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HOOPER, LUNDY & BOOKMAN, PC

HEALTH CARE LAWYERS & ADVISORS

# Hope for Health Care Change – Despite Political Paralysis



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## EXECUTIVE SUMMARY

# As 2018 drew to a close, the future of the Affordable Care Act came into question following a decision by a federal judge in Texas who struck down the entire act on grounds that its health insurance mandate is unconstitutional.

It's unclear whether Obamacare will survive subsequent appeals, but the uncertainty stemming from the ruling is emblematic of the state of America's \$2.7 billion health care industry.

However, as 2019 dawns, health care executives from across the country believe we may have reached an inflection point after years of turmoil in the industry. They say that despite growing political dysfunction, sweeping changes are coming to American health care in the coming years — maybe even in the next two.

That's according to a new survey by national law firm Hooper, Lundy & Bookman, P.C., released in concert with the first annual National Symposium on Health Law and Policy. At the top of the list of areas for reform is prescription drug pricing, which respondents believe will be a primary focus at both the federal and state levels, at least for the remainder of President Trump's first term. Nearly four in five respondents said efforts to control prescription drug pricing will have a significant impact on the market over the next two years.

Going beyond prescription drug prices, about three-quarters of respondents said significant changes in federal health care reform within the next two years is likely. But some experts think most of what will come out of Washington will be talk, leaving states to step up. And amid Washington's paralysis, that's already happening. Bipartisan efforts across the country — in both red and blue states — show that pharmaceutical pricing is one of a few issues in American life not tied to party.

Survey respondents are also keenly watching the consequences of the country's opioid crisis. More than two-thirds said last year's passage of H.R. 6, which targets substance abuse and opioid recovery, presents a challenge in serving patients with chronic pain, while a quarter expect the bill to add difficulty to telemedicine prescription regulations.

"We have a system that is a bit of a Jekyll and Hyde, in that you'll undergo enforcement if you don't manage someone's pain, but at the same time you can be accused of being so profligate with pain medications — opioids — that you fear repercussions from that," said Mark Reagan, Managing Shareholder of Hooper, Lundy & Bookman. "That's happening everywhere."

**"We have a system that is a bit of a Jekyll and Hyde"**

**MARK REAGAN**

Managing Shareholder of  
Hooper, Lundy & Bookman

States are also moving quickly on health care issues. California's new governor issued an executive order in January 2019 directly aimed at controlling drug prices and expanding Medicaid to include undocumented immigrants. Voters in Nebraska, Utah and Idaho all passed Medicaid expansion last fall, and in Maine, with a new governor in office, the expansion that was previously approved by voters will go into effect. Those actions mirror survey data: Seventy-nine percent of respondents said they expect some form of Medicaid expansion at the state level, compared with 59 percent who expect a similar change at the federal level.

"Every state that elected a Democratic governor that hasn't expanded Medicaid will do so," said Mark Parkinson, President and CEO of the American Health Care Association and National Center for Assisted Living. "Over time, even the red states will be under pressure to expand Medicaid."

The full survey results, including key highlights and analysis from industry experts, follow.

## SURVEY HIGHLIGHTS



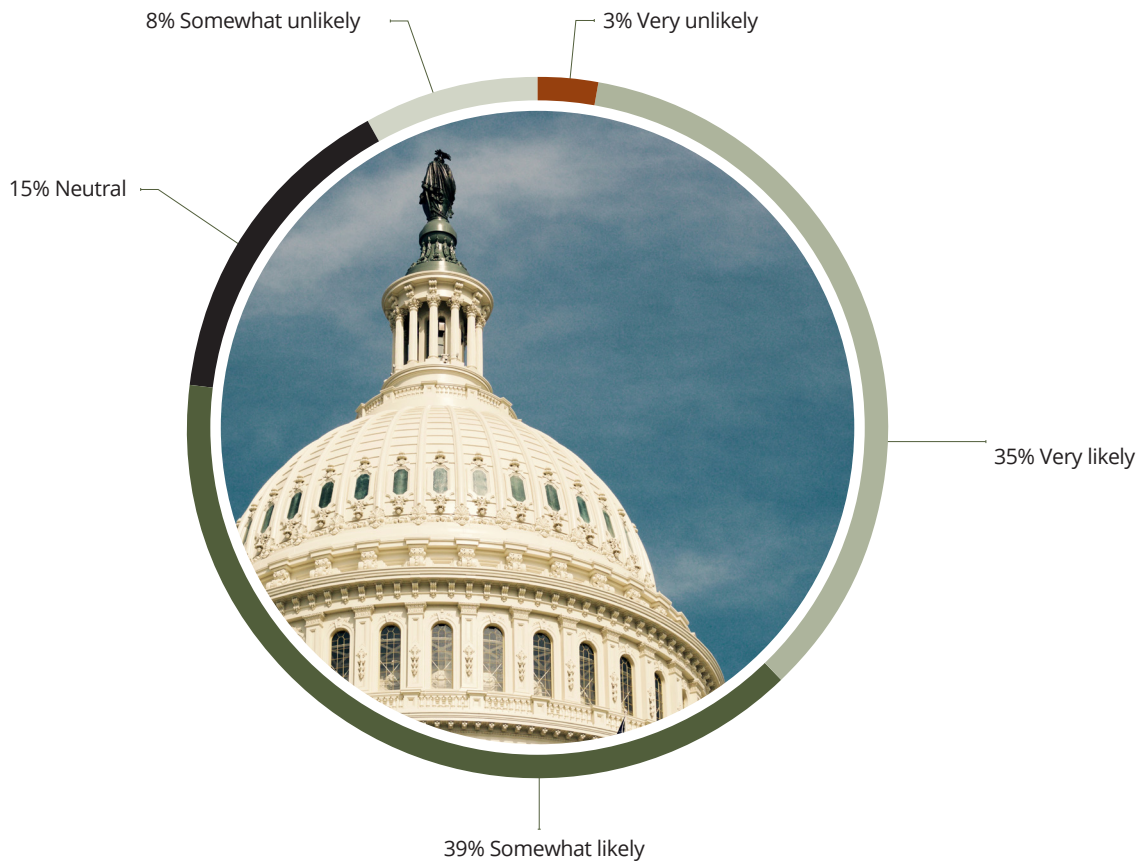
- » Prescription drug pricing will be a primary focus at both the federal and state levels for the remainder of President Trump's first term, as nearly four in five participants (79 percent) said efforts to control prescription drug pricing will significantly impact the market over the next two years. Most respondents indicated that prescription drug transparency to states (51 percent) is a top area for health care reform under the current administration. Almost two-thirds (62 percent) of respondents said drug prices would be an area of increased enforcement over the next two years.
- » Asked broadly about the opioid epidemic, survey respondents were much more concerned about how to serve those with chronic pain management needs than with other issues. About two-thirds said they are most concerned about managing chronic pain under increased regulatory scrutiny of opioids.
- » Questioned about possible changes at the state level, Medicaid expansion with exceptions (e.g., work requirements) garnered the highest concentration of selections (43 percent), ahead of Medicaid expansion (36 percent). While nearly three-fourths expect major changes in federal health care reform by the end of the decade, respondents remain divided on what these changes might be, with additional value-based payment models (40 percent), Medicaid expansion with exceptions (33 percent), "executive repeal" (30 percent) and Medicaid expansion (26 percent) making up the top four selections.
- » Universal insurance coverage (41 percent) was the option seen as most necessary among possible methods of cutting health care costs. However, one executive noted that universal coverage has vastly different meanings to the U.S. population. This is underscored by survey results around payment innovations in managed care, where respondents selected new plans and coverage options as the most impactful development to be expected over the next two years.
- » Despite hype around telemedicine, respondents were more bullish about other patient "high touch" opportunities. Increased reliance on allied health professionals (such as nurses and physician assistants) led the pack at 45 percent. This option is both an overarching strategy and the engine behind the growth of several other touch points including urgent care, which was the second most selected option (40 percent). Telemedicine was selected by less than a quarter (23 percent), and respondents pointed to regulatory barriers (74 percent) as an impediment to its growth. Commentary on barriers highlighted restrictions from insurance providers, HIPAA concerns and certification requirements. As one respondent noted, "In our rural area, some of the hoops restrict our ability to work with our providers. Payment models restrict the financial feasibility."



## FULL RESULTS

### QUESTION 1

How likely are we to see any significant changes in federal health care reform within the next two years?



Approximately 74 percent of respondents said that we are likely to see significant changes in federal health care reform in the next two years, but there was no clear choice as far as what shape that change might take. Digging deeper, a plurality of 40 percent of respondents said it will come in the form of additional value-based payment models, 33 percent said Medicaid expansion with exceptions (like work requirements), 30 percent said executive repeal and 26 percent think it will come by way of Medicaid expansion. Interestingly, no significant percentage predicted Medicare-for-All or universal health coverage would be enacted.

With Congress divided, action from the executive branch might be most likely when it comes to federal moves. "The administration, whether it's health care or any other sector, is very committed to deregulating, to giving the private sector as much latitude as possible,"

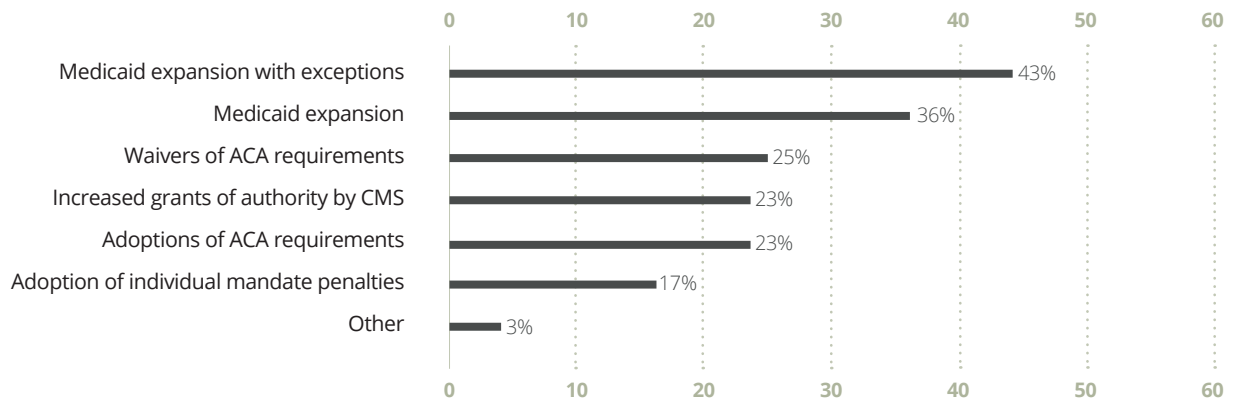
said Mark Parkinson, President and CEO of the American Health Care Association and National Center for Assisted Living.

Keith Fontenot, Executive Vice President of Policy and Strategy at America's Health Insurance Plans, added, "The changes in the U.S. House of Representatives and Senate mean, in the short term, that repeal-and-replace legislation is highly unlikely to pass. Block-granting or per capita caps on Medicaid in Congress are not in the cards for at least the next two years. Now, if you change perspectives, down to the other end of Pennsylvania Avenue, you still have an administration that has some very strong views on the ACA; the administration still has a lot of tools at its disposal — in terms of regulatory authority and waiver authority — to do those things administratively."

## FULL RESULTS

### QUESTION 2

At the state level, what are some likely changes around health care reform in the next two years?



There's been heavy action at the state level in recent months, notably with a handful of states passing Medicaid expansion during the November 2018 elections. Perhaps not surprisingly, nearly four in five respondents (79 percent) believe health care reform at the state level will come through expanding Medicaid, though a slim plurality of respondents (43 percent) said exceptions (e.g., work requirements) will be included. The third most popular choice, waivers of requirements under the Affordable Care Act (25 percent), relates to guidance from the Centers for Medicare & Medicaid Services (CMS) in late 2018 that seeks to give states more flexibility to design alternatives to the ACA. Robert W. Lundy, Jr., Chairman of Hooper, Lundy & Bookman, notes that "since the survey was conducted, the new California governor has proposed to adopt individual mandate penalties in California, despite this being the

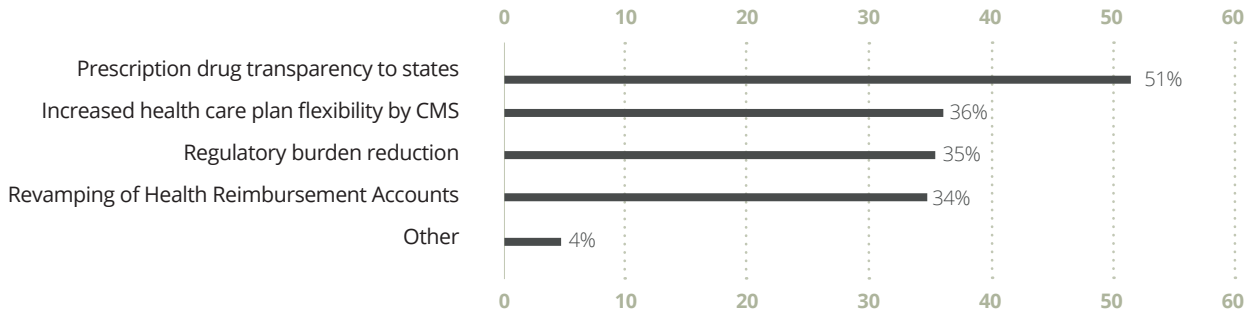
least likely change according to survey participants. It would not surprise me if other states follow the California lead, particularly since the Texas federal court struck down the federal mandate."

Keith Fontenot further explained, "Gubernatorial changes — including the election of seven Democratic governors, as well as referendums that were on ballots in select states — will have huge effects on our health care system going forward, and even bigger effects will be seen from changes to state legislatures. Since states administer Medicaid programs, we may see additional states considering expanding coverage under Medicaid. It is also possible we will see some states looking to expand coverage for other selected groups outside of Medicaid."

**FULL RESULTS**

**QUESTION 3**

**Beyond the ACA, what are the top areas for health care reform under the current administration?**



Most respondents said that prescription drug transparency to states (51 percent) serves as the top area for health care reform under the current administration. “The transparency issue, in the near term, is the one issue where you could see something enacted on a bipartisan basis,” said Martin A. Corry, Chair of the Government Relations & Public Policy department at Hooper, Lundy & Bookman. The results above conformed with other results from the survey — 62 percent cited drug prices as an area of increased enforcement over the next two years as noted in Question 4 — but that could be difficult given how business is conducted in the Beltway. “I think the pharmaceutical industry has outsized power in D.C., and I would be surprised if the system successfully took on the issue of drug pricing,” Mark Parkinson said. Related to Question 2, the CMS moving to offer more plan flexibility was the second most common answer to Question 3, at 36 percent.





## FULL RESULTS

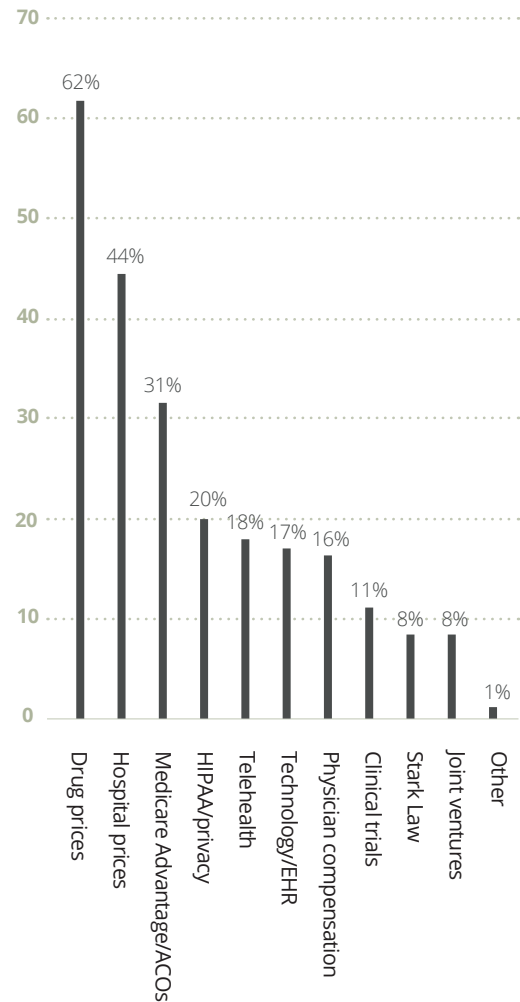
### QUESTION 4

Which of the following areas do you believe will most likely experience increased enforcement over the next two years?



As previously noted above, respondents overwhelmingly believe drug pricing is the most likely area to see increased enforcement over the next two years. This is possibly a result of then-candidate Trump's critique of drug prices during the 2016 presidential campaign — but it also could be a result of the potential for some bipartisan action on this issue. In December 2018, in comments on a proposed rule (Drug Pricing Transparency CMS-4187-P), providers and insurers alike called for the CMS to include financial penalties for violators in any forthcoming drug pricing transparency measures.

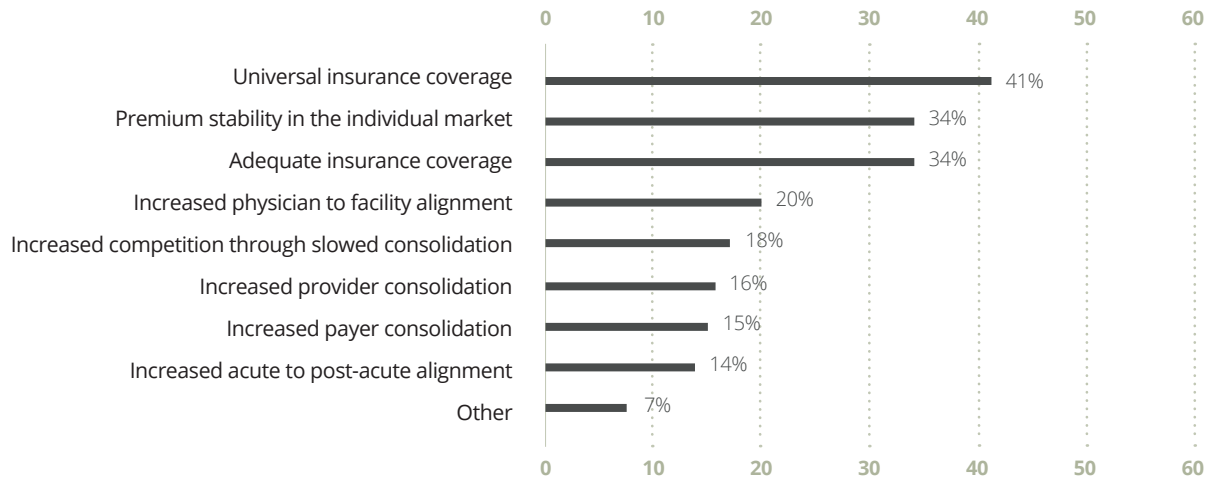
The second most likely area for increased enforcement is hospital pricing. According to Hooper, Lundy & Bookman Founding Partner Patric Hooper, "We are already seeing a significant pickup in class actions against hospitals for alleged violations of state pricing and unfair competition laws. The recent CMS requirement of transparency in hospital pricing will certainly increase this trend."



## FULL RESULTS

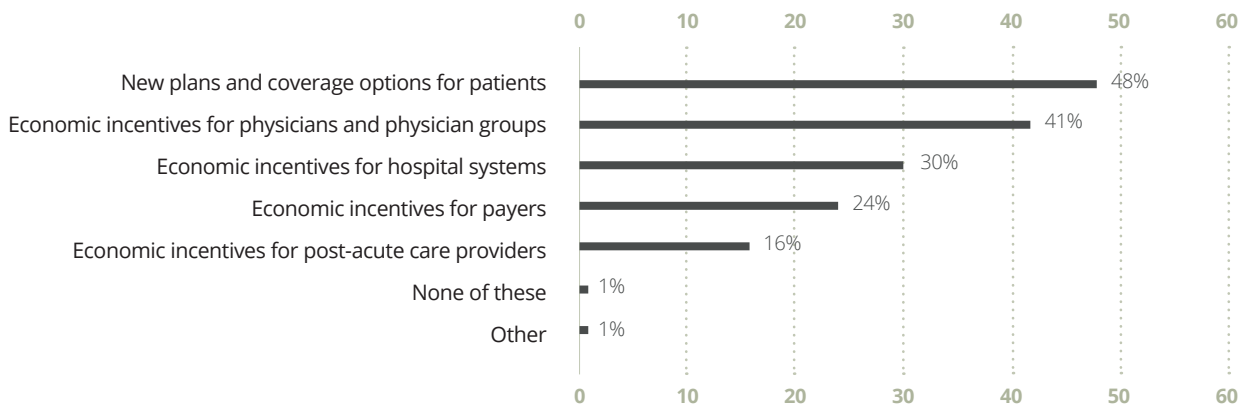
### QUESTION 5

Which of the following are most necessary to reduce the overall cost of health care?



### QUESTION 6

Which of the following do you believe will be the most impactful payment developments in managed care over the next two years?



While no single response won the day for Question 5, a clear plurality of respondents said universal insurance coverage was the most necessary way to reduce the overall cost of health care. By definition, that can't happen at the state level, and one expert was skeptical of anything happening in Washington before the end of the decade. "We're going to hear a lot about federal health care reform over the next two years, but given the current political divide, it is unlikely there will be sweeping change," Carmela Coyle, President and CEO of the California Hospital Association said. She added that those answering

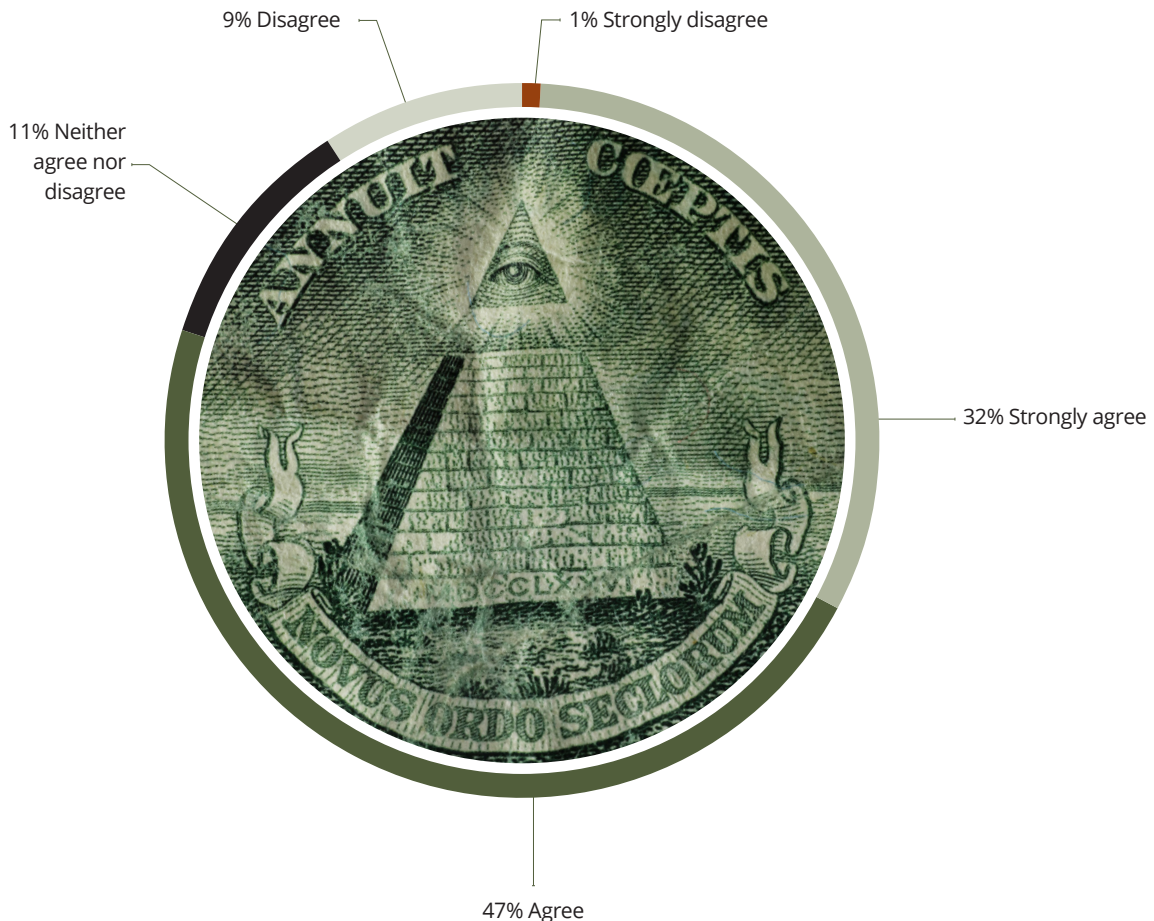
in the plurality likely were answering conceptually — without thinking of policy and political challenges.

But when asked about the most impactful payment development in managed care over the next two years — a question with more concrete answers — nearly half of respondents (48 percent) selected new plans and coverage options for patients. This illustrates a potential disconnect between the idealization of universal coverage as a far-reaching health care solution and a variety of more incremental options as more relevant to the complexities of U.S. health care.

## FULL RESULTS

### QUESTION 7

Please state your level of agreement with this statement: Efforts to control prescription drug pricing will have a significant impact on the market within the next two years.



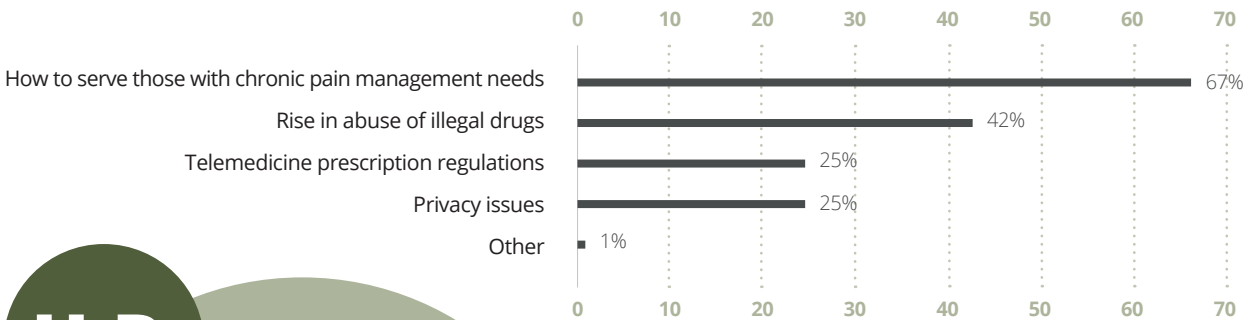
In line with the outlook on federal health care changes, nearly four in five participants (79 percent) said efforts to control prescription drug pricing will have a significant impact on the market over the next two years. "Changes in drug pricing will take place — I'll bet significant sums of money on it," Carmela Coyle said. "This will happen because of polling data that both Democrats and Republicans saw. This is a Democratic, a Republican, and a presidential issue." Other experts noted that Alex Azar — a former pharmaceutical executive who now heads the Department of Health and Human Services — said during his confirmation hearings that he would focus on fixing structural pricing issues.

However, the pharmaceutical industry will likely mount opposition. "No one throws money around more than the folks in prescription drugs," said Mark Reagan. "You see health care reform proposed in California that could be significantly reduced by the power of the insurers, and there would be a philosophical bent to go down this road on prescription drugs. But you may have an ancillary legal challenge mounted by the prescription drug companies."

FULL RESULTS

QUESTION 8

With the passage of H.R. 6, the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act, which of the following do you expect to arise as challenges?



In the wake of H.R. 6's passage last year, survey respondents — many of whom represent health care providers — said they were most concerned about how to treat patients with chronic pain. But some experts don't think H.R. 6 goes far enough. Others view the medical field as just one piece of a very complex puzzle that involves behavioral health, lack of jobs and education, and poverty — upstream issues that all need to be addressed.

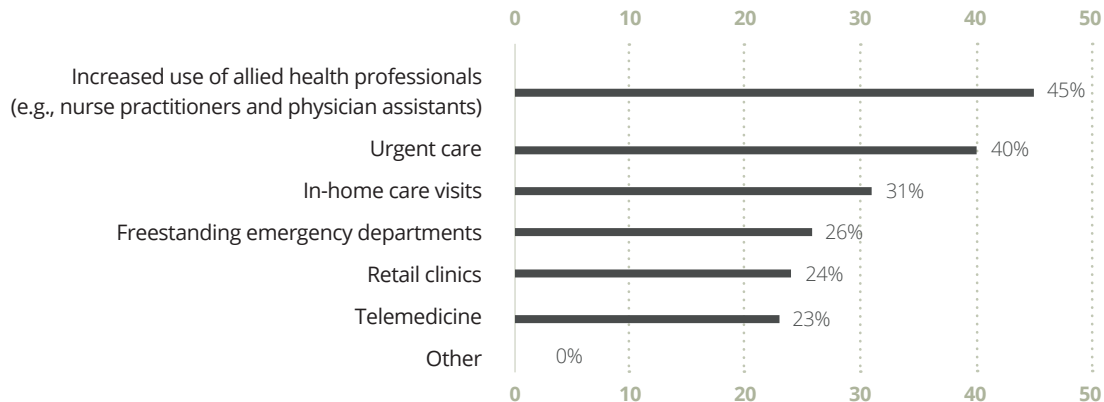
But others say that existing government policy surrounding opioids is a real challenge when it comes to post-acute and long-term care. "We have a system that is a bit of a Jekyll and Hyde, in that you'll undergo enforcement if you don't manage someone's pain, but at the same time you can be accused of being so profligate with pain medications — opioids — that you fear repercussions from that," said Mark Reagan.

Health care providers, who made up a large percentage of the survey respondent pool, heavily rely on opioids to help patients with pain management. That's despite the tremendous societal problem that's emerged in recent years.

## FULL RESULTS

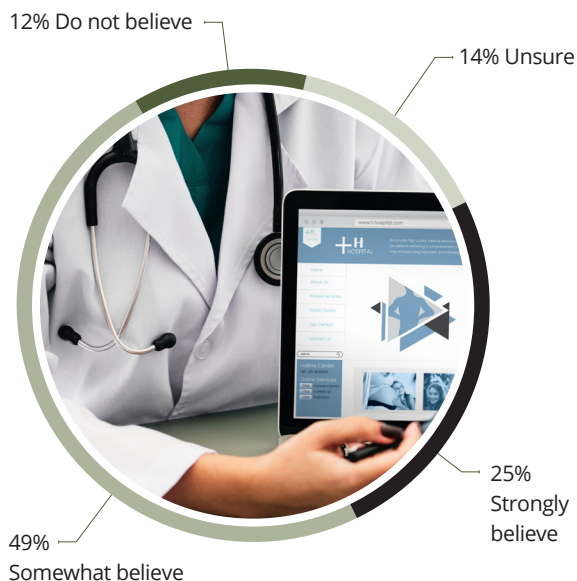
### QUESTION 9

## Where is the biggest growth opportunity for newer high touch points?



### QUESTION 10

## To what extent do you believe that regulatory barriers are currently hindering the growth of telemedicine?



The top two selections for Question 9 highlight increasing perceived willingness by patients to see medical professionals other than doctors. At 45 percent, increased usage of allied health professionals (such as nurses and physician assistants) leads as a new “high touch” growth opportunity, as it is both an overarching strategy and the engine behind the growth of touch points like second-ranking urgent care (40 percent). “Urgent care is a high-growth area and there are sophisticated developments

there that can handle a wide range of health care conditions, including acute conditions,” said Robert Lundy. “So, it is not surprising to see that ahead of telemedicine.”

The range of responses to Question 9 reflects a rapidly increasing comfort level with the full range of options. However, telemedicine — which has generated a great deal of hype of late — was only chosen by 23 percent of respondents. This may be a reflection of the responses to Question 10, where three in four respondents see regulation as a major hurdle hindering telemedicine’s growth. “That’s not shocking,” said Jeremy D. Sherer, an associate at Hooper, Lundy & Bookman who focuses on health care technology and telemedicine. “Telemedicine can do a lot of good, but along with regulatory barriers around reimbursement, provider facilities struggle to see how it will make sense for them in nuts-and-bolts ways.”

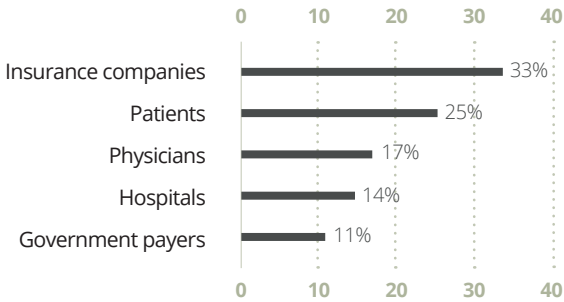
“There are huge regulatory barriers hindering growth in telemedicine,” said Steve Speil, Executive Vice President for Policy at the Federation of American Hospitals. “The administration has dealt with some of those issues and is inching forward on removing some barriers. But we’re moving too slowly in this area. Hospitals are investing in telemedicine in a major way and the world is primed for telehealth to move forward and take a much bigger role in the health care delivery continuum.”



**FULL RESULTS**

**QUESTION 11**

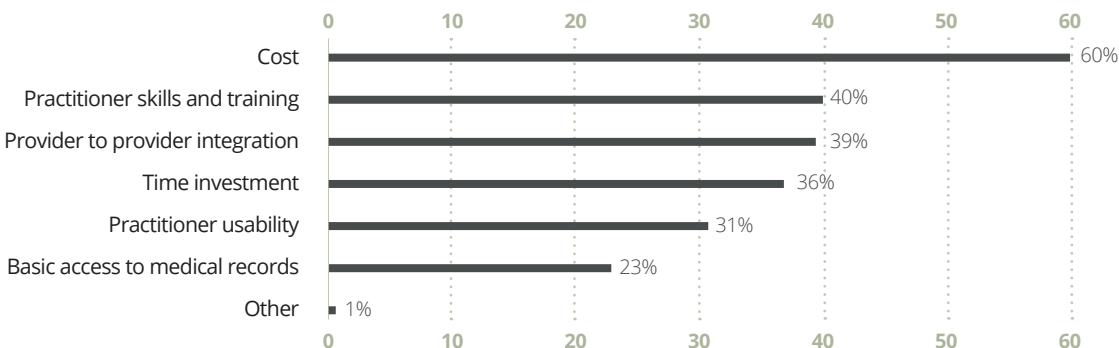
**Which party do you believe has the most to gain from physician alignment?**



For years, hospitals and hospital systems have invested heavily in physician alignment strategies, including physician/hospital joint ventures, physician networks, medical foundations, management of medical groups and acquisition of physician practices, yet somewhat surprisingly insurance companies top the list as the party gaining the most from physician alignment. This may make sense to the extent that hospital-physician alignment has resulted in cost savings and reductions in unnecessary hospitalization, but as Robert Lundy notes, "This may also reflect the recent activity by insurance companies, such as UnitedHealth, in acquiring large medical groups and forming fully integrated delivery systems, similar to the Kaiser model. I expect this trend to accelerate in the future."

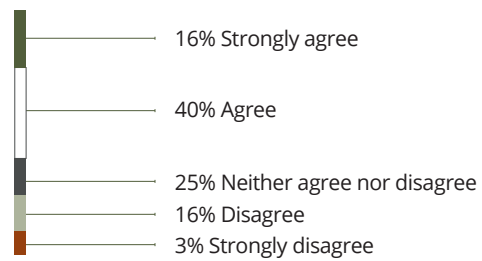
**QUESTION 12**

**From the provider, supplier and payer sides, what are the greatest challenges of health care's ever-increasing reliance on electronic systems?**



**QUESTION 13**

**Please indicate your level of agreement with this statement: In the move toward value-based care, large hospitals are better able to manage post-acute care than smaller systems.**



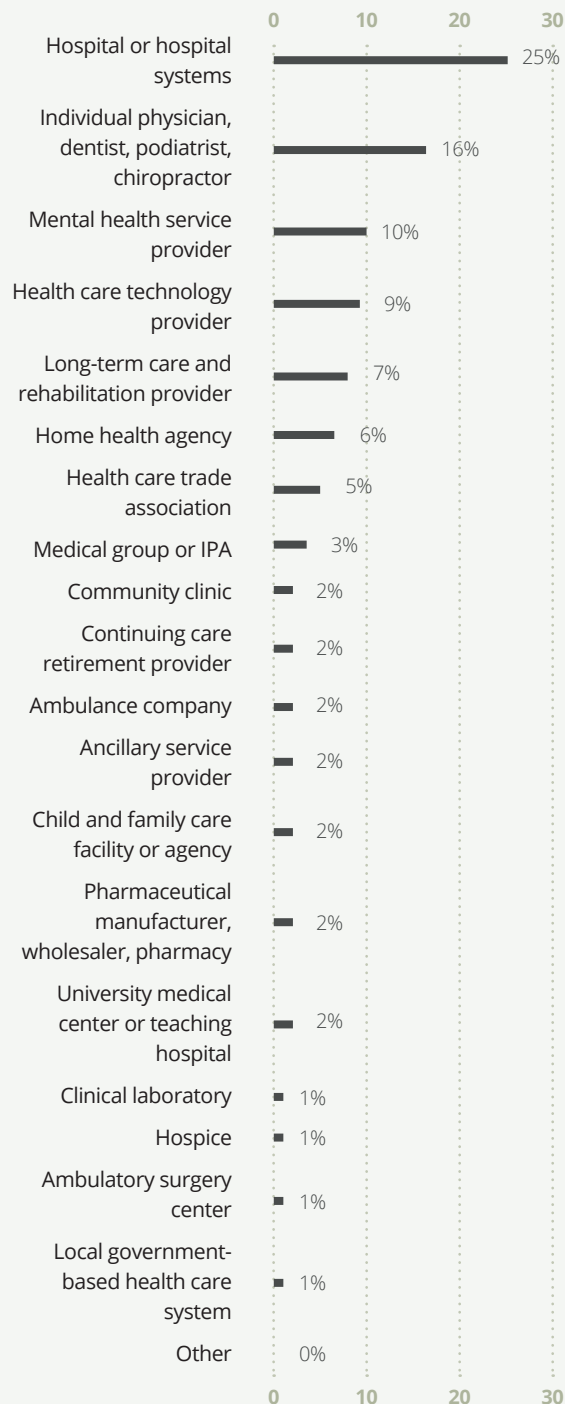
A majority of respondents agree that large hospitals are better able to manage post-acute care than smaller systems, particularly under a value-based payment system. According to Robert Lundy, "Many large hospital systems are developing post-acute strategies that may include 1) developing a network of preferred post-acute providers, 2) joint-venturing with post-acute providers or 3) acquiring post-acute providers. Each of these strategies requires a fairly sophisticated linkage of electronic medical records between the acute and post-acute providers, and the financial capacity to purchase these systems or undertake acquisitions." The data analytics necessary to maximize performance under a value-based payment system are also expensive.

## METHODOLOGY

In December 2018, national law firm Hooper, Lundy & Bookman surveyed 222 health care executives from across the United States. Respondent titles ranged from Chief Executive Officer to Manager, and respondents represented a wide variety of organizations. Percentages in some of the survey data exceed 100 percent, as respondents were asked to provide more than one answer. More detailed information on the survey respondents is listed below.

## SURVEY RESPONDENT DEMOGRAPHICS

### WHICH OF THE FOLLOWING BEST DEFINES THE ORGANIZATION WITH WHICH YOU ARE CURRENTLY EMPLOYED?



### WHICH OF THE FOLLOWING BEST DEFINES YOUR TITLE OR ROLE?



### IN WHICH STATE IS YOUR ORGANIZATION BASED?

Alabama - 2	Mississippi - 4
Alaska - 2	Missouri - 3
Arizona - 8	Montana - 1
Arkansas - 1	Nevada - 1
California - 19	New Jersey - 10
Colorado - 4	New Mexico - 2
Connecticut - 2	New York - 13
Delaware - 1	North Carolina - 6
Florida - 12	Ohio - 10
Georgia - 5	Oklahoma - 3
Hawaii - 2	Oregon - 3
Illinois - 13	Pennsylvania - 11
Indiana - 3	South Carolina - 6
Iowa - 2	Tennessee - 7
Kansas - 1	Texas - 12
Kentucky - 3	Utah - 1
Louisiana - 2	Vermont - 1
Maine - 2	Virginia - 2
Maryland - 5	Washington - 1
Massachusetts - 3	Washington, D.C. - 2
Michigan - 5	West Virginia - 2
Minnesota - 4	Wisconsin - 1

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## **ABOUT HOOPER, LUNDY & BOOKMAN**

Founded in 1987, Hooper, Lundy & Bookman, P.C. is the largest law firm in the country dedicated solely to the representation of health care providers and suppliers. With offices in Los Angeles, San Francisco, San Diego, Boston, and Washington, D.C., and clients in all 50 states, we meet the business, litigation, regulatory, and government relations needs of a broad array of health care providers, payers and suppliers — ranging from the largest national health care organizations to community hospitals and individual physician practices. We are pleased to be ranked by Chambers USA as Tier One: Health Care, California, and #1 for the West Region on the ABA Health Law Section's 6th Annual "Regional Law Firm Recognition Top 10 List." For more information, please visit our website at [www.health-law.com](http://www.health-law.com).