

10.18.2012

Obama? Romney? The Potential Impact of the Election on the Health Care Industry

While the election season often yields more heat than light, some clear themes emerged from last night's Brownstein Health Care Panel Discussion. Our panel and the audience of more than 80 health care professionals had consensus on five key issues impacting the health care industry:

The Patient Protection and Affordable Care Act (ACA) indeed creates new hurdles for small businesses.

The insurance exchanges contemplated by the ACA will provide a more consumer-friendly option for comparing and purchasing non-employer based health care. However, critics note that when a small business hires its 50th employee, it will trigger the employer's requirement to provide coverage for its employees. This may discourage growth of the employee base by causing small businesses to contract for services rather than hire more employees. Those independent contractors may be forced to look for individual coverage options, including through the ACA's insurance exchanges.

Governor Romney has promised to repeal the ACA, but without Republican control of 60 votes in the Senate, a Romney presidency can probably only undermine the ACA.

Without 60 votes, a Romney administration would not be able to break a filibuster by Democrats in the Senate. Although the Democrats utilized a procedure called "reconciliation" when Scott Brown's win in Massachusetts dropped their majority below 60 seats, this procedure was used to reconcile an already-passed Senate version with the House version and would not be available for a full repeal. Significantly, Washington experts currently believe that the maximum Republican pickup in the Senate will still leave the GOP in the low 50s, well short of the filibuster-proof supermajority of 60. However, even without a Republican Senate, a Romney administration could "slow play" implementation of the ACA by not fully enforcing it, not promulgating rules, or dedicating insufficient personnel to its implementation.

States, insurers and providers lack key regulations, creating ambiguity about implementation of the ACA.

States, insurers and providers are awaiting the issuance of numerous regulations before they can make critical design decisions on insurance exchanges and prepare health plan offerings to be offered in these new marketplaces, and the White House Office of Management and Budget website that tracks regulations under review by federal budget officials offers no information on their status. Irrespective of the election outcome, this creates concern about whether insurance exchanges will be in a position to enroll people by the ACA's required date of October 1, 2013, or what plans will be offered under those exchanges.

Uncertainty about the election and the implementation of the ACA have dampened decision making and investment by businesses, and slowed M&A activity.

Healthcare M&A was down almost 15% in the second quarter of 2012 from the prior year period, and has remained slower leading up to the election. Although the probability of a Romney win coupled with a GOP supermajority in Senate is low, many health care players have adopted a "wait and see" approach.

Always There

Healthcare M&A activity will thrive in the 12 to 24 months following the election, regardless of the outcome, due to substantial pressure to find efficiencies in the U.S. healthcare system.

The U.S. dedicates almost a fifth of its economy to healthcare, yet in many cases we achieve outcomes inferior to the industrialized world. A substantial portion of businesses large and small are dedicated to commerce up and down the healthcare supply chain – hospitals, providers, insurers, and medical devices, pharmaceuticals, and caregivers. Our experts see consolidation as fundamental to reducing costs - by integrating care coordination and delivery, and by increasing scale to drive efficiencies, including with payers and vendors. Innovation and technology will also be key drivers, as evidenced by an increase in health care information technology spending to \$293 million in the second quarter from only \$86 million for the same period in 2011.

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Health Care Panel Members from Brownstein:

- **Michael King**. Health care transactional matters, including structuring joint ventures and contractual arrangements, mergers and acquisitions, and financing transactions.
- **Alexander Dahl**. Federal public policy and legal counsel concerning health care, financial services, legal reform, corporate mergers, and congressional investigations. Admitted to practice before the Supreme Court of the U.S.
- **Darryl Landahl**. Regulatory and transactional matters, including structuring joint ventures and contractual arrangements, compliance program development and implementation, and medical staff and peer review issues.

This document is intended to provide you with general information about key issues impacting the health care industry. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed below or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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