors concluded “Wild cards including a raging pandemic and a pending U.S. Supreme Court case may shift the agenda at any time.”

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November 23, 2020

After the Election: Policy Priorities for Health Care Programs

Health care policy has been a key issue leading up to the 2020 elections, and the final outcome of the presidential and congressional elections will likely impact the health care policy priorities of the future. While the COVID-19 pandemic has sidelined key issues including drug pricing and cost of care, the pandemic has also increased the focus on health care issues such as expanding access to — and utilization of — telehealth and digital medicine. Additionally, the fate of the Affordable Care Act is up in the air as the Supreme Court considers the constitutionality of the entire ACA in *California v. Texas*. While the Court heard oral arguments on November 10, the Court's decision may not be released until next spring.

For all these reasons, stakeholders, including payors, are increasingly focused on the future of health care programs including the ACA, Medicare and Medicaid. Here are the key health care priorities that are likely to be pursued in 2021 and beyond, regardless of the final outcomes of the federal election:

- **Reducing drug costs.** Both parties have introduced proposals on common themes, such as:
 - Increasing drug price transparency
 - Enhancing generic drug competition
 - Reforming the current drug rebate system
- **Restructuring Medicare Part D.** There seems to be general accord between the parties on many aspects of a restructured Part D program, including:
 - Reducing enrollee out-of-pocket spending
 - Eliminating the 'donut hole' coverage gap

- Shifting more of the financial responsibility for the catastrophic phase away from the federal government and to Part D plans and drug manufacturers
- **Addressing surprise billing.** Surprise billing was a pre-COVID priority for both parties, with several federal bills offering comprehensive protections using both payment standards and an independent dispute resolution process. Attention to this issue has increased as the pandemic elevated the potential for out-of-network billing by health care providers and laboratories.
- **Price transparency.** The Trump administration finalized the [Transparency in Coverage rule](#) in the final days leading up to the election. Full implementation of the rule could take several years, and although price transparency is generally favored by both parties, a Biden administration may attempt to stall implementation or repeal the rule in favor of a different approach.
- **COVID-19 relief package.** After negotiations failed to produce additional relief aid prior to the election, the next prospect for pandemic-related aid could be the upcoming December 11 spending deadline or in late January after the new Congress is sworn in.

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November 23, 2020

What Insurers Need to Know about the Elections

At this point in the election cycle, we would be traditionally talking about the elections in the past tense. But among the many unique and interesting aspects of the 2020 elections is that the outcomes are still coming in, and in meaningful ways. President-elect Biden is proceeding to plan for the transition and has started to name key officials, although President Trump continues to mount challenges unlikely to impact the outcome but with the potential to affect the transition. Meanwhile, Georgia's two Senate runoffs in January will determine control of that chamber.

Nevertheless, the insurance industry, like all stakeholders, needs to plan and look **forward**. Our team has been doing so, and received some industry resources in the form of insights from a recent post-election roundtable, co-sponsored by the Networks Financial Institute at Indiana State University's Scott College of Business. Here are some of the key takeaways from our forum, which brought together a diverse set of perspectives from across the insurance industry:

State Elections Point to Stability for Regulator Appointments

Gubernatorial races played out as expected, with all nine incumbents on the ballot winning. Montana's Greg Gianforte (R) and Utah's Lieutenant Governor Spencer Cox (R) captured the two open seats. The five insurance commissioners' races also favored incumbents and yielded only one new official, Montana's Troy Downing (R). And Democratic efforts to make inroads on state legislatures did not come to pass. What do those results add up to?

- The number of transitions is lower than in recent years. Given the number of complex regulatory initiatives

under way, that could be a positive development.

- Our commentators noted several appointed regulator vacancies in key states — these transitions will still bring change that stakeholders need to consider and be prepared for.
- The new virtual formats for the National Association of Insurance Commissioners (NAIC) have the prospect of changing the pace of model law and regulation development.

Federal Elections Point to Divided Government (Pending Senate Outcomes)

Republicans in the House narrowed the Democrats' majority. Under the House committee system, that means Republicans will gain seats on committees as ratios are recalibrated. The House Financial Services Subcommittee on Housing, Community Development & Insurance will see a new Chairman in the wake of the primary loss of Rep. Lacy Clay (D-MO.)

On the Senate Banking Committee (covering financial regulatory issues), Sens. Doug Jones (D-AL) and Martha McSally (R-AZ) lost their races, with David Perdue (R-GA) headed for a January run-off. We expect the new Republican leader will be Pat Toomey (R-PA), with Sherrod Brown (D-OH) continuing in the Democratic leadership role.

Key Issues to Watch

Our post-election panel identified and discussed key issues to watch as we adjust to change and new players, including:

- **Climate Change:** Regulator interest has been increasing over the past few years, with disclosure requirements already in place and the prospect of more developments. International regulators, states and the NAIC are already active, and we expect the Biden administration to add its voice.
- **Department of Labor's Fiduciary Rule:** Expectations are for a Biden administration to take up its own rule that would impact duties around a fiduciary standard of conduct for financial product sales. However, the panel did not view such a rule as an item that would happen in the first hundred days, but rather that it might unfold over the first two years of the administration.
- **Race & Insurance:** The NAIC and its leadership have set up an executive-level Committee and five focused workstreams to advance progress on issues around race and insurance. Our forum discussed industry efforts to support those goals.
- **Business Interruption:** All our panels discussed the ongoing focus on business interruption insurance in the

wake of the pandemic. Federal legislative efforts regarding some form of a backstop are likely to continue, but even then, there are significant details that would need to be determined.

- Corporate Tax: Our legislative panel did not anticipate immediate activity on corporate tax as we head into the new Congress and a new administration.

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Insurance

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Post-Election Health Policy Outlook & Analysis

The following provides a high-level overview of how the November 3, 2020 election results will impact certain health care issues and policies. This analysis assumes that the Biden-Harris Electoral College win will be certified without issue and that the Senate will remain in Republican control.

Election Results Summary

What we saw this election year is a modest change election rather than a wave election. Although a one-term defeat of a sitting president is not that common and one could argue it is transformative, the wave never appeared. Once the final vote tallies are known for the electoral college and popular vote there will be a clearer line of sight into the margin of the Biden victory.

On Saturday, November 7, the presidential election was called for former Vice President Joe Biden after he secured Pennsylvania. Biden currently has 279 Electoral College votes to Trump's 214, with results from Georgia and, North Carolina still pending and legal challenges and recounts winding their way through the process. But while activity is continuing, most observers feel the election outcome will stand.

In Congress and state legislatures, the blue wave never materialized. The Senate stands at 50-48 with the two Georgia Senate seats going to runoffs in January after no candidate secured 50% of the vote in either race. For the Democrats to run the chamber, they would need to win both Georgia runoff races; under that circumstance, they would have the tie-breaking vote from Vice President Kamala Harris. In this scenario, Democrats would have full control of government, albeit by the slimmest of margins. Otherwise, Kentucky Republican Sen. Mitch McConnell is poised to stay as majority leader, where he would have the power to curb or even cripple President Joe Biden's agenda.

In the House, currently, the Democrats have a slight edge, with some races still to be called. Democrats will keep control of the House, but fell short of expanding their majority, as they hoped. Rather than gain seats, they lost seats and the party is navigating internal challenges between the center/left and progressives.

The Biden-Harris Administration — General Observations and What to Expect

Fundamentally, Joe Biden is not a progressive: he is considered by many to be a moderate and is known for being an institutionalist. Biden is also an incrementalist and has learned many lessons from his time in the Obama administration. He knows he will need to stabilize the economy, tamp down the coronavirus, and heal the nation as his first acts in office; in other words, he likely will not want to do anything too dramatic or disruptive out of the box. The [Biden-Harris transition website](#) clearly indicates a focus on COVID-19 and the economy.

President-elect Biden likely will not be able to legislate much change with respect to health care. Due to the tight margins in both chambers, most of what we will see in health care likely will occur through executive orders, regulations, sub-regulatory guidance, reprogramming of funding and tweaks to existing programs. So, one of the first acts that the Biden-Harris administration is likely to take is to issue a regulatory freeze memo, which puts a stop to anything that is pending. This will give them the opportunity to review what has been in the works and withdraw non-finalized proposals with which they disagree or put their own touch on anything that has already advanced.

Executive Priorities

The Biden-Harris administration generally will want to undo most everything from the Trump era, redo some Obama-era rules and do some things anew. The undoing or redoing of certain regulations could result in some pending lawsuits being voided, but entirely new regulations could prompt new suits from any number of parties. Senate Majority Leader McConnell has filled the federal bench over the past four years with judges aligned with the Republican perspective. One tool the Trump Administration used but which likely will not be available to a Biden Administration is the Congressional Review Act, which allows for a fast-tracked process to disapprove of recently finalized regulations if both houses of Congress agree. With Congress likely divided, this means the process for undoing Trump-era rules will require the promulgation and finalization of rules, with public comment periods, processes that can take many months.

The Democrats generally value access, affordability and choice in health care. It is important to note that to Democrats, access does not just mean a health insurance card — it means affordable access to the range of primary, specialty and emergency care. That is why they generally do not favor high-deductible health plans or “skinny” options that lack comprehensive coverage, for example; they do not believe those give consumers

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affordable access to the care they need. They believe health care is a right and that the Affordable Care Act (ACA) is the best mechanism available at this time to provide affordable access to more people. As such, Democrats will want to revert as quickly as possible to Obama-era regulations, funding and programs that promote the ACA. They will want to open up ACA enrollment, provide funding and programs to educate people about ACA options, and otherwise help more people secure coverage through ACA marketplaces or Medicaid, in those states that have expanded it. On some of these points, such as policies to more aggressively promote open enrollment and to help people enroll in ACA plans, the Administration can move forward more quickly. However, in other instances, such as reverting to Obama-era limits on short-term limited duration plans, the Administration will need to go through formal rulemaking.

Democrats have unwavering support for Medicaid. The Biden-Harris administration will want to expand eligibility and boost resources, and they will seek to sweeten the pot to make the 12 holdout states expand Medicaid. They will take action to roll back work requirements and other changes that are not aligned with their vision for the Medicaid program. Democrats assert that Medicaid — going back to its original statute — is meant to provide health care coverage, not to advance employment or other goals. One important tool in this box may be the incoming Administration's ability to approve state Medicaid (Sec. 1115) waivers. While the Trump Administration embraced waivers with work requirements and other limitations, the Biden Administration will oppose such plans and look to incent state proposals to expand access. It is also worth noting that the pandemic's impact on the economy — including state tax revenues — means many states are or may be looking at cuts to their Medicaid benefits, making federal incentives even more important to their efforts to maintain access to care.

Democrats are very supportive of traditional fee-for-service Medicare for similar reasons, namely choice and flexibility, and they will want to ensure that it is financially viable and available for current and future beneficiaries, especially if they ever have the opportunity to expand it to younger populations. Regarding Medicare Advantage (MA), while 10 years ago many Democrats held the MA program in low regard, the program has won over many skeptics, particularly given its expansive growth. Due to the generous and flexible benefit offerings (e.g., vision, hearing, dental) and increasing satisfaction among beneficiaries, many Democrats have come to appreciate the MA program as an important choice available to seniors. The Biden-Harris administration is expected to review and assess closely the changes that the Trump administration made to the MA program, such as providing additional flexibilities, and could make modifications of its own. These changes also include Congressionally authorized provisions to expand plan offerings of supplemental benefits.

With respect to value-based care, the Center for Medicare and Medicaid Innovation (CMMI) was authorized as part of the ACA. As such, Democrats generally support its work, but the Biden-Harris administration will want to examine and evaluate what the Trump administration did with respect to CMMI and the alternative payment models it designed and tested. One area of future CMMI focus will likely be on dual-eligible beneficiaries. There

are some Trump era models that have been announced but are not set to launch until after the inauguration, such as the Direct Contracting and Community Health Access and Rural Transformation (CHART) model. It remains unclear whether those will proceed as planned or be paused for review and assessment, and potentially additional public input.

The hospital price transparency rule is scheduled to come into effect on January 1, 2021, and many are hoping it will be delayed or shelved. The rule, while a hallmark effort of the Trump administration, is not necessarily an anathema to Democrats or the Biden-Harris administration. However, there are philosophical differences. The Trump approach on a consumer-directed marketplace is centered on consumers having more and better information about pricing, quality, and other metrics, so that they could make better choices about where and how to spend their health care dollars. This focus has included having access to a wider range of options, including short-term plans, which Democrats have traditionally not embraced. Democrats want consumers to have this information, but they also, as policymakers, want transparency so they can see where federal dollars are flowing and to hold those receiving federal dollars accountable — as well as illustrate the positive impact of federal spending. As part of this effort, the Biden-Harris administration likely will push for transparency in pharmaceutical pricing and in the overall pharmaceutical distribution system.

On the issue of pharmaceuticals, the Trump administration was known for statements that were highly critical of drug costs and that pledged various reform actions. However, many of those actions either failed to materialize, are still pending, or have been challenged in court. One policy that remains pending is a change in how Medicare reimburses for drugs administered in physician offices under Part B to tie reimbursement in part to prices paid by other nations. The pharmaceutical industry has strongly opposed this plan, which has some similarities to a proposed demonstration that came out during the latter years of the Obama administration before ultimately being withdrawn. While House Democrats were supportive of more sweeping measures to address drug costs, including to allow Medicare to negotiate directly, the level of Biden Administration interest in executive actions focused on drug costs remains to be determined. As noted earlier, it is anticipated that the incoming administration will review all pending proposals, and in particular, look closely at those pertaining to pharmaceuticals, and take action, within its executive authority, to reduce drug prices.

Finally, the new administration will likely put even higher priority on health care enforcement actions at the Federal Trade Commission and Department of Justice than the Trump administration, which was very active in that arena. [The Democratic Platform](#) clearly states, “we will vigorously use antitrust laws to fight against mega-mergers in the hospital, insurance, and pharmaceutical industries that would raise prices for patients by undermining market competition.” Further, Vice-President Elect Harris took significant antitrust legal action in the health care arena when she was Attorney General of California.

Divided Government — Six Main Points

1. The scuttling of the legislative filibuster in the Senate, which was talked about before the election, is unlikely. When the Democrats thought they would win the Senate with more than a few seats to spare, but not quite the 60 needed to overcome the Senate filibuster, there had been talk about changing or scuttling the filibuster to allow more of the Biden agenda to move forward and not be blocked by Republican Leader McConnell. The point is moot for now.
2. An even smaller group of centrist Senators may play key roles in major debates in the 117th Congress. Key Senators to watch include: Susan Collins (R-ME), Lisa Murkowski (R-AK), Mitt Romney (R-UT), Joe Manchin (D-WV), Shelley Moore Capito (R-WV) and Rob Portman (R-OH).
3. Many are intrigued by the McConnell-Biden relationship. Biden does have a relationship with McConnell and by all accounts it is a decent one. It is important to note that McConnell was the only Republican senator to attend Beau Biden's funeral. The men are longstanding colleagues and cut a lot of deals during the Obama administration. There is respect, history, connection and admiration between them, which can go a long way. However, due to pressure from his Republican conference, McConnell likely generally will deploy the same strategy as he did with President Obama — withholding funding and blocking initiatives.
4. Sweeping legislation will be highly unlikely given the lack of a Democratic Senate and a smaller Democratic majority in the House. Budget reconciliation, which allows for expedited consideration of certain tax, spending and debt limit legislation without the threat of a filibuster, has been used for all major legislation in recent years, including the ACA. But for now, it is off the table. This means more incremental changes than sweeping changes — or, gridlock.
5. The ability to disapprove and rescind the Trump administration's finalized rules and regulations through the use of the Congressional Review Act also is not available to the Biden-Harris administration without a Democratic-controlled Senate. However, as noted earlier:
 - The Biden-Harris administration could still undo and reverse regulations, but most would have to go through the prolonged rulemaking process. Typically, public notice and comment on proposed rules is allotted 60 days. Then agencies typically take another 60 days to review public comments and then issue the final rule. At the fastest, new regulations, issued through regular order, would take 120 days. An Interim Final Rule could be issued without prior public comment but could be subject to legal challenge.
 - A Biden-Harris administration can freeze work on non-finalized regulations.
 - In the weeks ahead, until January 19-20, there likely will be a flurry of late-stage Trump actions to finalize pending regulations.
6. Given the split in Congress, it is expected that the trend of aggressive use of executive power seen under

Presidents Obama and Trump will continue under a Biden-Harris administration.

There is one additional wild card to keep in mind — the Supreme Court decision in *California v. Texas* could necessitate legislative action on the ACA.

Affordable Care Act Supreme Court Case

The Supreme Court ACA case, *California v. Texas*, has significant implications for health policy in the coming year.

The Supreme Court is being asked whether the ACA individual mandate is constitutional, now that Congress dropped the penalty to zero. Congress could actually fix this issue and render the case moot by enacting a simple bill to eliminate the mandate or add a severability clause to the ACA — meaning the mandate could be severed from the rest of the statute. While these solutions are simple, they are unlikely to be enacted due to the decade-long partisan fight over the ACA.

There are a number of scenarios for the outcome of the case, per our Faegre Drinker attorney colleagues:

- The case could be dismissed for lack of standing.
- The individual mandate could be ruled unconstitutional but severed from the rest of the ACA.
- The individual mandate could be ruled unconstitutional and severed but take guaranteed issue and community rating with it.
- The individual mandate could be ruled unconstitutional and not severable, resulting in the whole law falling. This scenario is clearly the most disruptive and consequential outcome.

It is important to remember that the ACA is not just about health insurance. Other parts of the law include:

- Creation and funding of the CMMI
- Elimination of the Medicare Part D “doughnut hole”
- Authorization for Accountable Care Organizations (ACOs)
- Changes to Medicaid drug rebates, MA and Medicare payments

If the Supreme Court strikes down more than the individual mandate, then Americans of all stripes — Democrats and Republicans — could lose coverage, lose protections they like such as guaranteed issue and community

rating, and the health care system could go into a downward spiral. Should this occur, Senate Republicans may be forced to do something to stabilize the marketplace and reinstate protections that Americans overwhelmingly favor.

Bill Roberts on the Faegre Drinker litigation team predicts that the individual mandate will be struck down, but severed from the rest of the law. If that is the case, then there will be no measurable impact. Based on the media reports from the oral arguments held on Tuesday, November 10, it appears that the Supreme Court is not likely to strike down the law in its entirety. Yet, we will have to wait until late spring or summer for the ruling.

Lame Duck Session

While it is easy to jump ahead to the upcoming 117th Congress and January 20, 2021 inauguration, it is important not to forget the lame duck session. The Senate came back into session on November 9, with the House back for votes on November 16. Both the House and Senate will be in session the week of November 16 before leaving for Thanksgiving. They are scheduled to then be in session until December 18, providing opportunity for elected officials to clear the decks of a number of pending items.

Due to the election results, the Democrats have less of an incentive than anticipated to wait until the next Congress to act on certain items because they will not control the Senate. The Republicans meanwhile may feel they can get the smaller COVID-19 package that they want during the lame duck, then pivot to buckle down on spending next year when the Biden-Harris administration will team up with the House Democrats to demand more money. The biggest unknown is President Trump and what he may or may not decide to do — come to the table, defer to Leader McConnell or shut down the government?

There are a number of important legislative items that remain to be addressed in the lame duck, including:

COVID-19 Relief Package 4.0

Both Leader McConnell and House Speaker Nancy Pelosi (D-CA) say they want a package before the end of the year, but it is far from certain they get there. The elections likely mean Leader McConnell will engage in a way he did not before. But Speaker Pelosi may feel like Biden winning was a mandate on COVID-19 and stick to her guns for more money and may decide to wait and see what the Georgia runoffs bring.

If there is a package, it is likely to be smaller than originally envisioned as the Republicans feel the election gave them leverage. For both sides, the big areas of disagreement have not gone away: money for states and cities, a national testing plan, and liability protections. Most observers feel that all of these issues can be addressed in some way, but no one is quite sure what the tradeoffs are — or will be. And if President Trump chooses not to

engage, then Leader McConnell will have to convince the President and the White House that a plan he negotiated is the best way forward. There are lots of variables here.

Health Care Provider Relief Fund

Getting the Provider Relief Fund replenished will be a challenge. Republicans argue that the Fund “hasn’t run out yet” and they do not want to spend more money until that balance is spent, while Democrats would readily put more money in now. As the virus spreads and hits more and more states and communities, including those with Republican delegations, GOP members likely will have to concede there is a need to put more money in the Fund. Also, reporting requirements for those receiving funds continue to evolve and have proven difficult to follow with many providers asking for clarification and expressing concern about funding clawbacks. The Biden-Harris administration likely will review closely how the Department of Health and Human Services (HHS) has allocated the fund, will want feedback regarding reporting burdens, and advocate additional resources to support providers on the front lines.

Telehealth and Other Waivers Available During the Public Health Emergency

HHS extended the [Public Health Emergency \(PHE\)](#) until January 21, right after the inauguration. The PHE will be one of the first acts of the Biden-Harris administration, or one of the last acts of the Trump administration. Each PHE period lasts for 90 days. Democrats are expected to extend the PHE in order to leverage all the benefits that come with it, including an increase in the Federal Medical Assistance Percentages (FMAP) used for Medicaid matching funds, telehealth waivers, and waiver on anti-kickback rules. Members of Congress of both parties want to make many of the PHE changes permanent while others want more data on the benefit of the waivers first, especially on telehealth. There is also a set of Members who are willing to extend the telehealth waivers but not at the same rate as in-person care. Conventional wisdom indicates that with the assumption that the PHE will be extended through the first quarter of 2021 that Congress will wait to act on making PHE waivers and flexibilities permanent.

Continuing Resolution and Appropriations

Congress has not finished a single appropriations bill out of the 12 bills needed each year to fund the government. At the end of the past fiscal year (FY 2020, which ended on September 30), Congress punted by extending existing funding until December 11 through a Continuing Resolution (CR), a stop-gap spending measure that keeps the government funded and operating. If Congress fails to reach a funding agreement by December 11, the government will shut down. Fortunately, both Speaker Pelosi and Leader McConnell say they want a package, and on November 10 the Senate released its version of the 12 funding bills. Negotiations have begun in earnest.

Surprise Billing

Surprise billing generally has fallen from the headlines, except for those bills tied to COVID-19-related care. Still, there exists a bipartisan, bicameral compromise bill that was crafted by the chairs and ranking members of the House Energy and Commerce Committee and the Senate Health, Education, Labor and Pensions (HELP) Committee. However, that bill's momentum decreased after the introduction of an alternative proposal by the Chair and Ranking Member of the House Ways and Means Committee, followed by a third bill from the Chair and Ranking Member of the House Education and Labor Committee.

Some observers believe that a deal on this issue could emerge in the lame duck session or during 2021. The compromise, consensus bill (from HELP/Energy and Commerce) is the likely starting point. Members from both chambers and both parties have expressed interest in fixing this problem. Democrats are critical of private equity's involvement in health care and view private equity-owned physician groups as one of the principal causes of surprise billing. Republicans also share concerns about surprise bills, however, from both a substantive and political perspective, Leader McConnell is not prioritizing bringing health care bills to the floor other than must-pass bills, like Medicare extenders.

Health Care Extenders

The so-called health care — or Medicare — extenders are items that need funding or authorization to continue. Generally, these extenders move as a package and they include items like funding for Medicare quality measure selection, the Work Geographic Practice Cost Index for Medicare, delays in the implementation of Disproportionate Share Hospital payment reductions enacted under the ACA, community health center funding, and Medicaid Home and Community-Based Services. A package of extenders likely will be attached to either the FY 2021 funding agreement or a COVID-19 package. A short-term, temporary extension of these policies and programs into the beginning of 2021 also is possible. A big pending question is to what extent this legislation may be opened up to include several other health policy proposals that enjoy bipartisan support and/or that have cleared the House but not the Senate. Lame duck sessions are often times during which such legislation ultimately advances. However, if the lame duck session is narrowly focused that would be a strike against this scenario and mean these bills would need to be reintroduced in the new 117th Congress.

Lame Duck Regulations

There are rumors that HHS wants the Centers for Medicare and Medicaid Services (CMS) to put out a final Stark self-referral regulation and the Office of the Inspector General to put out its anti-kickback regulation before the end of the Trump administration, especially now that there's less of a risk of Congress using the Congressional Review Act to overturn them. If these regulations are not finalized, they will likely be among the pending regulations that the Biden-Harris administration will review closely and that could be amended significantly or

shelved entirely. Again, as noted above, it is expected that the Trump administration will push out a number of regulations in its final weeks, seeking to leave its mark on as many policies and programs as possible. A review of the regulatory [review dashboard of the Office of Management and Budget](#) reveals nearly 20 pending regulations from HHS alone.

Congressional Committees

Elections also scramble Congressional committees, not just in terms of membership, but also with respect to how many committee members each party is allocated. The number of Democrats and Republicans on congressional committees — the ratios — are based on the overall ratio of the parties at the chamber level. So, with tighter margins in both, the committees will have tighter margins, too. It is important to note that until the House and Senate races are finalized, we will not know who controls the Senate or margins for the majority and minority parties on committees, but we do know they will be slimmer. This means that although there are vacant seats on committees due to retirements and losses, these slots may not be filled.

Starting with the Senate Finance Committee, Sen. Chuck Grassley (R-IA) has timed out as chair (only the Republicans have term limits for committee chairmanships, which are currently set at six years) and will be taking over as Republican leader of the Senate Judiciary Committee. The Judiciary Committee will allow him to continue his investigative work in the health care field, including his investigation into the nonprofit status of hospitals. He is likely to be replaced by Mike Crapo (R-ID) on Finance, while Ron Wyden (D-OR) remains the lead Democrat.

While Sen. Crapo is not known for leading on many health care policy issues, he introduced the Lower Costs, More Cures Act (S. 3129), which paralleled Sen. Grassley's prescription drug reform bill in some ways, namely in its inclusion of an out-of-pocket cap and cost "smoothing" for Medicare Part D.

The Senate HELP Committee is losing its chair, Sen. Lamar Alexander (R-TN), to retirement. He likely will be replaced by Sen. Richard Burr (R-NC) or potentially Sen. Rand Paul (R-KY). The lead Democrat will continue to be Sen. Patty Murray (D-WA).

Sen. Burr's staff is strong on health policy and quite knowledgeable. He is a champion of biodefense and preparedness and also therapeutic innovation. He is, however, under investigation related to insider information and stock market purchases, which may impact his potential chairmanship. Sen. Paul is an ophthalmologist and has advocated for expanding health savings accounts. He has also been a strong advocate for measures to reduce the role of government in health care.

Sen. Murray has made oversight of the federal response to the pandemic a major focus. She is poised to keep that focus in 2021, demanding a larger role for the government in procuring medical supplies for hospitals and expanding state testing regimes. The thing to note here is that Sens. Alexander and Murray — at the personal and staff level — had a very good working relationship, one that is unlikely to be replicated moving forward. A new dynamic between Sen. Murray and whoever becomes the chairman will impact debates and the pace of legislation in the committee.

In the main House health committees, Energy and Commerce and Ways and Means, the only major change is the ranking member on Energy and Commerce. Rep. Greg Walden (R-OR) retired, and there are a number of members vying for that position, including Rep. Michael Burgess (R-TX), a physician who is the Republican lead on the committee's health subcommittee, and Rep. Cathy McMorris Rogers (R-WA). If Burgess is successful, Rep. Brett Guthrie (R-KY) is likely to be the ranking member on the Health Subcommittee with Rep. Anna Eshoo (D-CA) continuing as chair. Dr. Burgess has significant knowledge of and interest in health care legislation. If McMorris Rogers prevails, it is expected that Burgess will retain his position as Ranking Member of the Health Subcommittee. The House Education and Labor Committee has some jurisdiction over private health insurance, through the lens of an employee benefit, under its Health, Employment, Labor and Pensions Subcommittee. The subcommittee is chaired by Rep. Frederica Wilson (D-FL) and its ranking member is Tim Walberg (R-MI), who are both expected to continue in these roles next year.

On the House Oversight and Reform Committee, chair Rep. Carolyn Maloney (D-NY) and Ranking Member Rep. James Comer (R-KY) are returning. The committee is expected to focus on pandemic issues, including the distribution of relief funds and the vaccine approval and distribution process, in addition to drug pricing.

For the Appropriations Committees, the Senate will likely keep Sen. Richard Shelby (R-AL) and Sen. Patrick Leahy (D-VT) in place, but the House will see a new Chairwoman — either Rep. Rosa DeLauro (D-CT), Rep. Marcy Kaptur (D-OH), or Rep. Debbie Wasserman Schultz (D-FL). Rep. DeLauro is the current chair of the Subcommittee on Health and is deeply invested in public health. The chair will be important because funding for the COVID-19 crisis, ongoing rebuilding on national public health functions, vaccine supplies and distribution, and the provider fund all require robust appropriations.

Conclusion

The lame duck session and the year ahead promise to bring significant attention to – and legislative and executive branch action in – federal health policy. As always, the [District Policy Group](#) and Faegre Drinker are here to help advance your legislative and regulatory goals.

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November 10, 2020

Potential Changes to Labor Policy Under a Biden Administration

Employers should anticipate major changes to national labor policy when President-elect Joe Biden assumes the Oval Office. Changes will likely seek to increase union membership by facilitating organizing, shortening election periods and reducing the bargaining period for the first collective bargaining agreement. The Biden administration will seek to effectuate these policy changes using a combination of legislation and revisiting Trump-era National Labor Relations Board (NLRB) decisions.

In February 2020, the House of Representatives passed the Protecting the Right to Organize Act of 2019 (PRO Act), one of the most significant pieces of labor legislation since the Taft-Hartley Amendments of 1947. The PRO Act did not pass the Republican-controlled Senate.

Among other things, the PRO Act would ease employee classification, facilitate faster organizations, and shorten representative elections by codifying several Obama-era decisions and rule-makings. Most significantly, the PRO Act would substantially alter the test for determining whether an independent contractor is really an employee by codifying the “ABC” test used by the California Department of Labor. Under the “ABC” test, to prove that a worker is an independent contractor rather than an employee, the employer must demonstrate that:

1. the employer does not control or direct the performance of the work both under the terms of the employment contract and in practice.
2. the work performed is outside the usual course of business for the employer.
3. the worker ordinarily performs the same work as part of an independently established trade, occupation or business.

Because the “ABC” test requires an employer to meet all three prongs before classifying workers as independent contractors, its application tends to favor the classification of individuals as employees. This is important because, under the National Labor Relations Act (NLRA), only employees have the right to organize.

Even if the Democrats are unable to regain control of the Senate in January, it is likely that a newly-appointed Biden NLRB would revisit a number of Trump NLRB decisions, particularly those that overturned Obama-era determinations.

First, a Biden NLRB would likely reinstate *Specialty Healthcare*, 357 NLRB 934 (2011), which the Trump NLRB overruled in 2017. In *Specialty Healthcare*, the Obama NLRB endorsed the concept of “micro-units” when evaluating potential bargaining units. Under the “micro-unit” standard, the NLRB presumes that a bargaining unit is appropriate when it is composed of employees that perform the same job at the same facility regardless of whether other employees share a community of interest with that unit. This means that organizing efforts can target a smaller group of employees to organize, allowing the Union to gain a “toe-hold” in an employer’s operation from which it can expand its representation.

Second, a Biden NLRB would likely also reinstate *Purple Communications*, 361 NLRB 1050 (2014), which the Trump NLRB overturned in 2019. In *Purple Communications*, the Obama NLRB determined that employees had a NLRA-protected right to use their work email accounts for organizing purposes even if the employer prohibited non-work related use of work emails accounts. Reinstating this decision would be a boon for organizers looking to use employer provided email accounts as a way to organize — and it would require employers to review their handbooks to make sure their email use rules do not run afoul of NLRB law.

Finally, a Biden NLRB would likely return to the joint-employer test articulated in the Obama-era decision *Browning-Ferris Industries*, 362 NLRB 1599 (2015). In that decision, the NLRB expanded the joint-employer standard by holding that an employer’s status as a joint-employer hinges on the employer’s **reserved right** to control employees as well as its **indirect control** over employees. The *Browning-Ferris* decision relaxed the previous joint-employer standard, which required a demonstration that the putative joint-employer **actually** exercise **direct** control over the employees in question. By relaxing the joint-employer standard, employees may assert their right to bargain with both their direct employer **and** the company that contracted their services. *Browning-Ferris* has the potential to lead to increased bargaining across a variety of industries, particularly those industries that rely on a franchise model.

In sum, major changes to labor policy do not hinge solely on the Democrats winning both January run-off elections in Georgia. Regardless of the outcome of the Senate run-off elections, the composition of the NLRB will change under the Biden administration, likely resulting in a return to Obama-era precedent in key areas,

including unit composition, joint-employer status and the rules around organizing activity. If you have any questions about the possible labor policy changes that may be pursued by the Biden administration or how those potential changes will affect your business, please contact an attorney on the Faegre Drinker labor management relations team.

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