

New Congress, Same Challenges: What's Next for Healthcare Policy?

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The Republican wave on November 2 swept in a considerably different Congress, with a new majority in the U.S. House of Representatives and a substantially altered U.S. Senate. What will this mean for healthcare policy in the upcoming 112th Congress? Much attention is now focused on the Republican campaign promise to “repeal and replace” the Democratic healthcare reform law. However, as the Democrats discovered in their two-year battle to enact healthcare reform, the issues surrounding healthcare are complex. Now that healthcare reform is law, the Republicans will likely find that their efforts to repeal or alter it will prove similarly complex.

Upcoming healthcare policy challenges do not revolve solely around healthcare reform implementation. Even before the new Congress convenes, the current Congress will immediately face one of the toughest budgetary issues in the Medicare program—a looming 30% payment cut for physicians who treat Medicare patients. Below, we highlight what to expect for the remainder of 2010 and explain the strategies that Republicans may use in the coming years as they work to mold healthcare reform to their liking.

Healthcare During the Lame Duck Session

The lame duck session of Congress is scheduled to begin the week of November 15 and run through mid-December with a week-long break for Thanksgiving. During this short session, all current members and senators will retain their seats. New legislators will be sworn in on January 3, 2011.

Winding down. Congress will face a daunting agenda when it returns on November 15. The first week is likely to focus on selection of leadership in the House and Senate, leaving only a few short weeks in December for the remaining 2010 legislative agenda. As all pending legislation requires Republican cooperation to move forward in the Senate, only a few “must pass” items are likely to advance. For example, to prevent a government shutdown after the December 3 expiration of the current “continuing resolution” (CR) (passed to keep the government funded beyond the fiscal year-end), Congress must pass either another CR or an Omnibus Appropriations Bill for fiscal year 2011. Senate GOP leader Mitch McConnell (R-Ky.) is rumored to favor a catchall 2011 spending bill, funding the government at below 2010 levels; however, deficit hawks are pushing for more drastic cuts.

Taking care of the docs. The current “patch” to the Medicare physician fee schedule expires on November 30. Beginning December 1—only three weeks away—physician payment will be cut by 23%.

Starting January 1, this cut increases to nearly 30%. Without legislative action, the Medicare program could face a crisis that might limit seniors' access to care, as some providers decide not to accept patients at the lower rates. Congressional leaders may attempt to pass another short-term patch until new members take office, or a slightly longer (one-year) fix. A long-term (multiyear) or permanent fix is highly unlikely. With a substantial number of new conservative members, the next Congress may be reluctant to spend the estimated \$15 billion necessary for even a one-year patch. Likely, these members will, at a minimum, insist on offsetting spending. Many times in the past, offsets have come from reducing payments to other Medicare providers. However, with the large cuts just enacted in the healthcare reform law, this may not be a viable approach. This situation highlights the sober fiscal reality for healthcare issues that both the lame duck Congress and the new 112th Congress will face.

The New Congress

President Obama has already scheduled a White House meeting with congressional leaders of both parties on November 18, near the start of the lame duck session. The President hopes to discuss potential areas for joint effort during the 112th Congress. We expect the meeting to focus on issues directly affecting the economy. Notwithstanding any compromise efforts, the pace of all legislation in 2011, healthcare included, will likely be slow and contentious. Many experts predict gridlock and increased partisanship, while others see potential for compromise on issues such as deficit reduction and small business job creation.

The recently passed healthcare reform law will likely play a central role in increased partisanship. Getting past the campaign focus on immediate repeal, the Republicans' strategy to undercut the Democratic legislation, and substitute their own ideas, will likely manifest itself in a number of ways. Many approaches may be pursued simultaneously, and the desired outcome and likelihood of success of each will vary.

Repeal? The new GOP House majority will likely take up a bill to repeal the healthcare reform law as one of its first items of business in the 112th Congress. One early challenge facing the party is that the nonpartisan Congressional Budget Office (CBO) scored the healthcare bill as overall reducing the budget deficit by more than \$100 billion. Therefore, it is likely that the CBO would score a total repeal as adding to the deficit. Republicans have committed themselves to reducing the deficit, but they will likely face difficulty in offsetting the deficit increases resulting from repeal. Additionally, current GOP leaders have acknowledged that, even if a repeal bill passed the House, it would not pass the Senate or escape a presidential veto.

Attack the unpopular? Failing outright repeal, the GOP will likely target specific, unpopular bill provisions for repeal through more focused legislation. However, some of these initiatives could also run counter to the GOP pledge to reduce deficits. As Peter Orszag, former director of President Obama's Office of Management and Budget, has said, "Many of the provisions that politicians have been taking aim at are the ones that save money." For example, repealing the mandate for individuals to buy insurance, the 1099 tax form requirement for business purchases above \$600, and the Independent Payment Advisory Board (IPAB) tasked with reducing Medicare growth could be just a few of the options put forward. Again, where lawmakers will find budget offsets for these changes is unclear. However, Republicans believe they may succeed in stopping some of these new provisions because they are unpopular with the public. They plan to move these issues forward in hopes that enough Democratic senators will defect from their party to reach the 60-vote threshold needed to break a Democratic

filibuster. Even if this proves impossible, Republicans can use those votes to target vulnerable Democratic members in 2012.

Starve the beast? Through the appropriations process (by which Congress funds the activities of federal agencies), the GOP could attempt to limit or eliminate funding to implement the healthcare reform law. For example, the GOP could try to block funding for the Department of Health and Human Services and the Internal Revenue Service as these agencies seek to increase staffing for reform implementation. In the most extreme scenario, Congress could reach a stalemate in next year's appropriations process, with both parties refusing to compromise on healthcare reform implementation funds, eventually leading to a government shutdown similar to the one that occurred 1995. If the GOP fails in its broad attempt to stop implementation, it will likely try to block various smaller pieces of the law. Funding for new initiatives, such as the Patient Centered Outcomes Research Institute and the Center for Medicare and Medicaid Innovation, are likely targets.

Increase accountability? Republican House committee chairs will likely call HHS Secretary Kathleen Sebelius, CMS Administrator Donald Berwick, FDA Commissioner Margaret Hamburg, and other officials to Capitol Hill for regular hearings on healthcare reform implementation. These hearings could serve to highlight problems and tie up busy administration officials, although they could also serve to educate the public on lesser-known aspects of the bill, perhaps affecting its popularity. Additionally, Democrats still hold committee chairmanships in the Senate, and administration officials are working with key committees to call their own series of hearings to highlight benefits of the new law.

What Republicans want. In its Pledge to America, unveiled by Republican leaders on September 23, 2010, the GOP prioritizes malpractice reform, the ability to purchase insurance across state lines, health savings accounts, and expanded access for those with preexisting conditions. Many incumbent and newly elected Republican members, including the presumptive Speaker of the House John Boehner (R-Ohio) and the presumptive Minority Leader Eric Cantor (R-Va.), have endorsed the Pledge as an alternative to the policies of President Obama. The Pledge advocates insurance companies being required to cover people with preexisting conditions, expansion of state high-risk pools and reinsurance programs, elimination of lifetime and annual limits, and prevention of recessions—requirements similar to features of the enacted healthcare reform law. This overlap in policy goals again highlights the challenges facing the Republicans in discussions of total repeal.

Presumed Budget Committee Chairman Paul Ryan's (R-Wisc.) Roadmap for America's Future also offers guidance on the GOP's plans for deficit reduction. Ryan's plan, first announced in 2008 and adopted by many Tea Party candidates, has secured the endorsement of House Republican leadership. For the Medicare program, Congressman Ryan recommends preserving the current system for those who are 55 or older today. For future generations, Congressman Ryan recommends an annual government tax credit, initially averaging \$11,000, which seniors could use to individually purchase a "Medicare Certified Plan." It is unclear if this approach to altering the Medicare program, or other ambitious healthcare proposals included in the Roadmap, will play a prominent role in the Republican's 2011 legislative agenda. Deciding whether to pursue these proposals could create division, even within the Republican caucus.

An important issue, not much discussed during the campaign, is the regulatory enforcement environment. In Medicare fraud enforcement, not much is likely to change. Increased penalties for fraud and providing additional funding for antifraud efforts have been bipartisan endeavors. Republican control in the House will likely do little to reduce the heightened antifraud enforcement environment. On

the other hand, proposed FDA enforcement approaches to revive use of the *Park* doctrine for criminal prosecutions of individuals for FDA violations may be subject to questioning by House Republican oversight committees.

States

State electoral changes will also have an impact on healthcare reform implementation. State governments already face serious challenges in meeting the requirements of the new healthcare reform law, such as streamlining Medicaid enrollment to expanded populations and setting up state insurance exchanges. With a number of new Republican governors and a likely shake-up of state insurance commissioners, the willingness and ability of many states to implement reform could decrease even further. Should state-mandated tasks fall behind, congressional Republicans could draw attention to these delays as evidence of the healthcare reform legislation's failure.

Our Commitment

Much remains to be seen in the coming months and years. The healthcare reform law will not disappear overnight. For the near future, Republicans will be bound by the basic framework of the new healthcare reform law, and Republicans and Democrats alike will face numerous choices and challenges around implementation. Morgan Lewis will continue to closely follow legislative and regulatory changes as they unfold.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact the authors, **Joyce Cowan**, FDA and Healthcare partner (202.739.5373; jcowan@morganlewis.com), or **Stephen Bloom**, legislative and policy analyst (202.739.5152; sbloom@morganlewis.com).

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