

Vizient Post-Election Analysis 2020

The Impact on Health Care & Hospitals, November 10, 2020

The White House

After an unconventional, COVID-19 impacted campaign, in a decidedly unconventional year, former Vice President Joe Biden has [won](#) enough electoral votes to become the next President of the United States. Although President Trump has not yet conceded the election results, and recounts and legal challenges are expected over the coming weeks, as of the time of publication, former Vice President Biden appears to have won enough electoral votes to pass the 270 threshold requirement. For the purposes of this analysis, we will assume that Joe Biden, now President-elect Biden, will be sworn in as the 46th President of the United States on January 20.

Based on President-elect Biden's previously released [health policy priorities](#), Vizient prepared a [summary](#) that offers additional information about the potential impact of a Biden presidency on health care policy and hospitals. While the campaign positioning and our analysis offer some insight, the outcome of the outstanding races for control of the Senate ultimately will determine how successful a Biden presidency will be in accomplishing its health policy goals.

Due to election dynamics, it appears that a Biden administration will most likely be working to accomplish its health policy goals with a Democratic House and a Republican Senate – often referred to as a “divided government”. With that in mind, bipartisan cooperation will be necessary to accomplish any significant health policy goals. While Biden has signaled that bipartisanship is a primary aim of his administration, it seems just as likely that the next two years could be marked by ongoing partisan gridlock, with only lowest-common-denominator agreements around must-pass legislation possible.

The Supreme Court decision regarding the ongoing legal challenge to the Affordable Care Act (ACA) may be the key determining factor on health policy matters early in a Biden administration. If the court strikes the entirety of the law, then reconstructing a bipartisan health care plan that covers preexisting conditions, and addresses potential significant losses of insured individuals – including those who had secured coverage through the Medicaid expansion – will dominate the agenda. However, steps could be taken to mitigate some of that risk, including reaching a bipartisan agreement on striking any constitutionally questionable provisions (such as the individual mandate), which could leave the bulk of the law intact.

With that in mind, President-elect Biden already has a robust transition team in place and has begun to put the [pieces of his administration](#) together. He has also announced a [COVID-19 Advisory Board](#) that will be tasked with continuing America's response to the pandemic. Although rumors are already swirling about who will fill Cabinet and sub-agency roles, the only clear direction the President-elect has given is that he will choose the most [diverse](#) Cabinet in history. Outside of that pledge, Biden will also need to pursue candidates who are more moderate in nature, as current Senate Majority Leader Mitch McConnell (R-KY) has indicated that he will be reluctant to confirm any Biden appointees he views as too extreme. Somewhat limiting his choices is the narrowly divided Senate, where Biden is unlikely to select certain Democratic Senators out of concern that he could lose Democratic seats to replacements appointed by Republican governors or won through special elections.

“The refusal of Democrats and Republicans to cooperate with one another is not due to some mysterious force beyond our control. It’s a decision. It’s a choice we make. And if we can decide not to cooperate, then we can decide to cooperate. And I believe that this is part of the mandate from the American people. They want us to cooperate. That’s the choice I’ll make. And I call on the Congress – Democrats and Republicans alike – to make that choice with me.”

President-elect Joseph R. Biden – 11/7/2020

Congressional Election Results

Though significant attention is always placed on the outcome of a presidential election, perhaps just as consequential is the race for control of the Senate. Though many polls indicated that Democrats would likely claim control of the Senate, based on what we know now, it does not look like that will be the outcome. Generally speaking, election night was more successful for Republicans in the House and Senate than many pollsters expected. In the Senate, Republicans were defending 23 seats, with as many as 10 of them considered at risk of flipping, while Democrats entered the election defending 12 seats, with fewer than five considered competitive. As of publication, Democrats gained two seats (Arizona and Colorado), while losing one seat (Alabama). Additionally, two races have yet to be called (North Carolina and Alaska), with Republican candidates expected to hold both seats. These expected outcomes will give Republicans 50 seats to the Democrats’ 48 seats, with two contested Senate races in Georgia heading toward a runoff on January 5.

If Republicans win at least one of those seats in Georgia, they will maintain control of the Senate. Democrats must win both in order to be deadlocked in a 50-50 tie, with Vice President-elect Kamala Harris breaking the tie for control of the upper chamber.

Democrats are still expected to maintain control of the House of Representatives, though with a smaller majority than they had in the last Congress. Republicans have so far gained at least five seats with 24 races yet to be called as of 12:00 PM ET on Nov. 9. Coming into the election, public polls strongly suggested that Republicans were expected to lose a small number of seats, so Republican House candidates largely exceeded expectations. That said, although not the outcome Speaker of the House Nancy Pelosi (D-CA) was hoping for, it is unlikely to have a meaningful impact on her policy agenda.

Lame-Duck Session

Before the new Congress is sworn in early next year, members of the current 116th Congress will return to D.C. for what is known as a “lame-duck” session. There are two simultaneous efforts that will be the focus of the session – reaching a deal to fund the government and finding a compromise on COVID-19 relief efforts.

The government is currently operating under a Continuing Resolution (CR) that extends through December 11. Democrats, who will regain control of the White House in 2021, may look to pass another short-term CR so they may have a greater chance of shaping a longer-term spending bill that includes more of their priorities once President-elect Biden is sworn in. However, given Senate control will likely remain in Republican hands in the next Congress, Democrats will still need to compromise. It is possible that both sides will work in earnest on a full fiscal year package during this lame-duck session, both to provide certainty to the American public and to avoid any early 2021 breakdowns. The only thing we know for certain is that absent another spending bill – long or short-term – the government will shut down on December 12.

Another key legislative effort for the lame-duck session is whether Congress will finally reach a deal to pass another COVID-19 relief bill. Prior to the election, Speaker Pelosi was working closely with Treasury Secretary Steve Mnuchin on negotiating a compromise agreement, but Leader McConnell was wary of putting another multi-trillion-dollar piece of legislation on the floor of the Senate due to lack of Republican support. Since the election, Leader McConnell has indicated his support for passing a package prior to the end of the year, although significant differences remain between his and Speaker Pelosi's priorities. The White House remains a wild card with respect to whether President Trump will sign another COVID-19 relief bill before he leaves office. Nonetheless, we can expect the Speaker and Majority Leader to work toward a compromise. Any bill that does pass before the end of 2020 will likely be smaller in scale than what the House has wanted but could potentially pave the way for a more aggressive bill once President-elect Biden takes office.

It is also possible, given the need for legislative action on both issues, that Congressional leaders will work to attach a smaller scale COVID-19 relief bill to the CR as part of one, large bill. In that case, neither piece would necessarily be significant in scope, but would accomplish the goals of keeping the government open and infusing some funds into various sectors of the country (e.g., state and local governments, airlines, small businesses, etc.).

Additionally, given that the government is (and will likely remain) divided, there does not appear to be ample opportunity for President Trump to pass any significant legacy items during the remainder of his term (such as prescription drug pricing reforms), despite bipartisan support. Although both Congress and the White House have worked on drug pricing and other issues (like surprise billing), over the last several years, it does not appear likely that they will rush to agreements on any of these issues before year-end. At the same time, lame duck periods can be unpredictable, and outgoing members may be more inclined to support legislation to secure accomplishments before they leave Congress.

Finally – with respect to both a CR and COVID-19 relief package, it is worth noting that as of the time of this publication, President Trump has not conceded the election; and the outcome of election-related legal challenges and recounts may shape how willing the President may be to sign any legislation before leaving the White House early next year. President Trump has been somewhat unpredictable during his term and, as such, it is anyone's guess as to what may unfold over the next several weeks.

Outlook for 2021

Although conventional wisdom tells us that 2021 will continue to mirror the last two years, in that we will have a divided government, anything is still possible. Democrats could sweep the two special elections in Georgia, giving Vice President-elect Kamala Harris the tie-breaking vote in the Senate and effectively putting both branches of government in Democratic control. However, for the purposes of this analysis, we have assumed that President-elect Biden will inherit a divided Congress, making "compromise" the true nature of the game.

Perhaps first on the President-elect's priority list is [addressing COVID-19](#), on which his transition team has already begun to work. A COVID-19 Task Force has been established and its goals include: increasing testing, enhancing the supply of personal protective equipment, providing evidence-based guidance for communities, creating a vaccine distribution plan, protecting high-risk populations, preparing for future threats and implementing a nationwide mask mandate. This work, while already underway, will continue well into 2021 and will likely dominate the President-elect's overall agenda and efforts.

Another significant variable for 2021 is the potential repercussions of the legal challenge to the ACA in the Supreme Court. The Supreme Court's decision (expected by June 2021) could have significant and immediate impacts on President-elect Biden's and Congress's health care priorities (depending on the nature and scope of their decision). Although passing any large-scale health care proposals is unlikely in a divided government, there could be quick action on protections for pre-existing conditions, any non-

controversial components of the ACA that may be impacted by an adverse ruling and potentially additional targeted health insurance reforms.

In the event the ACA stands, it is unlikely that the Republican-led Senate will want to bolster it – that includes blocking any attempts at a public option or additional Medicare or Medicaid expansions. That said, President-elect Biden will likely use his authority via Executive Orders and additional regulatory action to potentially reopen the insurance marketplaces for a special enrollment period (and restore funds for enrollment outreach), roll-back the expansion of less comprehensive health coverage options like association health plans and short-term, limited duration plans, and create new incentives for states to expand Medicaid. Additionally, a Biden administration is likely to reverse recently granted flexibilities that have allowed states to adopt barriers to Medicaid enrollment like work and community engagement requirements. With that in mind, it is worth noting that any effort to enhance the ACA could ultimately have a positive impact on providers, as it would result in a greater number of insured individuals and likely reductions in uncompensated care.

Although the new administration will largely be focused on their response to COVID-19, Congress will still be eyeing similar policy issues as they have over the last several years. This includes a renewed focus on prescription drug pricing, surprise billing and potentially, the 340B Drug Pricing Program. While reaching a deal on drug pricing and surprise billing proved elusive over the last several years, we can certainly count on additional hearings and potentially greater involvement from the new administration. Additionally, while Democrats have largely supported the 340B Program over the years, recent actions by suppliers, combined with the questionable regulatory authority of the agency that oversees the program, could provide some momentum for action.

For hospitals, questions remain regarding ongoing efforts to transition to a value-based system of care and how quickly a new administration could revive those ongoing efforts, especially amid a pandemic. Hospitals also must contend with impending transparency requirements, which a Biden administration may delay enforcing (although requirements go into effect on January 1 and Biden doesn't take office until January 21), but is unlikely to repeal, given the bipartisan concern over hospital charges and surprise bills. Additionally, there are several policies in place that have been expanded during the public health emergency (e.g., telehealth), and we could see swift action from either the administration or Congress in making those permanent. Finally, although a divided government will likely remain, significant entitlement reform that could potentially reduce Medicare or Medicaid coverage is highly unlikely during a Biden administration. However, with Medicare again approaching insolvency (2024), policymakers will need to eventually make tough decisions. Typically, this means that expenditures (e.g., reimbursements to hospitals) may be impacted more so than beneficiary access.

While pending election results and multiple other variables make future policy decisions difficult to predict, we anticipate greater clarity in the coming weeks and months. Regardless of what comes next, Vizient's office of public policy and government relations looks forward to working with our members, colleagues, outside stakeholders, the 117th Congress and the new administration to continue advocating on behalf of affordable, accessible, quality health care.