



Way Too Early Preview: What the Midterm Election Results Might Mean for Health Policy in 2023

Although we are still awaiting final results of the November 8, 2022, midterm elections, the US House of Representatives appears likely to flip to Republican control, while the US Senate will remain in Democratic hands. Changes from one party to another in Congress, even in just one chamber, can mean big changes in policy progress and direction. This article provides an early 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. One of the big benefits 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 not-for-profit status
- The 340B drug discount program
- The Medicare Advantage program
- Substance abuse (especially related to fentanyl).

They 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-related funding and flexibilities, and should prepare to respond to potential congressional inquiries.

The End of the COVID-19 Public Health Emergency

The COVID-19 PHE likely will end in 2023. With the PHE's end come two very significant challenges for healthcare policymakers:

- **Medicaid Unwinding.** When the PHE ends, millions of Americans will lose Medicaid coverage, either because their state redetermination process finds that they are no longer eligible or because they fail to complete processes to maintain enrollment. Transitioning these individuals to new coverage is certain to be a priority for the Administration but a Republican House might take an adversarial position. Transitioning this many Americans from one coverage to another, or to no coverage at all will be disruptive for the individuals involved. Stakeholders should perform internal payer-source reviews and plan for disruption.
- **PHE Flexibilities.** Congress and the Administration provided hundreds of regulatory flexibilities to healthcare providers during the PHE, most notably in relation to telehealth.



These flexibilities will expire at or shortly after the end of the PHE. Congress has already extended some telehealth flexibilities beyond the PHE end date, and in 2023 it may consider whether additional policies need to be extended legislatively 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 and consider advocating for changes they wish to extend.

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 will push Congress to intervene. Increasing payments to providers because of inflation may seem counterintuitive. 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, 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 2005, which overhauled how Medicare pays physicians, in period 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 re-election in 2024. In the next election, Senate Democrats will have 23 seats (counting two independent senators who caucus with Democrats) up for election, while Republicans will have only 10 senators facing voters. Democratic Senators Stabenow (MI), Tester (MT), Rosen (NV), Brown (OH), Heinrich (NM), Sinema (AZ) and Manchin (WV) will be up for re-election in 2024, and each won their last contest by less than 55%; Senators Casey (PA), Kaine (VA), Cantwell (WA) and Baldwin (WI) barely crossed the 55% line. So at least 11 Senate 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, among other Democratic ambitions in 2022). Accordingly, Senate Democrats also may 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 as tight as they will be. The Senate Health, Education, Labor and Pensions (HELP) Committee will be particularly challenged in this regard. The panel is likely to be led by Senators Bernie Sanders (VT) and Rand Paul (KY), possibly two of the most philosophically opposed Senators in the chamber. Getting any health policy through the HELP Committee looks to be challenging in the 118th Congress.

HEALTH POLICIES THAT CAN SEE ACTION IN 2023

Healthcare Extenders

A number of 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 Medicare and Medicaid programs are among a larger list that are set to expire in 2023 and therefore will require congressional intervention to be sustained:

- Medicaid disproportionate share hospital (DSH) 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, non-profit 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 the 2015 Medicare Access and CHIP Reauthorization Act, more commonly known as 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 advance targeted legislation to repeal specific provisions of the IRA that they believe challenge Democrats with politically difficult votes, like voting to support a tax provision that Republicans are proposing 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 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 also 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), set to become chair of the House Energy and Commerce Committee, is interested in examining home and community-based services policies. This year, 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.

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, encouraging or requiring collaboration with the private sector, and scrutinizing the expenditure of federal dollars on public health (with a particular focus 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. Congress might act on this issue in the 2022 lame duck session, but if not, this will be a focus in 2023.
- Expanding access to patient-centered technologies through data-sharing standards and streamlining regulations.



Preview for 2023

FINAL THOUGHTS: THE ADMINISTRATION AND THE 2024 PRESIDENTIAL CYCLE

Amidst 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 desire 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. By the time Congress returns to start the 118th Congress, presidential politics will already be in play.

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