NELSON HARDIMAN
HEALTHCARE LAWYERS

Client Alert: Biden Healthcare Proposal Faces Uncertain Future

Healthcare is a top policy agenda item for President Biden. In his first week in office, he issued executive orders aimed at making Medicaid and ACA plan coverage more accessible to Americans, including institution of a special open enrollment period and a reinstatement of HealthCare.gov as a working portal. The President went on to propose a $1.9 trillion infrastructure bill last month, which included $400 billion for support of aging at home through expanding home-based care and community services that allow seniors to receive care in the home setting. The legislation so far lacks detail and doesn't specify how the $400 billion in additional funding would be spent. The spending proposal was accompanied by progressive labor policies for home care workers, with the Administration offering that the new law would provide in-home workers "a long-overdue raise, stronger benefits and an opportunity to organize or join a union." (This healthcare portion of the infrastructure legislation has drawn strong opposition from Republicans, and some Democrats, as being too amorphous, and not constituting true any infrastructure or investment.)

Even while the Congress debates the landmark infrastructure investment legislation, the White House has signaled a follow-on bill, the American Families Act, which will specifically address President Biden's core health care initiatives.

During the campaign, Biden proposed high-level health care policy to advocate for four legislative initiatives: (i) reinstate the individual mandate under the Affordable Care Act, (ii) add a public-option, Medicare-like health program for non-seniors, (iii) limit net cost to consumers of insurance coverage under the ACA programs to 8.5% of adjusted income, and (iv) address prescription pharmacy costs. The campaign proposal is undergoing some revision, as the President recently indicated that the healthcare policies are subject to further change and negotiation. It now appears that the 8.5% limitation on insurance costs is a non-starter in the eventual package that will be sent to Congress. Senior congressional leaders are also advocating additional health care proposals not currently backed by the Administration, including (i) increasing subsidies for low income ACA plan participants, (ii) reducing Medicare age to 60, and (iii) expanding regular Medicare to include dental and vision services.

Handicapping where healthcare policy initiatives will end up is difficult. The lack of unity within the Democratic party at this point on policy initiatives is one factor, as is the strong opposition to 'soft' infrastructure proposals, and the attendant costs and tax implications of the infrastructure bill. We believe that these pressures will likely result in the aging at home initiatives being dropped from the infrastructure bill, as a way to lower the price tag to try to gain passage in the Senate.

Thus we foresee that the policies behind Americans aging in the home and needing support to do so are likely to be rolled into the American Families Act expected later this Spring. These particular policies have a decent chance of success, as they are arguably in part a cost-saving measure; it is pretty clear that supporting people in their homes is cheaper than providing institutional care. With better definition of the spending priorities (and toning down of the progressive labor initiatives) the aging at home proposals may have some legs.

Additionally, the pharmaceutical cost control initiatives also seem to have a pathway for passage. Biden's plan would repeal existing law that currently bans Medicare from negotiating lower prices with the pharma industry. The plan would also limit price increases "for all brand, biotech and abusively priced generic drugs" and control prices for drugs that do not have competition. The Biden Administration's proposal to negotiate drug prices directly with pharmaceutical manufacturer's is not dissimilar to ones floated in the Trump Administration. The 'hands-off' pharma policy currently followed by Medicare was a result of the ACA negotiations; it was a policy that the Obama Administration had to concede in order to bring an important stakeholder to the table to support passage of the ACA. Eleven years later, pharma billing practices are seen as a huge cost driver of health care in the US, and the Biden Administration needs to reverse the Obama-era stance with respect to the pharma industry if it wants to advance the overall interests of keeping Medicare and Medicaid costs in line. At some level, a bi-partisan pharma bill would seem to be possible.

We see a much harder path to success of the other health policy initiatives in their current versions. The individual mandate is a firewall for the Republicans, calling it the gateway to socialized medicine. While it doesn't have a

particularly significant price tag, it is an easily turned political hot potato from a messaging standpoint.

Another complicating factor for each of the coverage expansion initiatives is that they add to the federal cost burden, with the public-option for Medicare carrying the additional baggage as a stepping stone for Medicare for all. Also, while the Biden Administration is concurrently grappling with immigration issues, it has proposed to open federal health programs to undocumented immigrants (but not subsidies). This crossover issue, while supportive of the immigration policy path, complicates the ability of the Administration to gain approval of health initiatives when they are tied into immigration policy.

At bottom, some expansion of the ACA coverages might be possible in a well-defined aging at home and pharma cost control package, if the net financial effect was kept neutral or better to the federal budget. Given that we are one heart attack away from the Senate flipping back to Republican control, congressional politics becomes very hard in the current era. 'Single-issue' Democratic senators can hold up the process with the current leverage being the party needs 100% of its votes. We see the progressive policy initiatives embedded in increased federal healthcare spending as unattractive to middle-of-the-road Democrats from swing States, let alone Republicans. And the trades and compromises that might otherwise be available will be made more difficult by whatever process the infrastructure legislation takes and whatever political scar tissue that process leaves.

So for the moment, we think that, while the messaging on the progressive policy future for healthcare is strong, the actual legislative pathway is too uncertain to envision success. We predict that there will be changes in federal healthcare policy, but from a legislative perspective they will be more like marginal changes to the existing ACA-dominated structure, and not a full revamp of federal initiatives.

We also view healthcare policy as subject to significant change through Executive Branch innovation in pilot programs under the existing ACA structure. These HHS-lead trial innovations are likely to be more significant, at least in the short to intermediate term, than healthcare legislative action.

For further discussion of how these policy pathways may impact your business or your investments, please reach out to Nelson Hardiman, LLP, the leading healthcare boutique law firm in the West and a prominent thought leadership center.

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