

Agencies and States Drive Policy in Post-Midterm Gridlock

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Congress Isn't the Only Policy Maker

The upcoming midterm elections will determine control of Congress, with the potential for a split Congress or change of control from Republican to Democrat. **What happens if legislative policymaking comes to a halt in Washington D.C.?**

While Congress tends to be the most widely known policymaking branch, government agencies, state legislatures and state attorneys general can also influence policy. **Below is an overview of the various policymaking bodies to watch if Congress is unable to form a consensus or pass legislation.**

Government Agencies

Government agencies are administrative agencies with specific authority granted by Congress and the President of the United States. **The independent agencies possess the authority to: legislate through rulemaking authority; investigate, execute and enforce agency regulations; and apply and interpret compliance with regulations.** With these delegated powers, the independent agencies have been called the "headless fourth branch", despite not being expressly mentioned in the Constitution. Examples include the Federal Communication Commission (FCC), Food and Drug Administration (FDA), Environmental Protection Agency (EPA) and Federal Trade Commission (FTC).

Due to their authoritative nature, government agencies can be a significant source of policymaking in the United States. Below are examples of regulations released by agencies.

- Drug Compounding: The FDA recently proposed excluding three substances from a list of ingredients that could be used to manufacture compounded medications in bulk. **Endo Pharmaceuticals (ENDP) may benefit from the change, as one of the proposed ingredients was the subject of its lawsuit targeting how the FDA regulates drug compounding.** Additionally, the FDA has issued a statement discussing changes to prior drug compounding regulation (e.g. ATNX).
- Gainful Employment: The regulation requires vocational programs at for-profit higher education institutions and nondegree programs at community colleges to meet minimum thresholds with respect to debt-to-income rates of graduates. **Programs that fail to meet requirements could lose access to loans and grants that help students afford their programs, putting them at a higher risk of closing.** The Department of Education recently proposed repealing Gainful Employment. Impacted companies include for-profit colleges (e.g. ATGE, LAUR, CECO).

State Legislatures

State policymaking is generally modeled after the federal process, with separate legislative, executive and judicial branches. **While state legislative authority only applies to the applicable state, enacted laws may still impact a company with outsized operations in the state or spur additional states to enact similar legislation.** Below are some of the state policy items we're currently tracking.

- California: **Due to the population size and above-average GDP (~14% of U.S. GDP), CA is a significant policymaking entity in our view.** Current examples of CA legislative priorities include dialysis regulation and ballot proposals (e.g. DVA, FMS), an upcoming ballot proposal to repeal Costa-Hawkins (e.g. INVH, AMH) and inverse condemnation rules (e.g. PCG, EIX, SRE).
- Medicaid Expansion: **The upcoming governorship and state legislature elections may play a significant role in the potential for Medicaid expansion.** Key states where expansion is an issue include FL, GA, KS, SC and WI. In our view, state Medicaid expansion is a potential growth catalyst for certain Affordable Care Act (ACA) insurers (e.g. WCG, MOH, CHC, HUM).

State Attorneys General

The attorney general of a state is its chief law officer, with authority to represent, defend and enforce the legal interests of the state government and the public. While varying from one jurisdiction to the next, state attorneys general are granted authority to issue formal opinions to state agencies, enforce environmental laws, represent the state in court and file civil suits on behalf of the state.

As chief law officer, state attorneys general can use their powers to impact policymaking. Below are some of the ways they have challenged policy.

- ACA Constitutionality: The Texas and Wisconsin state attorneys general are currently leading a 20-state coalition against the federal government. In the lawsuit, they claim that Congress made the ACA unconstitutional by doing away with the ACA individual mandate when it enacted President Trump's tax overhaul. **While it will take years to work through the legal system, a ruling could impact insurers (e.g. WCG, MOH, CNC, HUM).**
- Opioid Epidemic: Multiple state attorneys general have filed lawsuits and issued investigative subpoenas against drug manufacturers (e.g. TEVA, ENDP, JNJ's Janssen Pharma, AGN, MNK, MYL) and drug distributors (e.g. CAH, ABC, MCK).



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