

# Post-Election Webinar Series

Healthcare | November 20, 2020

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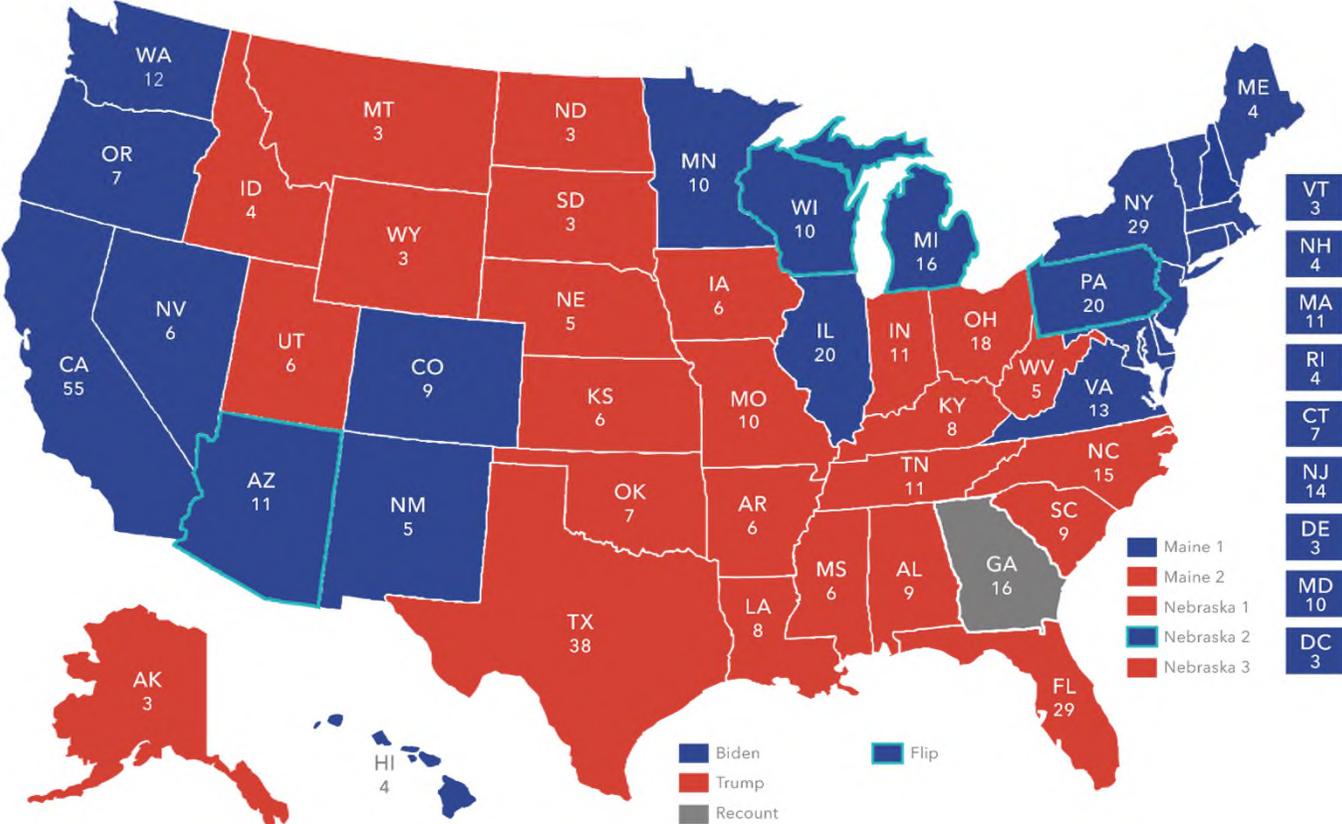
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# The 2020 Election – President-Elect Biden at 290

- President-Elect Joe Biden is the projected winner with 290 votes. President Trump has 232 votes but has yet to concede.
- Georgia is going to a recount. Pennsylvania is being litigated, and President Trump wants to prohibit PA from certifying the election.





# The 2020 Election – The Next 60 Days

## The Election Fight, Continuing Resolution, and COVID-19 Stimulus Bill

- How long could it take to finalize the results of the presidential election?
- Georgia January runoff elections
- The government runs out of funding on December 11
- Will Democrats and Republicans work to finish a COVID-19 bill and combine with a CR or wait until 2021?
- Will Trump sign any bill coming to him?



# The 117th Congress

## House of Representatives



Rep. Nancy Pelosi (D-CA)

### House Committee Chairs



Unknown  
House Appropriations



Rep. Richard Neal (D-MA)  
House Ways and Means



Rep. Frank Pallone (D-NJ)  
House Energy and Commerce



Rep. Maxine Waters (D-CA)  
House Financial Services

## U.S. Senate



Sen. Mitch McConnell (R-KY)

### Senate Committee Chairs



Sen. Richard Shelby (R-AL)  
Senate Appropriations



Sen. Mike Crapo (R-ID)  
Senate Finance



Sen. Roger Wicker (R-MS)  
Senate Commerce, Science, and Transportation



Sen. Patrick Toomey (R-PA)  
Senate Banking

# The First 100 Days

Potential priorities for the first 100 days of a Biden administration could include:

- COVID-19 response/stimulus, possibly coupled with infrastructure
  - A COVID-19 package could happen regardless of which party controls the Senate, but scope will be different, depending on whether Republicans or Democrats are in the majority
  - There could be a tax component
- Immigration
  - Look for Biden to undo Trump policies and push for comprehensive immigration reform (as Biden reiterated in the last debate)
  - There is bipartisan support for something in the Senate regardless of which party controls it
- Climate/Environment
  - Biden wants to re-enter the Paris Agreement
  - Probable rollback of Trump environmental deregulation and a legislative push if Democrats control the Senate
- Voting rights advancement/John R. Lewis Voting Rights Act

# Authorizing Bills

There are several issue areas that could undergo major policy overhauls, including:

- Higher Education Act (HEA) reauthorization (expired 2014)
- Debt limit suspension (expiring July 2021)
- Surface transportation programs/Highway Trust Fund (HTF) (expiring September 2021)
- National Flood Insurance Program (NFIP) (expiring September 2021)
- And, of course, healthcare

# Government Spending

- Where could increased spending impact healthcare?
  - Stimulus and/or COVID-19
  - Grant programs
  - New programs/spending
  - Appropriations
- Democrats generally favor public institutions rather than private (education, healthcare, etc.)
- Fiscal Year 2022 (FY22) will be the first in a decade where Congress isn't hamstrung by discretionary spending caps on defense and non-defense spending
  - Budget Control Act in 2011 imposed these caps
- Renewed chatter about returning to some form of congressionally directed spending ("earmarks")
  - House Select Committee on the Modernization of Congress recommended this in September

# Regulations

- Generally speaking, more regulations under a Democratic administration
- Anticipate Biden will get to work on “day one” undoing Trump regulatory changes (particularly ones that unwound Affordable Care Act regulations)
- Open question whether congressional Democrats will attempt to use the Congressional Review Act (CRA) to repeal some deregulatory actions of the Trump administration

# COVID-19 Policies

## Trump Administration

- Push for vaccines and therapeutics
- State-led testing and tracking
- Push to safely reopen schools and the economy
- Telehealth (especially Medicare)
- More money from Congress

## Biden Administration

- Federal government lead
- Massive testing
- Deferential to states and localities on school and economy reopening
- Telehealth (especially Medicare)
- More money from Congress

# Healthcare – Key House Players

## House Ways and Means Committee

- Chairman Richard Neal (D-MA)
- Ranking Member Kevin Brady (R-TX)

## Energy and Commerce Committee

- Chairman Frank Pallone (D-NJ)
- Rep. Anna Eshoo (D-CA) – *Health Subcommittee Chairwoman*
- Next top Republican:
  - Rep. Michael Burgess (R-TX);
  - Rep. Bob Latta (R-OH); or
  - Rep. Cathy McMorris Rodgers (R-WA).

# Healthcare – Key Senate Players

## Senate Finance Committee

- Sen. Mike Crapo (R-ID) – *likely to become top Republican*
- Sen. Ron Wyden (D-OR) – *to remain top Democrat*

## Senate HELP Committee

- Sen. Richard Burr (R-NC) – *next in line to become top Republican*
  - Seniority will follow:
  - Sen. Rand Paul (R-KY)
  - Sen. Susan Collins (R-ME)
  - Sen. Bill Cassidy (R-LA)
- Sen. Patty Murray (D-WA) – *to remain top Democrat*

# Biden Administration Health Agenda

## Republican Senate

- Administration lead
- Drug pricing reform via imports, price controls, and CMS negotiation on what Medicare pays drug companies
- One-offs – surprise billing, PDUFA, cosmetics legislation

## Democratic Senate

- Expand and strengthen the ACA via legislation and administrative steps
- Expand access to healthcare through a public option
- Drug pricing reform via imports, price controls, and CMS negotiation on what Medicare pays drug companies
- One-offs – surprise billing, PDUFA, cosmetics legislation

# Nonprofit Public Option Health Plan

- Approximately 96 Democratic members who voted for the Affordable Care Act (ACA) in 2010 are still in the U.S. House
- Depending on Supreme Court decision in the first quarter of 2021, president would move legislation very quickly through U.S. House
- Even without U.S. Supreme Court decision, President-Elect Biden has stated that he will improve the ACA and move toward a public option
- Public option is viewed as a glide path to Medicare for All

# Nonprofit Public Option Health Plan

- The public option is a government-sponsored, nonprofit healthcare plan
- Similar to Medicare, it will not be funded by government subsidies, but instead will be funded solely by the premiums it collects (just like private plans)
- It will be required to follow the same regulations as those placed on private insurance companies, including staying financially solvent
- Absolutely no one will be forced into the public option; it is just that – an option
- It will exist only as long as Americans want to buy into it

# Nonprofit Public Option Health Plan

- Eliminate the health insurance industry's anti-trust exemption
- Create interim high-risk pools for individuals who are uninsured because of preexisting condition
- Allow young people to remain on their parents' insurance policy
- Create individual mandate to have insurance coverage
- Fully close prescription drug donut hole
- Base reimbursement on quality of care rather than quantity of procedures
- Provide coverage for all individuals, including undocumented individuals

# Nonprofit Public Option Health Plan

- Require Secretary of HHS to negotiate lower drug prices for federal government
- Prohibit employers from reducing employee pay to cover costs of healthcare
- Limit yearly out-of-pocket expenses
- Eliminate lifetime cap on benefits

# Nonprofit Public Option Health Plan

- Employer mandate to provide health insurance for employees and their families
- Public Option recognizes how employers can meet mandate by providing 1. group health insurance; 2. private health insurance; 3. nonprofit public option; 4. non-federal government plan; or 5. federal government-provided healthcare.
- Federal tax credits for small businesses up to [35% up to 50%\*] of employer premium contributions
- Public option structured similar to Medicare for consumers to choose their own health insurance provider
- Surcharge on high-income individuals
- Excise tax on medical devices

# Nonprofit Public Option Health Plan

\*Figures that are bracketed are based on HR 3962 Public Option passed by Democratic House in 2009

- Public Option is an Employer Mandate
- Employer contribution to Employee [72.5%\*] and family coverage [65%\*] of lowest-cost private plan offer AND not to exceed [12%\*] of Employer modified adjusted gross income
- If not providing insurance, Employer must pay [8%\*] of average of wages to nonprofit public option plan
- Small business exemption is fewer than 100 employees or sliding scale based on annual payroll less than \$750,000.00
- Employer waiver for “undue hardship”
- Employee can opt out of Employer health insurance plan

# Budget Reconciliation

- Budget tool that allows for expedited consideration in the Senate – debate limited to 20 hours; simple majority (51) votes for passage
  - A way for Democrats to enact some policies without eliminating the filibuster
- Reconciliation bills can only alter revenue, spending or the debt limit – no extraneous policy matters
- Reconciliation has been used 21 times since 1980
  - Republican tax bill in December 2017
  - Portions of the Affordable Care Act in March 2010

# What's Possible with Budget Reconciliation?

- Must be fiscal in nature (revenue, spending, or debt limit)
- Republicans attempted to use reconciliation to repeal portions of the ACA in 2017 but faced limitations
  - Couldn't repeal the individual mandate but could eliminate the tax penalty for noncompliance
  - Couldn't eliminate policies, such as coverage for preexisting conditions
- Funding for federal healthcare programs, perhaps even the creation of a slimmed-down public option, could be done through reconciliation

# California v. Texas

- Argument held November 10, 2020
- **Background.** In 2013, SCOTUS held that the ACA’s “individual mandate” was constitutional as a “tax” and was intimately entwined with other provisions of the ACA. In 2017, Congress reduced the “tax” to \$0.
- **The Standing Issue.** In order to bring a lawsuit, the individual must generally have experienced some harm that the court can remedy. Has there been any such harm here?
- **The Constitutional Issue.** Is the individual mandate, which has no enforcement mechanism, a command or merely “precatory” language? If a command, is it justified by the taxing power even though it does not raise revenue?
- **The Severability Issue.** Is the mandate intimately entwined with the rest of the ACA based on the 2010 congressional findings, or is the mandate severable based on Congress’s action in 2017?

# ***Rutledge v. Pharmaceutical Care Management Ass'n***

Argued October 6, 2020

- **Background.** An Arkansas statute seeks to regulate the reimbursement rates paid to pharmacies by pharmacy benefit managers (PBMs). In particular, the law prevents PBMs from paying pharmacies less than their out-of-pocket costs.
- **The Preemption Issue.** ERISA preempts state laws that attempt to regulate the administration of employee benefit plans.
  - Arkansas argues that its law regulates rates, not plan administration, and is not preempted by ERISA. (There are many similar state laws.)
  - The PBMs argue that the state law regulates plan administration and interferes with uniform national administration.

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**Questions?**

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