Election 2020

The Next Phase of the US Healthcare Policy War — Supplemental Materials

October 19, 2020

We characterized each policy's relative impact using estimated changes to healthcare coverage and cost as a result of policy implementation

Impact

DIRECTIONAL

Decreasing impact

	Total coverage gain or loss/reduction*	Total cost increase/ savings^	Description of methodology	Sources
A Affordable Care Act (ACA) invalidation	(25M)	($90-100B)	• Lesser coverage for individuals enrolled in marketplace plans, and those enrolled in Medicaid as a result of Medicaid expansion; these individuals may be left with low cost, low coverage, i.e., "skinny" coverage options • Annualized federal savings minus annualized increase in state spending as a result of ACA repeal (estimated in 2016 by the Robert Wood Johnson Foundation)	KFF; RWJ Foundation
D3 Importation of U.S. Food and Drug Administration (FDA)-approved foreign drugs	-	($150-160B)	• Assumes U.S. drug prices fall to Canadian levels (~70% reduction) for branded chemical drugs	IQVIA; Frost & Sullivan; waysandmeans.house.gov
JK Public option + ACA coverage expansion	10-20M	$150-200B	• Combined impact of covering ~5M individuals ineligible for Medicaid because their state chose not to expand, and increased marketplace enrollment due to lower-cost public option and expanded tax subsides (5M+) • Annualized projected federal spending as a result of ACA expansion and administering a public option	KFF; Commonwealth Fund; RAND; Committee for a Responsible Federal Budget
I Lower Medicare age to 60	<5M	($120-130B)	• Assumes all ~20M 60-65 year olds would shift into Medicare; ~78% are currently on commercial plans, ~12% are on Medicaid and ~10% are uninsured • Commercial healthcare service rates are ~250% of Medicare, and Medicaid service rates are ~70% of Medicare; resetting rates at par with Medicare for all 60-65 year olds would save ~40%-50% of healthcare services spending (~$260B)** • Such a policy would generate a significant revenue loss for providers; estimated cost savings could be lower if providers successfully lobby for increased Medicare and/or commercial rates to mitigate revenue loss	CMS; RAND; KFF; NHE; Census
D1 Elijah E. Cummings Lower Drug Costs Now Act	-	($40-50B)	• Annualized estimated deficit reduction of ~$500B over 10 years due to lower drug costs; does not factor in proposed Medicare benefit expansion	CBO
E End of surprise billing	-	($40B)	• Estimated savings from eliminating out-of-network payments for anesthesiologists, pathologists, radiologists and assistant surgeons: physician specialties most likely to generate a surprise bill	Health Affairs
D2 Prescription Drug Pricing Reduction Act	-	($10-15B)	• Annualized estimated deficit reduction of ~$130B over 10 years due to lower drug costs	CBO
D4 End of pharmaceutical tax credit for direct-to-consumer (DTC) ads	-	($5B)	• Estimated annual pharmaceutical spending on DTC advertising	brown.senate.gov

*Rounded to nearest 5M
^Rounded to nearest $5B

Low Medium High

A Given a conservative-leaning Supreme Court, it is likely that all or some parts of the ACA will be deemed unconstitutional and struck down

Feasibility

ACA invalidation: All or significant parts of the ACA, including guaranteed issue, community rating provisions and preexisting condition exclusion ban,* could be deemed unconstitutional following a Supreme Court vote, likely next year

Decreasing ← likelihood of govt. composition

Govt. composition			Likelihood of passing
Pres.	Sen. maj.	House maj.	
D	D	D	Medium
R	D	D	Medium
D	R	D	Medium
R	R	D	Medium
Overall			**Medium**
Additional influencing factors			**Description**
Passable via executive order			N/A
Passable via budget reconciliation			N/A
Degree of lobbying support/ resistance			N/A
Influence of Supreme Court composition			High

*On Sept, 25, 2020, President Donald Trump signed an executive order stating that it is national policy to protect patients with preexisting conditions regardless of the fate of the ACA, but its enforceability is not clear
Source: Commonwealth Fund; FierceHealthcare; L.E.K. research and analysis

The Supreme Court will decide whether the ACA is upheld

- In February 2018, a group of 20 states, led by Texas, sued the federal government, arguing that the ACA is unconstitutional
- They argued that the individual mandate is unconstitutional given the Supreme Court's previous ruling that it is constitutional only as a tax, and the tax is now $0; they further argued that given the mandate's centrality to the ACA, the ACA is also unconstitutional
- 17 states, led by California, along with the House, are defending the ACA
- In 2018, a Texas district court judge ruled the ACA unconstitutional; the U.S. Court of Appeals also ruled the individual mandate unconstitutional, but decided that the District Court must determine which provisions are "inseverable" from the mandate
- The case will be heard in the Supreme Court on Nov. 10; whether the Trump administration is successful in appointing a replacement for Ruth Bader Ginsburg before then or not, two conservative judges would need to vote with the three remaining liberal judges to uphold the act in its entirety
  - A tie in the Supreme Court would uphold the Court of Appeals decision and send the case back to the district court
  - If Biden is elected and nominates a replacement, the court will be stacked 5-4 conservative and one conservative judge would need to vote to uphold the ACA; alternatively, the Biden administration could raise the individual mandate penalty, thus invalidating Texas' arguments

D1 The Elijah E. Cummings Lower Drug Costs Now Act is unlikely to be passed by a Republican Senate, even with presidential support

Feasibility

Elijah E. Cummings Lower Drug Costs Now Act: Among other measures, aims to lower the cost of single-source drugs that comprise a high percentage of total drug spend by allowing HHS to negotiate directly with manufacturers, and mandates that the negotiated price fall between the lowest price and 120% of the average price across six high-income countries; this price would be accessible to commercial insurers

Decreasing ← likelihood of govt. composition

Govt. composition			Likelihood of passing
Pres.	Sen. maj.	House maj.	
D	D	D	High
R	D	D	Medium-low
D	R	D	Low
R	R	D	Low
Overall			**Medium**
Additional influencing factors			**Description**
Passable via executive order			Medium; the Trump administration has attempted to lower drug prices and increase transparency, but has faced congressional/legal hurdles
Passable via budget reconciliation			Low
Degree of lobbying support/ resistance			High degree of opposition from pharmaceutical lobby
Influence of Supreme Court composition			Not applicable

Republicans are opposed to drug price setting, and the act in its current form is unlikely to pass

- The act was passed in the House in December 2019, largely along party lines, and sent to the Senate
- A Senate hearing has not been scheduled, and Mitch McConnell and other Republicans have made clear that the bill is dead on arrival due mainly to its price-setting elements
- President Trump originally expressed support for the act, which aligns with his administration's priority of lowering drug costs; however, his stance changed after House-initiated impeachment proceedings in January
- Going forward, it is unlikely that an act enabling drug pricing regulation will pass in the Senate, unless Democrats have a two-thirds majority or the filibuster is repealed
- However, a modified bipartisan bill could be pushed through, given widespread public support for regulations on drug pricing

*Australia, Canada, France, Germany, Japan and the UK; this maximum allowable price would be enforced through federal tax penalties on noncompliant manufacturers
Source: Commonwealth Fund; L.E.K. research and analysis

D2 The bipartisan Prescription Drug Pricing Reduction Act (PDPRA) could pass under any government composition, but may still face some Republican resistance

Feasibility

PDPRA: Aims to reduce prescription drug costs via a number of avenues, including a) increasing Part D plan contribution to drug costs, thereby incentivizing more aggressive cost management; b) mandating manufacturer rebates to the federal government for drugs whose prices increase in excess of general economic inflation (both Part B and Part D); and c) reducing provider reimbursement for Part B drug administration

Decreasing ← likelihood of govt. composition

Govt. composition			Likelihood of passing
Pres.	Sen. maj.	House maj.	
D	D	D	Medium-high
R	D	D	Medium-high
D	R	D	Medium
R	R	D	Medium
Overall			**Medium-high**
Additional influencing factors			**Description**
Passable via executive order			Medium; the Trump administration has attempted to lower drug prices and increase transparency, but has faced congressional/legal hurdles
Passable via budget reconciliation			Low likelihood
Degree of lobbying support/ resistance			High degree of likely opposition from pharmaceutical lobby; support from America's Health Insurance Plans, AARP, Blue Cross/Blue Shield and patient organizations
Influence of Supreme Court composition			Not applicable

Widespread popular support for lower drug prices

- An April 2020 Gallup poll notes that 30% of U.S. adults rank a candidate's position on drug prices as the most important or among the most important factors in determining their vote in the 2020 elections

Despite bipartisan support, congressional action could be stymied by pressure from the pharmaceutical lobby

- PDPRA proposes drug cost reduction measures that fall short of price setting by the federal government (as proposed in the House's Elijah E. Cummings Lower Drug Costs Now Act), and has the support of the Trump administration
- However, it still lacks broad Republican support; it is speculated that this is because of pressure from the pharmaceutical lobby
- Senators Grassley and Wyden first introduced the bill to the Senate in July 2019, and subsequently amended and reintroduced it in December 2019; the bill did not make it to a vote either time

Source: National Law Review; grassley.senate.gov; finance.senate.gov; The Hill; Gallup; L.E.K. research and analysis

D3 If elected, both Trump and Biden are likely to pass executive orders supporting importation of drugs, albeit with limited potential effect

Feasibility

Importation of FDA-approved foreign drugs: Drug importation has been legal since the MEDS Act was passed in 2000; however, the FDA has never been able to certify the safety of a proposed importation program, and drug importation has never been pursued on a large scale. New policies aim to create novel pathways that potentially circumvent historical safety and certification barriers

Decreasing ← likelihood of govt. composition

Govt. composition			Likelihood of implementation (even if passed)
Pres.	Sen. maj.	House maj.	
D	D	D	High
R	D	D	Low
D	R	D	Low
R	R	D	Low
Overall			**Low**
Additional influencing factors			**Description**
Passable via executive order			Medium; the president is able to influence the FDA, which is responsible for overseeing and certifying reimportation programs
Passable via budget reconciliation			N/A
Degree of lobbying support/ resistance			High; PhRMA and BIO have stated that importation would expose Americans to substandard or counterfeit drugs
Influence of Supreme Court composition			N/A

Source: KFF; L.E.K. research and analysis

Strong bipartisan support, but safety concerns could be a hurdle

- In December 2019, Trump proposed the following pathways to import prescription drugs:
  - States and other nonfederal government entities can develop and implement time-limited Section 804 Implementation Programs (SIPs) from Canada only. Proposals must be approved by the U.S. Department of Health and Human Services (HHS) secretary for safety and cost-savings potential, and will be subject to post-importation reporting requirements to the FDA; this pathway excludes biologics (including insulin) and infused, IV or inhaled drugs
  - Manufacturers can import and market FDA-approved drugs that were manufactured and intended for sale abroad; there are no restrictions on which drugs can be imported this way, however pharmaceutical groups have taken stances against importation
- Several states, including Florida, Vermont, Colorado, Maine and New Mexico, have passed legislation establishing importation programs for drugs from Canada; however, the HHS secretary has not certified any plan to date
- Biden has also proposed supporting drug reimportation

Canadian Health Authority could be a barrier to implementation

- The Canadian government has stated that it would not allow drug exports that jeopardize the needs of Canadians; the Canadian Health Authority is responsible for licensing the entities that purchase drugs from manufacturers and sell to U.S. importers

D4 Legislation to end the pharmaceutical tax credit for DTC advertising is likely to be challenged in the courts for violation of the First Amendment

Feasibility

End pharmaceutical tax credit for advertising: Aims to amend the IRS tax code to no longer allow pharmaceutical companies to deduct their DTC advertising spend; this would apply across print, direct mail, radio, TV and digital ads

Decreasing ← likelihood of govt. composition

Govt. composition			Likelihood of passing
Pres.	Sen. maj.	House maj.	
D	D	D	Medium
R	D	D	Medium
D	R	D	Low
R	R	D	Low
Overall			**Medium**

Additional influencing factors	Description
Passable via executive order	Low
Passable via budget reconciliation	N/A
Degree of lobbying support/ resistance	High; pharma lobby is likely to strongly oppose
Influence of Supreme Court composition	High; taxing advertising could be construed as a violation of the First Amendment

Source: FiercePharma; joebiden.com; shaheen.senate.gov; Drugwatch; L.E.K. research and analysis

Biden and leading Senate Democrats support ending this practice

- 16 democratic senators, including Shaheen (D-NH), Warren (D-MA), Sanders (I-VT) and Brown (D-OH) co-sponsored a bill in early 2019 seeking to end the pharmaceutical tax deduction for DTC advertising
- Biden has included this policy in his healthcare platform, indicating that this is likely to be a Democratic legislative priority
- Given the bipartisan focus on reducing drug prices, the bill is unlikely to face significant Republican resistance

Likely to face lobby resistance and legal hurdles

- Commercial speech is protected under the First Amendment, and legal experts anticipate that the Supreme Court may strike down any legislation that taxes pharmaceutical advertising
- Further, strong resistance from the drug lobby is expected

E There is bipartisan support in Congress and from both presidential candidates to end the practice of surprise billing

Feasibility

Ending surprise billing: Aims to prevent patients from receiving surprise bills at out-of-network rates in situations where the patient has no control over which provider they see (e.g., emergency procedures, out-of-network physician practicing at an in-network hospital)

Decreasing ← likelihood of govt. composition

Govt. composition			Likelihood of passing
Pres.	Sen. maj.	House maj.	
D	D	D	High
R	D	D	High
D	R	D	High
R	R	D	High
Overall			**High**
Additional influencing factors			**Description**
Passable via executive order			Medium; consumer protections may be enabled by executive action, but directly ending surprise billing may not be possible
Passable via budget reconciliation			N/A
Degree of lobbying support/ resistance			Medium; providers have expressed a preferred method for ending surprise billing*
Influence of Supreme Court composition			N/A

The Trump administration has taken action on surprise billing

- In 2019, Trump signed an executive order, resulting in two HHS rules aimed at indirectly reducing the instance of surprise billing:
  - Effective Jan. 1, 2021, hospitals will be required to establish, update and make public at least annually a list of their standard charges for the items and services they provide
  - A requirement that most group plans be similarly transparent has been proposed
- Further, the Trump administration has called on Congress to pass legislation effectively banning the practice of surprise billing

Biden has also made it a platform priority

- Biden's proposed healthcare plan states that, if elected, Biden will seek to ban providers from charging out-of-network rates when the patients do not have control over which provider they see

Congress has signaled bipartisan interest in ending surprise billing

- In December 2019, the Senate Committee on Health, Education, Labor and Pensions and the House Energy and Commerce committees released a joint proposal to end surprise billing
- Since then, two separate bipartisan bills have been proposed in the House

*Providers prefer "independent dispute resolution," where an independent arbiter determines the payment rate in cases where providers are not satisfied with the amount paid under the payment standard (in-network rate)
Source: Commonwealth Fund; HHS; joebiden.com; L.E.K. research and analysis

I Lowering the Medicare eligible age to 60 is legislatively feasible, provided a Democratic majority in Congress

Feasibility

Lower Medicare age to 60: Lowers the Medicare eligible age from 65 to 60 years

Decreasing ← likelihood of govt. composition

Govt. composition			Likelihood of passing
Pres.	Sen. maj.	House maj.	
D	D	D	Medium-High
R	D	D	Low
D	R	D	Low
R	R	D	Low
Overall			**Medium**
Additional influencing factors			**Description**
Passable via executive order			Low likelihood, even with a Democratic president
Passable via budget reconciliation			Medium likelihood; easier to pass than public option
Degree of lobbying support/ resistance			Medium-low; medical lobbies have not yet voiced strong opposition but may still do so if faced with significant revenue loss
Influence of Supreme Court composition			Not applicable

Source

Congressional Republican support is unlikely, but public opinion could impact future political positions

- Congressional Republicans have tried to raise the Medicare eligible age in recent years to 67 (e.g., in House Republican FY 2019 budget resolution); new financing requirements to support lowering the age, likely via payroll tax, would be a key barrier
- Widespread support among congressional Democrats is likely; however, some hesitation is possible due to concerns for program solvency (current projections show that the Medicare hospital insurance fund will deplete its reserves by 2026)
- Budget reconciliation is a possible avenue, but may be challenging; Democrats will have to make the case that the impact on federal spending is more than incidental to policy impact

Implementation would be easier than a public option

- Unlike the public option, lowering the Medicare eligible age would not require the creation of a new product/infrastructure
- Further, lowering the age to 60 is unlikely to require significant change to the Medicare benefit structure, as the health needs of 60-64 year olds are similar to those age 65+

JK

The creation of a public option is unlikely unless Democrats control a significant majority of government

Feasibility

Public option: Creates a public health insurance plan, which would be offered to all Americans on the ACA marketplace and would be free to low-income Americans, particularly those who are not eligible for Medicaid because their state has chosen not to expand

Decreasing ← likelihood of govt. composition

Govt. composition			Likelihood of passing
Pres.	Sen. maj.	House maj.	
D	D	D	Medium
R	D	D	Low
D	R	D	Low
R	R	D	Low
Overall			**Medium-low**

Additional influencing factors	Description
Passable via executive order	Low likelihood, even with Democratic president
Passable via budget reconciliation	Low likelihood, even with Democratic-controlled Congress
Degree of lobbying support/ resistance	High degree of resistance; the American Medical Association and American Hospital Association strongly oppose
Influence of Supreme Court composition	Low; Supreme Court unlikely to influence policy passage

Source: L.E.K. research and analysis

A Democratic Congress is likely required to pass a public option

- Even with a Democratic-led Congress, unless the Senate is two-thirds Democrat, the public option may be challenged via a filibuster (unless the filibuster is first repealed)
- Budget reconciliation, while possible, is likely to be a challenging path to public option implementation
- However, public opinion could tip the odds in Biden's favor; in a January 2020 poll, 85% of Democrats supported a public option vs. 42% of Republicans (51% of whom opposed the public option)

If passed, implementation will likely take two or more years

- At minimum, rolling out a new public option will likely take two to three years, as evidenced by Washington state's Cascade Care
- If the Centers for Medicare & Medicaid Services does not utilize third-party managed care organizations, implementation could take even longer as it would require the government to develop health plan operations capabilities

JK

A Democratic sweep could result in ACA expansion as proposed by Biden, provided it is not struck down in the Supreme Court

Feasibility

Expanding the ACA: Increases federal marketplace tax credit subsidies, eliminates the income cap on federal tax credit eligibility and limits individual premium contributions to 8.5% of household income

Decreasing ← likelihood of govt. composition

Govt. composition			Likelihood of passing
Pres.	Sen. maj.	House maj.	
D	D	D	Medium
R	D	D	Low
D	R	D	Low
R	R	D	Low
Overall			**Medium-low**

Additional influencing factors	Description
Passable via executive order	Low potential even with Democratic president
Passable via budget reconciliation	Low potential even with Democratic-controlled Congress
Degree of lobbying support/ resistance	Medical interest groups are generally supportive of coverage expansion
Influence of Supreme Court composition	Medium; Supreme Court composition at the time of its decision on the ACA could be 3:6 liberal:conservative

A Democratic Congress is likely to attempt to pass ACA enhancements

- In June 2019, House Democrats passed the Patient Protection and Affordable Care Enhancement Act (PPACEA), which encompasses key ACA expansion elements proposed by Biden; while the PPACEA is unlikely to pass, it is indicative of the level of congressional Democratic support for this policy
- Expanding the ACA has strong public support; according to a July 2020 KFF poll, ~80% of Democrat and ~70% of Republican voters reported being "generally favorable" to the 2010 healthcare reform bill
- However, Republicans are likely to block passage unless the Senate is two-thirds Democrat and the filibuster is removed

However, the ACA's future is contingent on the Supreme Court

- In February 2018, a group of 20 states, led by Texas, sued the federal government, arguing that the ACA is unconstitutional and should be struck down; the current administration's position is also that the ACA is unconstitutional, and it has therefore provided no defense
- 17 states, led by California, have been allowed to defend the ACA
- The case will be argued in the Supreme Court on Nov. 10; if the ACA is struck down, efforts to build on current structures will be stymied

Source: L.E.K. research and analysis

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