



2023 HEALTH POLICY OUTLOOK



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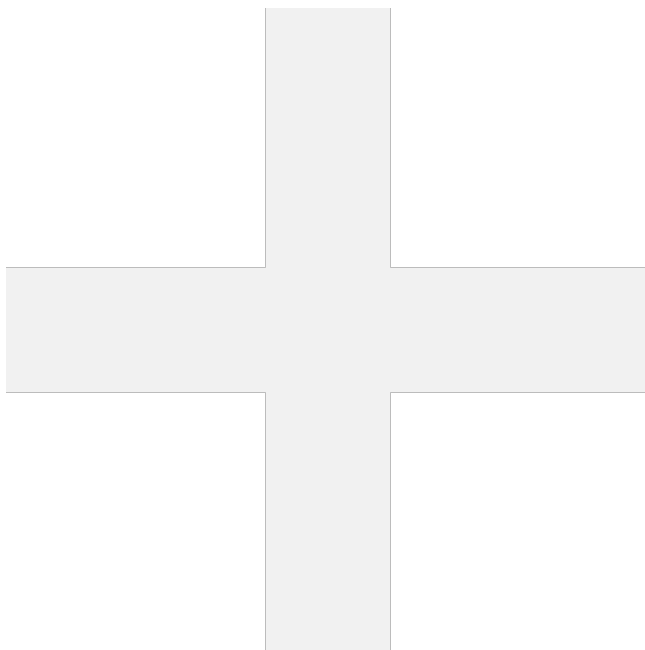


OVERVIEW

The results of the 2022 election brought changes to the makeup of Congress. In the US Senate, Democrats maintained control and gained one seat, with a 51-49 margin. In the US House of Representatives, Republicans gained control with a 222-213 margin (currently 222-212 because of a vacancy).

Changes from one party to another in Congress, even in just one chamber, can mean big changes in policy progress and direction. However, the Senate and the House both have razor thin margins, and with a divided government it will be difficult to pass legislation.

This report provides a look into how those in the healthcare sector should view these outcomes and plan for new dynamics from Capitol Hill and health policy priorities.



MAJOR TRENDS LIKELY TO DRIVE HEALTHCARE POLICY IN 2023

OVERSIGHT

House Republicans will flex new oversight muscles. A significant benefit of gaining control of a congressional chamber is the ability to set the agenda, *i.e.*, choose which bills come to the floor and what topics congressional committees prioritize. With razor thin margins, House Republicans may have difficulty uniting their conference behind legislation (just a few Republican dissenters can cost Republicans a majority), but they likely will not struggle to find consensus around scrutiny of the Biden Administration. Congressional Republicans will look to define their party and agenda—and weaken the president politically—by calling Biden Administration officials to testify before congressional committees. Healthcare topics likely to be the subject of oversight hearings include the following:

- Health sector consolidation
- Health system nonprofit status
- The 340B drug discount program
- Pharmacy benefit managers
- The Medicare Advantage program
- Substance use (especially related to fentanyl).

Congressional Republicans won't limit their reviews to the Biden Administration. Stakeholders should also expect deeper reviews of private sector use of Provider Relief Fund dollars and other COVID-19-related funding and flexibilities, and should prepare to respond to potential congressional inquiries.

THE END OF THE COVID-19 PUBLIC HEALTH EMERGENCY

The Biden Administration has announced that the COVID-19 public health emergency (PHE) will end May 11, 2023. At the beginning of the COVID-19 PHE, Congress and the Administration provided hundreds of regulatory flexibilities to healthcare providers, most notably in relation to telehealth. These regulatory flexibilities will expire at or shortly after the end of the PHE.

Congress has acted to extend some telehealth flexibilities beyond the PHE end date (most recently through December 31, 2024, in the Consolidated Appropriations Act, 2023). In 2023, Congress, the Centers for Medicare & Medicaid (CMS), the US Food and Drug Administration, and other agencies may consider whether additional policies need to be extended or even made permanent. These policy discussions may be an opportunity for additional conversations about regulatory modernization generally. Affected stakeholders should begin formulating plans to transition back to traditional regulatory requirements. They should also consider advocating for changes they wish to extend or make permanent, and consider seeking legislative solutions where agencies do not have the flexibility to act.

INFLATION, HEALTHCARE COSTS AND WORKFORCE SHORTAGES

If provider costs (*e.g.*, labor, supplies and prescription drugs) outpace provider payments in 2023 as expected, the healthcare sector likely will push Congress to intervene. Increasing payments to providers because of inflation may seem counterintuitive, and Congress has few other tools to address these challenges. Look for House Republicans to leverage these pressure points into a discussion about Medicare solvency and the need for broad programmatic reforms.

The healthcare workforce shortage also will remain on Congress's radar. There are few policy levers available for Congress to provide relief in the short term, but Congress may begin considering longer-term policy changes to ensure a stable workforce across varying areas of need. Such policies may relate to telehealth, training programs, education policies, immigration policies, Occupational Safety and Health Administration standards, and workforce innovations.

2023 HEALTHCARE LEGISLATIVE OUTLOOK

A divided government does not necessarily preclude significant legislative action. Congress approved the Balanced Budget Act of 1997, which made substantial Medicare program reforms, and the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA), which overhauled how Medicare pays physicians, in periods of divided government. But substantial bipartisan cooperation will be required. If members of Congress decide that campaigning on policy differences is more politically advantageous than compromise and legislating, productive bipartisan discussions are easily derailed.

Undermining the potential for bipartisan compromise is expected Republican emphasis on fiscal constraint. A Republican House is unlikely to advance healthcare legislation without offsetting spending increases with equivalent spending cuts, and there are limited spending reductions that can garner support from both Republicans and Democrats. As a result, significant healthcare legislation during the 118th Congress is not impossible, but it is unlikely. Instead, stakeholders should expect House Republicans to focus on oversight and smaller health policy priorities where they can achieve

compromise or "trade" policy priorities with Senate Democrats.

In the Senate, the challenge for Democrats will be identifying and championing legislation that will promote and protect members of their caucus who are up for reelection in 2024. In the next election, Senate Democrats will have 23 seats (counting three independent senators who caucus with Democrats) up for election, while Republicans will have only 10 senators facing voters. Democratic Senators Tester (MT), Rosen (NV), Brown (OH), Heinrich (NM) and Manchin (WV), as well as former Democrat, now Independent Senator Sinema (AZ), will be up for reelection in 2024, and each won their last contest by less than 55%. Senators Casey (PA), Kaine (VA), Cantwell (WA) and Baldwin (WI), who also are up for reelection, barely crossed the 55% line. Senator Stabenow (MI) has announced her retirement at the end of this term, leaving a critical open seat in Michigan for 2024. This means at least 10 Senators who caucus with the Democrats will have to walk a line between supporting Democratic priorities and not veering too far from the political center. In addition to the challenge any progressive legislation would face in a Republican House, it may be hard to even get such policies through the Senate (think about the fits Senators Manchin and Sinema caused Senate Democrats with the Inflation Reduction Act and Build Back Better, among other Democratic ambitions in 2022). Accordingly, Senate Democrats also may choose to focus on small ball policies in 2023.

We will also see challenges at the committee level. Even though Democrats will control the gavels at Senate committees, bipartisan compromise is often necessary to advance policies, particularly when partisan margins are so tight. The Senate Health, Education, Labor and Pensions (HELP) Committee will be one to watch in this regard, as it has new leadership from both parties. The HELP Committee will be led by Senator Bernie Sanders (I-VT), and Bill

Cassidy (R-LA) will be the new ranking member. Both have strong voices on healthcare policy, but it is unknown how they will work together.

HEALTH POLICIES THAT COULD SEE ACTION IN 2023

HEALTHCARE EXTENDERS

Several popular health programs will need to be reauthorized in the fourth quarter of 2023. Many have bipartisan support, at least generally, and therefore are likely to be renewed. The following programs (among many others) are set to expire in 2023 and therefore will require congressional intervention to be sustained:

- Medicaid disproportionate share hospital (DSH) cuts go into effect October 1, 2023.
- Community health center funding expires October 1, 2023.
- The Special Diabetes Program for Type I Diabetes expires October 1, 2023.

MEDICARE

Time-sensitive legislation with bipartisan support can present an opportunity to advance additional healthcare-related policies, including issues related to Medicare, Medicaid and public health. But Republicans are likely to scrutinize all aspects of the Medicare program with a focus on Medicare solvency. Medicare's Part A Trust Fund is forecast to be depleted in 2028, meaning that there will not be enough funds to cover all Part A operating expenses as of that date. Republicans will leverage that threat as a tool to extract cost savings in Medicare in exchange for extending these programs, all of which increase federal spending.

In the hospital space, Republicans are likely to consider hospitals' role as potential cost drivers. They will examine industry consolidation, nonprofit status, site-neutral payment policy and the 340B drug discount policy. In the physician/practitioner/supplier space, House Republicans may seek to tackle perennial problems with formula-driven updates and shortcomings in MACRA.

Although Republicans have historically been supportive of Medicare Advantage, stakeholders can expect Republicans to examine the program with an eye toward reining in perceived plan excesses, especially as close to half of all Medicare beneficiaries are enrolled in Medicare Advantage.

In the Medicare drug space, Republicans probably will not build upon the Inflation Reduction Act's drug pricing provisions. Instead, Republicans may seek to repeal specific provisions of the act via targeted legislation that they believe would challenge Democrats with politically difficult votes, such as a vote to support a tax provision that Republicans propose to repeal.

MEDICAID

The significant Medicaid DSH cuts coming at the end of 2023 will refocus attention on the original policy. The Affordable Care Act (ACA) created the mechanisms that lead to these cuts: the ACA's provisions were premised on an expectation that expanded Medicaid coverage would reduce the need for DSH support. Since Medicaid did not expand as fully as envisioned by the ACA, Congress has intervened since the law's passage to prevent what would otherwise be annual DSH cuts. Republicans will be reluctant to let the cuts go into effect, but there could be significant conversation about the nature of DSH payments and whether changes to the existing model would be appropriate. Democrats also will want to avoid cuts, but they

will be less inclined to accept programmatic changes put forward by Republicans.

Home and community-based services were a priority for Democrats in the 117th Congress and will continue to be a noteworthy issue for House Republicans in the 118th Congress, albeit with drastically reduced spending goals. Representative Cathy McMorris Rodgers (WA), chair of the House Energy and Commerce Committee, is interested in examining home and community-based services policies. In 2022, she released a disability policy request for information for stakeholder feedback. She likely will continue her work in the disability space and use stakeholders' responses to craft policy. It is unclear how willing Democrats will be to work with her on this front.

Finally, states will begin the Medicaid unwinding process, which refers to restarting the redeterminations of Medicaid eligibility that have been halted during the COVID-19 PHE. The Families First Coronavirus Response Act (Public Law No: 116-127), which became law in 2020, provided Medicaid programs a 6.2 percentage point increase in the federal share if states met certain maintenance of eligibility requirements that ensure continuous coverage for current enrollees. As a result of this payment change, all Medicaid beneficiaries have been continuously enrolled in Medicaid during the COVID-19 PHE. This increase in Medicaid funds was initially available to states through the quarter in which the PHE ends. As enacted in the Families First Coronavirus Response Act, the maintenance of eligibility requirements, including the continuous enrollment requirement, expire at the end of the month in which the PHE ends. CMS has also required each state to develop a plan to resume operations post-PHE. It is estimated that as many as 18 million people could lose Medicaid coverage because they no longer meet Medicaid eligibility requirements or fail to make it through their state's redetermination process.

In late 2022, Congress changed this policy as part of Consolidated Appropriations Act, 2023. Under the new law, Congress permits states to begin Medicaid eligibility redeterminations and renewals as of April 1, 2023, regardless of COVID-19 PHE end date, and also phases down the increased federal medical assistance percentage (FMAP) to states starting in April 2023 and concluding December 31, 2023. The decreasing FMAP payments incentivize states to proceed with an accelerated timeline for Medicaid redeterminations and renewals. That said, Medicaid enrollees could lose Medicaid coverage earlier than anticipated. These individuals will need to transition to another form of coverage or become uninsured. Expect ongoing congressional oversight on this issue in the new Congress, as well as potential congressional intervention depending on how the redetermination process proceeds.

PUBLIC HEALTH

The challenges surrounding mental health and substance use disorders will remain a significant priority in a Republican Congress, with a strong focus on fentanyl-related substances and their entry into the United States. Congress will seek opportunities to implement policies intended to make a measurable impact on these problems.

A Republican House likely will pursue significant oversight of the National Institutes of Health, the Centers for Disease Control and Prevention, and other agencies involved in pandemic response. Republicans will focus on cutting red tape across the public health security preparedness and response systems, including in the Strategic National Stockpile. They will also focus on encouraging or requiring collaboration with the private sector, and scrutinizing the expenditure of federal dollars on public health (with a particular attention on funds spent overseas). The House has not had nearly the level of engagement with the Administration that the Senate had during the



pandemic, and Republicans will be looking to change that.

LONGTIME REPUBLICAN POLICY GOALS

Republicans may also seek to revive long-sought smaller health policies, such as the following:

- Expanding association health plans to provide opportunities for small businesses and self-employed individuals to band together to purchase health insurance. Democrats have successfully fought these initiatives over many years, and the Biden Administration is likely to take the same stance in the face of new efforts to permit more plan options.
- Ensuring that individuals can obtain telehealth and certain other services in health savings account plans.
- Expanding access to patient-centered technologies through data-sharing standards and streamlining regulations.

FINAL THOUGHTS: THE ADMINISTRATION AND THE 2024 PRESIDENTIAL CYCLE

Amid all of this change in Congress, the Biden Administration retains a substantial policymaking role. This Administration has been aggressive in using its authority to advance policy. That trend will only strengthen as the Administration seeks to achieve health policy priorities that cannot advance in a Republican House. At the same time, the more aggressively the Administration seeks to exercise authority, the more congressional Republicans will increase oversight of those actions.

Healthcare policy in 2023 will also be influenced by the 2024 presidential election cycle, which began the moment the midterm elections ended. Presidential politics are already in play.

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