

MEMORANDUM

To: American Therapeutic Recreation Association

From: Powers Legislative Practice Group

Date: November 5, 2014

Re: 2014 Election Overview and Implications

In the mid-term elections of November 5, the Republican Party won control of the Senate and added members to its majority in the House. Republicans now control both houses of Congress for the first time since the 109th Congress during President George W. Bush's presidency. The current balance of power in the new Congress, compared with the current Congress, is described below. A majority in the House is 218 votes, while a majority in the Senate is 51 votes (60 votes for a filibuster-proof majority).

Net Gains for Republicans in the 114th Congress (Beginning in January 2015)

	Senate	House	Governors
Republicans	52 (+7)	243 (+13)	31 (+3)
Democrats	43 (-5)	179 (-13)	17 (-3)
Independents	2* (same)	0	0 (same)
Pending	3**	13	2

* Sen. Angus King (I-ME) and Sen. Bernard Sanders (I-VT) currently caucus with the Democrats.

**The Louisiana Senate race will head into a December runoff. The Virginia and Alaska Senate races are still too close to call.

The Republican Party's ability to retake the Senate and add to its majority in the House has major implications for the health care agenda of the 114th Congress. Discussed below are predictions for the lame duck session, the future of the Affordable Care Act (ACA), a Medicare Sustainable Growth Rate (SGR) fix including pay-fors, and entitlement reform.

Potential Impact of Elections on the Lame Duck Session

The House and Senate will reconvene on November 12. The Senate has not released a schedule beyond November 14, and the House has not scheduled votes after December 12. The length of time and substance of the lame duck session remains in question. During the lame duck, Republicans are expected to re-organize committees and leadership, and seek greater collaboration between the House and Senate. The question going forward will be if they will be able to negotiate and govern, or if Republicans will merely force votes that prompt Presidential vetoes.

The legislative accomplishments of the lame duck session may serve as an early indication of whether the Republican leadership or Tea Party members are driving the Republican agenda moving forward. Incoming Senate Majority Leader Mitch McConnell (R-KY), Speaker of the House John Boehner (R-OH), and ranking House and Senate Republicans have indicated that they would like to use the lame duck session for must-pass legislation, including an omnibus spending bill, in order to create a fresh start for the 114th Congress. Current Senate Majority Leader Harry Reid (D-NV) has stated that he also would like to move significant legislation during the lame duck. Senators Ted Cruz (R-TX) and Mike Lee (R-UT), on the other hand, envision the lame duck session being used only to pass a short-term continuing resolution. They object to passing any legislation they deem non-emergency before the new Congress is installed. It is possible that the lame duck session will also consider a fix to the Medicare Sustainable Growth Rate (SGR) formula, as described below.

The Future of the Affordable Care Act

While the majority of Republicans have stated that they seek to repeal, replace, or otherwise amend the Affordable Care Act (ACA), the ACA is likely to stay largely intact. A full repeal of the ACA appears unlikely given that the President still wields veto power and has stated in a press conference today that he will halt any attempted repeal. Republican piecemeal reform of the ACA and continued diminution of its funding are expected to continue.

Piecemeal Approach

In the 114th Congress, after expected ACA repeal votes in the Senate, Majority Leader McConnell and the Republican-controlled Senate may attempt to enlist Senate Democrats to vote on parts of the bill, including the medical device tax, employer mandate (including the 30-hour workweek standard), and the individual mandate. Today, the day after the election, incoming Majority Leader McConnell stated that he wished to focus the new Congress on a repeal of these three elements of the ACA.

- **Medical Device Tax.** A repeal of the medical device tax seems most likely to be advanced, given its bipartisan unpopularity. In addition to support by House and Senate Republicans, there are several high profile Democrats who also support a repeal of the tax. However, cost of a medical device tax repeal is significant; the tax generated \$913 million in the first half of 2013, and is expected to raise \$20 billion between fiscal years 2013 and 2019. Former Indiana Democratic Senator Evan Bayh recently [stated](#) that President Obama would be amenable to a repeal of the tax if there was an offset. Fiscal conservatives will similarly demand a pay-for to compensate for the repeal.
- **Employer and Individual Mandates.** The Republicans may be able to reach a vote in the Senate on the employer and individual mandates. However, repeal of the individual mandate is unlikely; its repeal would pose a significant threat to how the ACA is funded. President Obama said in today's press conference that he would also veto any legislation that undermines the structure of the ACA. The insurance industry would also strongly oppose repealing the individual mandate. Democrats and Republicans, however, may be

able to reach a compromise on certain changes to the employer mandate such as the 30-hour work week.

Medicare Reform

Medicare Sustainable Growth Rate (SGR). There is a slight possibility that the SGR formula will be repealed during the lame duck session; the committees responsible for the Medicare physician fee schedule are in bipartisan, bicameral agreement on the means to repeal the SGR. While agreement on the substance of an SGR fix has been reached, there is significant disagreement among Republicans and Democrats about how to pay for the repeal. Republicans advanced a delay in the individual mandate and Democrats sought to offset the cost of repeal by using costs savings from the overseas contingency fund. Neither option was palatable to the other party.

Senator Ron Wyden (D-OR), the current chairman of the Senate Finance Committee may prove to be an ally in gaining agreement for a permanent fix either during the lame duck session or before the current patch's expiration on April 1, 2015. Also, on November 3, in a [letter](#) issued in support of the *SGR Repeal and Medicare Provider Payment Modernization Act*, the House GOP Doctor's caucus formally called for a full repeal of the SGR during the lame duck. Further, on October 31, CMS issued a [rule](#) on the physician fee schedule noting that if Congress does not act to repeal the SGR, physicians will face a 21.2% cut in Medicare reimbursement in April 2015.

Possible SGR Pay-Fors

In the last decade, commonly used sources within Medicare to pay for delay of the Medicare physician pay cut have included reimbursement cuts to hospitals, home health and post-acute care. These sources are expected to be revisited for a further postponement or full repeal of SGR in 2015. Savings from the Independence at Home Medicare demonstration (IAH), if converted into a permanent program, could also provide a pay-for source, depending on the savings that the Congressional Budget Office finds that the IAH program will generate.

- **Hospital Cuts.** Congress has often tapped into payments to hospitals to fund the Medicare physician fee schedule "patch." Hospital associations are working diligently to prevent such cuts, but may again face cuts to pay for the SGR patch or repeal in 2015.
- **Home Health.** The Republican Congress is poised to target Medicare fraud and over-utilization in home health. The Office of the Inspector General (OIG) at the United States Department of Health and Human Services' [2015 Work Plan](#) stated that Medicare home health has accounted for approximately \$1 billion in fraudulent and improper payments since 2010 and one in four home health providers have had "questionable billing". MedPAC is required to report to Congress by the end of the year on whether additional cuts should be made under the rebasing requirements of the ACA. This development follows the final home health PPS regulations, released in late October, which cut \$60 million, or 0.3% of the Medicare payment, from the benefit. MedPAC staff in September stated that MedPAC should recommend further reimbursement cuts to the home health benefit because providers' margins are still too high.

- **PAC Reform.** Now that the *Improved Medicare Post-Acute Care Transformation Act of 2014* (IMPACT Act) has become law, post-acute care stakeholders are hopeful that the Centers for Medicare & Medicaid (CMS) will spend time over the next several years collecting data across settings, in order to design PAC reforms based on good evidence. It is not clear whether Congress will wait for this to occur or will proceed with payment and delivery reforms before the IMPACT Act is implemented.
- **Independence at Home.** The IAH demonstration targets the 5%-25% of Medicare beneficiaries who account for 50%-85% of the costs of Medicare expenditures and will account for even more of Medicare costs over the next 10 years as the population ages. The IAH Medicare Demonstration is in the third year of a three-year term and participants believe it is achieving strong savings results. Savings from the IAH demonstration may serve as a SGR pay-for if Congress merely eliminated the restrictions from the existing IAH Demo legislation at section 1866E of the Medicare Act, allowing it to become a permanent Medicare program. The IAH model has proven to reduce costs as well as reduce the number of emergency department visits, specialist visits, and re-hospitalizations, in Medicare and non-Medicare markets outside of the Demo. The IAH legislation requires participants to achieve minimum savings of annually and provides additional savings to Medicare in an 80%/20% savings sharing split for savings beyond 5%.

Entitlement Reform

The Republican-led Congress will likely generate more hearings on reforming Medicare, Medicaid, and Social Security. For example, the House Energy and Commerce Committee will likely hold more hearings on the continued promotion of the 21st Century Cures initiative, which seeks to improve the discovery, development and delivery of drugs. Legislative proposals are certain to incorporate fiscally conservative entitlement reform principles based on Congressman Paul Ryan's *A Roadmap for America's Future*, especially if Congressman Ryan (R-WI) defeats Rep. Kevin Brady (R-TX) for the chairmanship of the House Ways and Means Committee. If Republicans press forward with Rep. Ryan's approach, they will likely rally around reforms to restructure Medicare as a partially private benefit (commonly referred to as a "voucher program") and Medicaid into what Democrats characterize as a "block grant" program. Republicans will continue to look for ways to reduce entitlement spending by addressing fraud in bills such as Rep. Brady's *Protecting Integrity in Medicare Act of 2014*, which targets fraud across the Medicare program.

It is widely expected that the new Congress will take up Graduate Medical Education (GME) in some form in 2015. Senator Patty Murray (D-WA) and several others have already introduced the *Community-Based Medical Education Act of 2014* in this Congress in preparation for next year. In July, the Institute on Medicine (IOM) released its long-awaited and controversial report on Graduate Medical Education (GME) that would completely reorganize how GME is funded and give broad regulatory authority and flexibility to determine which geographic areas and

physician specialties should be funded. OIG has also included monitoring duplicate GME payments in its [2015 Work Plan](#).

Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities (CRPD), an international treaty recognizing the rights of people with disabilities, which was modeled on the Americans with Disabilities Act, was signed in 2009, but needs a 67-vote super majority vote in the Senate to be ratified. Senators Harkin and McCain, and others, may make a last ditch effort to ratify the treaty during the lame duck session. Ratification of this treaty appears unlikely in the Republican-controlled 114th Senate.

Significant Policy Healthcare Expertise Lost in the 114th Congress

Thirty-two Members of Congress are retiring at the end of the 113th session. Of this group, 14 Republicans and 10 Democrats are retiring from the House, while three (3) Republican and five (5) Democratic Senators are set to leave office. Among the Members of Congress retiring from each chamber are many Representatives and Senators with significant legacies on health care issues. Notables in this area include: Representatives Camp (R-MI), Petri (R-WI), Rogers (R-MI), Dingell (D-MI), McCarthy (D-NY), Miller (D-CA), and Waxman (D-CA), as well as, Senators Coburn (R-OK), Harkin (D-IA), Johnson (D-SD), Levin (D-MI), and Rockefeller (D-WV). See Appendix for a chart of these and other retirements.

With the loss of 32 experienced Members, other Representatives and Senators will be needed to lead on such critical topics as Medicare, Medicaid, Children's Health Insurance Program (CHIP), access to healthcare, rehabilitation, disability, long term services and supports (LTSS), homecare, social security, and assistive technology.

One example of a significant Congressional loss is the departure of Representative John Dingell (D-MI). Representative Dingell, the longest serving lawmaker in congressional history and one of only two remaining House members who served in World War II. Dingell presided over the 1965 Medicare amendment to the Social Security Act, co-authored the original CHIP legislation and its reauthorization, and co-authored the ACA.

Changes in Committee Leadership

Various Senate and House committees with jurisdiction over healthcare will see significant departures as a consequence of both retirement and the results of the November 4 elections.

The Senate Committee on Health, Education, Labor, and Pensions (HELP), the Senate Finance Committee, the Senate Appropriations Committee, and their various subcommittees, will seek to select new chairmen from the Republican Party and a new ranking member from the Democratic Party.

The Senate HELP Committee will see the departure of their current Chairman, Senator Tom Harkin (D-IA), who is retiring. Senator Harkin is known for his work on disability rights, including authoring the Americans with Disabilities Act (ADA), sponsoring reauthorizations of

the Individuals with Disabilities Education Act (IDEA), and has been a strong proponent of the Affordable Care Act, expanding preventative medicine and complementary medicine. Senator Kay Hagan (D-NC), a first-term Senator, was defeated by Republican Thom Tillis, leaving vacant her position on the Senate HELP Committee.

Representative Henry Waxman (D-CA), ranking member of the Energy and Commerce Committee, also will retire at the conclusion of the 113th Congress. Representative Waxman sponsored a multitude of healthcare legislation including the Ryan White AIDS Care Act, the Drug Price Competition and Patent Term Restoration Act, and the Orphan Drug Act and was a strong proponent of healthcare reform.

The Energy and Commerce Subcommittee on Health will lose Representatives Mike Rogers (R-MI), Phil Gingrey (R-GA), John Dingell (D-MI), Jim Matheson (D-UT), and Henry Waxman (D-CA) as a result of retirement. Representative Bill Cassidy (R-LA) has given up his seat in the House of Representatives to seek election to the Louisiana Senate. A runoff for this Senate seat is scheduled for December 6, 2014.

Representative Dave Camp (R-MI), a strong opponent to the implementation of the ACA, will retire, leaving vacant his position as Chairman of the House Ways and Means Committee. Representative Jim Gerlach (R-PA) will also retire, leaving vacant his position on the House Ways and Means Subcommittee on Health.

Democratic Representatives Michael Michaud (D-ME) and Gloria Negrete-McLeod (D-CA) will both retire at the conclusion of the 113th Congress. Representative Michaud will leave vacant his position as Ranking Member of the House Committee on Veterans' Affairs while Representative Negrete-McLeod leaves vacant her position on the House Committee on Veterans' Affairs Subcommittee on Health.

The Senate Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies will lose its Chair, Senator Harkin, and Senator Mike Johanns (R-NE), both as a result of retirement. Additionally, Senator Mark Pryor (D-AR) will leave vacant his position on the subcommittee after being defeated by Republican Tom Cotton. Whether Senator Mary Landrieu (D-LA) remains in the Senate and therefore on this subcommittee will be determined after the runoff with Republican physician Representative Bill Cassidy (R-LA).

Representative Jack Kingston (R-GA), a strong opponent of the ACA and a proponent and supporter of the National Institutes of Health, will be retiring, leaving open his position as the Chairman of the House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies.

Physicians Retained in the 114th Congress

The 113th Congress was composed of 13 Republican physician Representatives, four (4) Democratic physician Representatives, and three (3) Republican physician Senators. The 114th Congress will include at least 10 Republican physician Representatives, and three (3) Democratic physician Representatives.

Representatives Paul Broun, M.D. (R-GA) and Phil Gingrey, M.D. (R-GA) were both defeated in their respective Senate primaries while Representative Bill Cassidy, M.D. (R-LA) will participate in a December runoff for a Louisiana Senate seat. The seat of Representative Ami Bera, M.D. (D-CA) is in jeopardy and remains too close to call. The 114th Congress will retain two physicians in the U.S. Senate, Senators Rand Paul (R-KY) and John Barrasso (R-WY). Neither was up for reelection in 2014. Senator Tom Coburn (R-OK) is resigning.

Appendix

Congressional Retirements

House Republicans	House Democrats
Michele Bachmann (MN)	John D. Dingell (MI)*
Spencer Bachus (AL)	Rush D. Holt (NJ)
John Campbell (CA)	Jim Matheson (UT)
Dave Camp (MI)*	Carolyn McCarthy (NY)*
Howard Coble (NC)	Mike McIntyre (NC)
Jim Gerlach (PA)	George Miller (CA)*
Doc Hastings (WA)	James P. Moran (VA)
Tom Latham (IA)	Bill Owens (NY)
Howard "Buck" McKeon (CA)	Ed Pastor (AZ)
Gary G. Miller (CA)	Henry A. Waxman (CA)*
Tom Petri (WI)*	Senate Democrats
Mike Rogers (MI)*	Tom Harkin (IA)*
Jon Runyan (NJ)	Tim Johnson (SD)*
Frank R. Wolf (VA)	Carl Levin (MI)*
Senate Republicans	Jay Rockefeller (WV)*
Tom Coburn (OK)* ^R	John Walsh (MT)
Saxby Chambliss (GA)	
Mike Johanns (NE)	

* Members departing that have demonstrated significant leadership on health care issues

^RTom Coburn is resigning.

Most Competitive Senate Races

State	Elected	Defeated
Alaska	Mark Begich * ^T	Dan Sullivan ^T
Colorado	Cory Gardner	Mark Udall*
Georgia	David Perdue	Michelle Nunn
Iowa	Joni Ernst	Bruce Braley
Kansas	Pat Roberts*	Greg Orman
Louisiana	Mary Landrieu * ^R	Bill Cassidy ^R
New Hampshire	Jeanne Shaheen*	Scott Brown
North Carolina	Thom Tillis	Kay Hagan*
Virginia	Mark Warner ^T	Ed Gillespie ^T

Republicans are in red text, Democrats are in blue text, and independents are in purple text.

* Incumbent.

^T Too close to call. Individuals in the "Elected" column were polling ahead at the time of writing.

Republicans are in red text, Democrats are in blue text, and independents are in purple text.

^R The Louisiana race will enter into a runoff between incumbent Mary Landrieu and Bill Cassidy.

Most Competitive House Races

State	District	Elected	Defeated
Arkansas	2	French Hill	Patrick Henry Hays
Arkansas	4	Bruce Westerman	James Lee Witt
Arizona	1	Ann Kirkpatrick* ^T	Andy Tobin ^T
Arizona	2	Ron Barber* ^T	Martha McSally ^T
California	7	Doug Ose ^T	Ami Bera* ^T
California	26	Julia Brownley* ^T	Jeff Gorell ^T
California	52	Carl DeMaio ^T	Scott Peters* ^T
Colorado	6	Mike Coffman*	Andrew Romanoff
Florida	2	Gwen Graham	Steve Southerland*
Florida	26	Carlos Curbelo	Joe Garcia*
Georgia	12	Rick Allen	John Barrow*
Hawaii	1	Mark Takai	Charles Djou
Iowa	1	Rod Blum	Pat Murphy
Iowa	3	David Young	Staci Appel
Illinois	10	Robert Dold	Brad Schneider
Illinois	11	Bill Foster*	Darlene Senger
Illinois	12	Mike Bost	William Enyart*
Maine	2	Bruce Poliquin	Emily Cain
Michigan	1	Dan Benishek, M.D.	Jerry Cannon
Minnesota	8	Rick Nolan*	Stewart Mills
Nebraska	2	Brad Ashford ^T	Lee Terry* ^T
New Hampshire	1	Frank Guinta	Carol Shea-Porter*
New Hampshire	2	Annie Kuster*	Marilinda Garcia
Nevada	4	Crescent Hardy	Steven Horsford*
New York	1	Tim Bishop*	Lee Zeldin
New York	11	Michael Grimm*	Domenic Recchia
Texas	23	Will Hurd	Pete Gallego*
Virginia	10	Barbara Comstock	John Foust
West Virginia	2	Alex Mooney	Nick Casey
West Virginia	3	Evan Jenkins	Nick Rahall*

Republicans are in red text, Democrats are in blue text, and independents are in purple text.

* Incumbent.

^T Too close to call. Individuals in the "Elected" column were polling ahead at the time of writing.

Republicans are in red text, Democrats are in blue text, and independents are in purple text.

Most Competitive Gubernatorial Races

Gubernatorial elections have become increasingly important to federal level health care policy since many decisions regarding the implementation of the Affordable Care Act (ACA) are being pushed to the state level, as in the case of Medicaid expansion and the health care exchanges/marketplaces.

The most competitive gubernatorial races occurred in Alaska, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, New Hampshire, Rhode Island, Vermont, and Wisconsin. Many of the elections in these states either resulted in the Republican candidate being elected to the office of Governor (Rick Scott in Florida, Nathan Deal in Georgia, Bruce Rauner in Illinois, Sam Brownback in Kansas, Paul LePage in Maine, Larry Hogan in Maryland, Charlie Baker in Massachusetts, Rick Snyder in Michigan, and Scott Walker in Wisconsin), or being too close to call in Alaska and Vermont. Democrats won election in Colorado, Connecticut, and New Hampshire (John Hickenlooper, Dannel Malloy, Maggie Hassan were re-elected), as well as in Rhode Island, where Gina Raimondo won in an open election. Tom Wolf, a Democrat won the race for governor in Pennsylvania.

Overall, Republicans and incumbents seemed to have garnered the most support from voters in the fifteen most contentious races. Based on yesterday's election results, Democrats will occupy 17 governorships (a loss of three states) and Republicans will occupy 31 governorships (a gain of three states). Republicans will continue to hold a large majority of governorships.