

# The 2018 Elections: Winners and Losers in the Healthcare Ecosystem

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Healthcare featured prominently in the 2018 election campaign. Candidates debated a wide array of healthcare issues, including the Affordable Care Act (“ACA”), potential expansion of the Medicare and Medicaid programs, prescription opioids, prescription drug pricing and state ballot initiatives on a variety of healthcare-related topics. Post-election survey results confirmed that healthcare issues were a high priority for a significant percentage of voters. Below we offer our thoughts on what the election results and a divided Congress mean for different sectors in the healthcare ecosystem.

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**Health Insurance Coverage:** After the 2016 election, President Trump and Congressional Republicans sought to “repeal and replace” the ACA. Those efforts ultimately failed, in large part because there was no consensus on a workable replacement. Indeed, the only significant change Congress was able to make to the ACA in the past two years was the repeal of the individual mandate (a tax on certain individuals who did not purchase health insurance that satisfied the ACA’s requirements). Given the election of a Democrat-controlled House of Representatives, the ACA is likely to remain intact for the foreseeable future.

With a divided Congress, the Trump Administration will likely continue its focus on regulatory initiatives aimed at expanding the availability of health insurance plans that have significantly lower premiums than ACA-compliant plans. These low-cost plans, however, are not subject to some or all of the ACA’s consumer protection measures and therefore may provide more limited coverage. Many Democratic leaders have criticized these policies because consumers may not realize that these plans offer limited protection and because these policies are likely to attract young, healthy individuals. Therefore, the population that ultimately purchases ACA-compliant plans is likely to be older and sicker on average (*i.e.*, adverse selection), causing the premiums on ACA-compliant plans to rise. Democratic Attorneys General have challenged the Administration’s efforts in court and the coming year is likely to see additional efforts at the state level to block lower-cost plans.

**Impact of ACA stability and Administration regulatory initiatives:** The continuation of the ACA is likely to be a win for many insurers. Since the passage of the ACA, the

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market for health insurance plans offered on the ACA's exchanges for individuals and small groups has been relatively unstable. Insurers have frequently raised premiums by large amounts to cover higher than expected healthcare costs for individuals on the exchanges. Some insurers exited the market altogether due to concern that participation would never be profitable. The possibility that the ACA would be significantly amended during the past two years has only led to further uncertainty. However, many insurers have recently announced that they do not plan significant premium increases for 2019. These announcements may in part reflect a realization by insurers—which has only been confirmed by the elections—that ACA exchanges are here to stay. Therefore, insurers may be concluding that the time is right to make the investments necessary to maximize the success and profitability of plans sold on the ACA exchanges over the long term.

The impact of the Trump Administration's regulatory efforts is difficult to predict. To the extent that those regulatory efforts result in people who were not previously insured acquiring some form of insurance (even if limited), the demand for healthcare goods and services could rise. However, these initiatives will also result in some individuals switching from ACA-qualified plans to plans that offer limited coverage. Beneficiaries of such plans may have to pay for healthcare expenses out of pocket, and those expenses may prove unaffordable. Providers and pharmaceutical companies may be harmed if such individuals curtail their expenditures.

**Medicaid Expansion:** The ACA provided for the expansion of Medicaid to cover "childless adults" whose income is up to 138 percent of the federal poverty level. The federal government reimburses each state for 90 percent of the cost of healthcare expenditures incurred for the Medicaid expansion population. In 2012, the Supreme Court held that the ACA's Medicaid expansion was optional. Subsequently, 33 states and the District of Columbia voluntarily expanded Medicaid. In the recent elections, voters in Idaho, Utah and Nebraska approved ballot initiatives to expand Medicaid. Additionally, as a result of gubernatorial elections, Medicaid expansion is now a possibility in Maine, Kansas, and Wisconsin.

**Impact of Medicaid expansion:** A state's expansion of Medicaid is likely to be beneficial to hospitals operating in that state. Hospitals often treat patients without regard to their ability to pay and then write off the bills of uninsured patients as bad debt or charity care. The Medicaid expansion means that many previously uninsured patients will now have health insurance and that hospitals will therefore receive some reimbursement for their care. Similarly, an increase in the number of individuals covered by health insurance is likely to translate into greater demand for physician care and prescription drugs.

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Medicaid expansion also creates opportunities for commercial health insurers. Many states provide care to their Medicaid beneficiaries through managed care plans operated by commercial insurers. More Medicaid expansions are likely to create more opportunities for administrators of state Medicaid plans.

**Prescription Drug Pricing:** The pricing practices of pharmaceutical companies have been subject to criticism from many quarters, including the Trump Administration, Congress (particularly Democrats), state legislatures and the media. Over the past two years, a Republican-controlled Congress has not enacted any significant legislation relating to prescription drug prices. A Democrat-controlled House, however, may pursue such legislation—and could find support from the White House.

The Trump Administration recently proposed several initiatives that have been strongly opposed by the pharmaceutical industry, including one that would require pharmaceutical companies to disclose the “list price” of certain prescription drugs in direct-to-consumer television advertisements, and one that would effectively impose price controls on certain prescription drugs covered by Medicare Part B.<sup>1</sup> It therefore may not be surprising if the Administration renews its support for the following two proposals, both of which were part of President Trump’s 2016 campaign platform and have received strong Democratic support:

- ***Allowing for the unregulated importation of prescription drugs from other countries.*** Currently, with limited exceptions, consumers are not permitted to import prescription drugs from other countries, where prices may be lower due to price controls or other factors. For at least the past eighteen years, Secretaries of the Department of Health and Human Services and FDA Commissioners have refused to certify the safety of imported prescription drugs due to safety and quality concerns. Once drugs are outside the “closed distribution system” that exists in the United States, the risk of counterfeit, contaminated, or adulterated drugs increases exponentially. Some members of Congress, however, have argued that such importation should be allowed because it would enable consumers to take advantage of lower prescription drug prices in other countries. With the House led by Democrats who are concerned about drug pricing, this issue may once again predominate the drug pricing public policy debate.
- ***Allowing the Center for Medicare and Medicaid Services (“CMS”) to negotiate the price of all prescription drugs covered by Medicare Part D.*** Since the inception of the Part D program, each Part D plan separately negotiates prescription drug prices; CMS is prohibited from negotiating such prices. Many Democrats have argued that

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<sup>1</sup> We discussed the Administration’s proposal regarding disclosure of “list prices” in direct-to-consumer advertising [here](#) and the Administration’s proposal regarding Medicare Part B drugs [here](#).

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CMS should be able to take advantage of its enormous purchasing power to negotiate lower prices for Part D drugs. The pharmaceutical industry has strongly opposed this proposal for obvious reasons, noting that its support for the Part D program was conditioned on CMS not negotiating Part D drug prices. This issue may also resurface in the new Congress.

The new Congress might also reconsider the “CREATES” Act, a statute which previously had the backing of some prominent Senate Republicans but failed to gain traction in the House. The impetus for this statute is the allegation that innovator pharmaceutical companies often delay generic competition by declining to sell generic drug companies the drugs that these companies need to conduct the bioequivalence studies necessary to file an abbreviated new drug application. The CREATES Act would provide that, under certain circumstances, a generic drug company could sue an innovator drug company if the innovator does not sell the drug to the generic drug company in sufficient quantities for bioequivalence testing. If the House passes this measure, some Republican senators may pressure the leadership to bring it to a vote.

**Impact of potential drug pricing measures:** The political environment for innovator pharmaceutical companies remains hostile. Senate Republicans are likely to seek to block the implementation of any drug-pricing legislation that would cause significant harm to the pharmaceutical industry. However, if President Trump wants to garner publicity for “doing something” about prescription drug pricing, he might seek to reach an agreement with Congressional Democrats and then attempt to get it through the Senate (potentially by including it as part of essential legislation).

**Healthcare Operations State Initiatives:** Voters in California and Massachusetts defeated union-sponsored initiatives that would have imposed significant costs on dialysis centers and hospitals, respectively. The California initiative would have capped prices on care offered by dialysis centers by requiring them to issue refunds to patients or payors for revenue above 115 percent of the cost of such care. The Massachusetts initiative would have mandated very low nurse-to-staff ratios, which would have resulted in hospitals needing to hire thousands of additional nurses. In both cases, the affected industries spent millions of dollars in opposition to the initiatives and the initiatives were defeated by significant margins.

These are unlikely to be the last union-sponsored initiatives that would adversely impact sectors of the healthcare industry. The defeat of the California and Massachusetts initiatives, however, demonstrates that healthcare entities can mount a successful defense if they dedicate the necessary resources to educate the public.

**State Attorneys General (“AGs”):** Healthcare issues featured prominently in many state AG elections. A number of Democrats who prevailed have pledged to take an

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aggressive approach toward opioid abuse and/or use antitrust laws to reduce prescription drug prices. Many of the newly elected AGs are often at odds with healthcare companies, and particularly with the pharmaceutical industry. Accordingly, one may expect an increase in investigations and enforcement actions against healthcare companies in these states.

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