

Public Focus

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Governing Hospitals and Health Systems in a Period of Chaos and Confusion

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In the month since the January 20 inauguration, actions taken or threatened by the new administration and Congress pose significant challenges on many fronts to the nation's hospitals and health systems. It is essential that governing boards be aware of the range and scope of those challenges and be prepared to take a leadership role in support of management and clinical staff in responding to them.

The purpose of this article is not to re-argue the politics of the November elections. We must accept that the party that now controls both branches of Congress and the White House has earned the right to pursue their own policy initiatives. However, this does not mean that all of those policies and initiatives are objectively positive for the nation's health system. Regardless of your political perspective, some of those policies and initiatives, if carried to fruition, are likely to pose existential or mission-critical threats to our nation's hospitals and health systems and the hundreds of millions of people who rely on them.

For example, executive orders were issued to pause medical and scientific research, to shut down the flow of medical, scientific, and public health information from key federal agencies, to temporarily halt over \$3 trillion in Congressionally appropriated funding, to attempt to end most diversity, equity, and inclusion (DE&I) programs at the federal level and among other public and private entities, and to attempt to give federal immigration agents unprecedented access to entities nationally to identify, arrest, and deport immigrants. Some of these efforts have already caused considerable chaos for the nation's health system, even though many of these actions have been put on hold by the courts or withdrawn by the administration.¹

1 Dan Diamond, et al., "Health Officials Left With Chaos as HHS Goes Silent," *The Washington Post*, January 23, 2025.

My goal with this article is not to provide a detailed analysis of specific issues and policies. Rather, it is to provide several principles to guide hospital governing boards in addressing the issues that are most likely to be detrimental to hospitals, and to the patients and communities they serve.

Don't Panic (At least Not Yet)

Every second-term president is a lame duck the minute he (or she) takes the oath of office. It helps to understand why President Trump moved quickly to sign so many executive orders and try to implement so many campaign promises. The half-life of any presidency is measured in months not years, especially when it comes to lofty campaign promises. This is doubly true for second-termers.

The national debate over mission-critical health issues and proposals is likely to play out over the next several months, and the longer the process takes, the more likely legislators and administration leaders are to listen to reason—even to resurrect the bipartisan approaches that have been necessary in recent years to achieve enactment of sensible budgetary priorities.

It is important to take the long view and approach the initial flurry of proposals with patience and rationality. Take, for example, the temporary freeze on federal spending, which would have affected hundreds of health programs covered by these orders. The freeze was blocked within hours by multiple federal judges, and the resulting chaos and confusion may ironically have already made it harder for the new administration to achieve even its legitimate policy goals.²

Check Your Political Differences at the Boardroom Door

It will be more important than ever in the face of the chaotic political environment to understand and actively carry out your board's fiduciary responsibilities. Above all else, those responsibilities extend to ensuring the financial viability of the hospitals and systems you govern and the quality of and access to healthcare by the patients and communities you serve.

This means that board members, as stewards of public trust, must always act for the benefit and in the best interests of the good of the organization and the community rather than for the benefit of themselves or their particular political beliefs. Fiduciary duty requires board members to be objective, responsible, honest, trustworthy, and efficient. They are expected to exercise reasonable care in all decision making, honor their duties under the law, and avoid placing the organization under unnecessary risk.³

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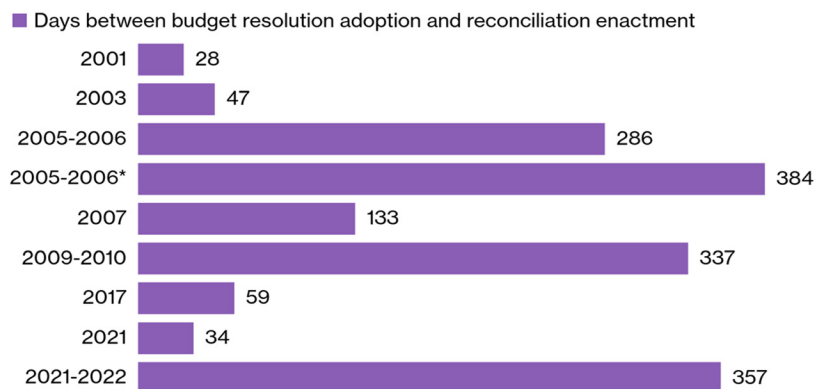
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- 2 Michael D. Sheer, "Beyond Chaos of Freeze, a Bipartisan Thorn," *The New York Times*, February 2, 2025.
 - 3 BoardSource, "Non-Profit Fiduciary Duty + Responsibilities."

To effectively perform your fiduciary duties, it will be important to identify those proposals that present the greatest potential threats to the hospitals you govern, to educate yourselves, and to be prepared to work with management to use every tool at your hospital's disposal.

Budget Reconciliation: Why It's a Marathon Not a Sprint

House wants to pass one large bill by May; Senate eyeing tax bill before provisions expire at end of 2025; Reconciliation bills have been signed into law an average of 185 days after budget resolution adopted since 2001.

Budget Resolution to Reconciliation Timeline



Source: "GOP Kicks Off Budget Reconciliation Process," Bloomberg Government, February 18, 2025.

There Is More to Government than the Federal Executive Branch

It is also important, as you approach the challenges of the next several years, to understand the roles (positive and negative) that will be played by other branches of government. For example, even while President Trump was seeking its freeze on spending, the House Ways & Means Committee was releasing a list of dozens of potential funding cuts, including many affecting health programs.⁴

At the same time, prominent members of key Congressional Committees continue to question the tax-exempt status of non-profit hospitals, the deductibility of charitable

4 Edwin Park, "House Budget Committee Circulates New Detailed List of Budget Reconciliation Options, Including Draconian Medicaid Cuts," Georgetown University McCourt School of Public Policy, Center for Children and Families, January 20, 2025.

donations to hospitals, and the growth of—and participation of many hospitals in—mission-critical programs like the 340B drug rebate program. And more recently, House Republicans released a budget blueprint on February 12 that orders the Energy and Commerce Committee, which oversees Medicare and Medicaid, to find \$880 billion in savings from fiscal years 2025 through 2034. The budget resolution does not specify how the committee must cut costs by \$880 billion, but Medicare and Medicaid are by far the largest programs under its oversight.⁵

However, Democrats are not the only ones protesting the administration’s health-related edicts. Former Senate Majority Leader Mitch McConnell—a polio survivor—has consistently voted against confirming administration cabinet appointments, including most recently voting against confirming Robert F. Kennedy, Jr. as Secretary of HHS. Also, in a statement released on February 10, GOP Senator Susan Collins, Chair of the Senate Appropriations Committee, issued a statement opposing the administration’s proposal to cap indirect costs on biomedical research funded by NIH. Senator Collins indicated that she had heard from many constituents (including teaching hospitals) that “these cuts, which in some cases would apply retroactively to existing grants, would be devastating, stopping vital biomedical research and leading to the loss of jobs.”

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Possible Statutory Changes to Medicaid

In January, the House Budget Committee released an “options” document for consideration of offsets to pay for the reconciliation package. It includes Medicaid cuts totaling \$2.3 trillion over 10 years. The Medicaid proposals include:

- Converting Medicaid to a per capita cap, which would set the federal share at a fixed or capped amount—Medicaid is currently an entitlement
- Imposing mandatory Medicaid work reporting requirements
- Restricting state use of provider taxes and intergovernmental transfers (IGTs) to finance state Medicaid costs
- Changing the formula used to calculate Medicaid matching rates, lowering the minimum Medicaid matching rates, and eliminating the enhanced matching rate
- Eliminating or restricting Medicaid state-directed payments by managed care organizations

Source: Alston & Bird Presentation to Hospital Association of Oregon, February 19, 2025.

5 Alan Condon, “Republicans Target \$880B in Healthcare Cuts; Hospitals Push Back,” *Beckers Hospital Review*, February 12, 2025.

It is also important to understand that state and local governments often have greater control over many health policies than the federal government. The new administration may be able to curtail the activities of the Centers for Disease Control but ultimately the feds don't control public health. That is primarily the responsibility of state and local government agencies. Those agencies will undoubtedly require greater leadership and support from your hospitals in the months and years ahead,⁶ in areas that range from public education about vaccines and responses to potential future pandemics, to adequate nutrition and access to health services for vulnerable patient populations. Misinformation is not the sole province of the federal administration—it is a constant, insidious fact of life in our online society, and hospitals and their governing boards will be essential to effectively contradicting it.

Board Leadership Will Be Required in Policy Areas beyond the Federal Health Programs

For example, federal immigration policies can also dramatically affect hospitals and health systems. While there is broad bipartisan support for sensible immigration reforms, governing boards should be aware of the ways in which some of the new policies could negatively impact patients and staff. On January 21, the Department of Homeland Security lifted restrictions on federal immigration officers, allowing enforcement actions, including arrests, to take place in previously protected "sensitive" areas like hospitals. Different states have responded in different ways to this announcement.

KFF Health News has reported that California has advised healthcare providers not to document patients' immigration status on bills or medical records and is informing providers they are under no obligation to assist federal agents in arrests. Some Massachusetts hospitals and clinics are posting privacy rights in emergency rooms in multiple languages to ensure patients feel safe. At the same time, states like Florida and Texas have introduced measures requiring healthcare facilities to ask patients about their immigration status and report the associated costs of care for undocumented individuals.⁷ A survey from the University of South Florida revealed that 66 percent of non-citizens in Florida hesitated to seek medical care after the state passed legislation requiring hospitals to inquire about legal status.

The argument is already being made that federal privacy protections like HIPAA will protect hospitals that refuse to ask patients about their immigration status. HIPAA considers a patient's immigration status as protected health information (PHI) and generally prohibits healthcare providers from disclosing this information without the patient's consent. Be sure to consult legal counsel before simply opening the hospital doors to federal officials.

6 Lauren Weber and Caitlin Gilbert, "Experts Disagree with RFK Jr.'s Claims That Vaccines Aren't Tested Enough," *The Washington Post*, February 12, 2025.

7 Vanessa G. Sánchez and Daniel Chang, "As States Diverge on Immigration, Hospitals Say They Won't Turn Patients Away," *KFF Health News*, January 26, 2025. See also Vanessa G. Sanchez, "Health Providers Gird for Immigration Crackdown," *KFF Health News*, January 24, 2025.

DE&I Policies: Why It's a Marathon Not a Sprint

- To take just one example, the executive order (EO) extending the DE&I mandate to all private entities that contract with the federal government is ambiguous at best.
- The EO attempts to prohibit “unlawful” or “illegal” DE&I programs and policies that seemingly violate federal antidiscrimination laws.
- However, it is not at all clear what DE&I-related initiatives might violate current antidiscrimination law, how the new EO will affect existing regulations or contract provisions requiring the behavior now being prohibited, or whether the prohibition extends to subcontractors.
- The EO also attempted to revoke prior requirements for equal employment opportunity/affirmative action (EEO/AA), which are not merely contractual requirements.
- The EEO/AA obligations also implicate Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin, and other statutory provisions, which apply to various categories of individuals, such as veterans and the disabled, or to specific industries, such as construction contracts.
- These statutory and regulatory obligations will remain in effect despite any contract modifications unless they, too, are modified by statutory changes or regulatory processes.
- Finally, note that this prohibition is not effective immediately. Rather, after a 90-day grace period (which expires April 21, 2025), it will go into effect for new contracts or upon amendment/modification of existing contracts.
- Lengthy litigation over many of these ambiguities is inevitable.

Source: Jeffrey Belkin, et al., *Government Contracts Advisory, DEI Executive Order's Impact on Government Contractors and Fund Recipients*, Alston & Bird LLP, February 18, 2025.

Increased tariffs also present a financial threat to hospitals and health systems. While the threat of a broad trade war with Canada and Mexico has subsided for now, it remains a significant possibility, and tariffs on China have already gone into effect. Nearly 70 percent of U.S.-marketed medical devices are manufactured outside of the U.S., according to Medical Device Network. According to Census Bureau data cited by the Associated Press, about 13.6 percent of U.S.-marketed medical devices are manufactured in China. In addition, generic drugs could face further supply challenges, President Trump has also

shared intentions to introduce a “tariff wall” around pharmaceuticals, with the goal of encouraging domestic pharmaceutical manufacturing.

Don't Assume It Is Necessary to Respond Immediately to Every Federal Challenge or Threat

President Trump knows what he is doing by seeking to rapidly and unilaterally implement policies that he talked about throughout his campaign, without regard to whether they will ultimately survive scrutiny by the courts or the Congress.

Brendan Nyhan, a government professor at Dartmouth College, recently pointed out that “The president is openly violating the law and Constitution on a daily basis” and “He’s using the tools of government to challenge the limits on the post-Watergate presidency... Some of these efforts will be turned back by the courts, but the level of anticipatory obedience we’re seeing from business, universities, and the media is unlike anything I’ve seen in my lifetime.”⁸

Approach key issues with care and thoughtfulness—don’t be blinded by the hundreds of different actions or pronouncements you will hear about in the coming weeks and months. Don’t let it cause you to rush into “anticipatory obedience” over every new policy and every pronouncement, especially the more outlandish ones. This is exactly what the administration expects you to do. Despite concerns expressed by many observers that our democracy may be at risk, there will continue to be multiple checks and balances, including the courts, state and local governments, and the many thousands of laws and regulations on the books that no President can successfully countervene through executive orders alone.

As of this writing, more than 40 lawsuits have been filed by state attorneys general, unions, and non-profits seeking to undo the administration’s executive orders and other policy initiatives, and courts have been issuing preliminary injunctions or temporary restraining orders halting their implementation while this litigation moves through the courts.

Don't Be Quick to Abandon Important Efforts to Address Health Disparities of Your Patients and Inequities that Affect Your Workforce

It is by now well-known that governmental and corporate DE&I programs have come under attack.⁹ What is perhaps less well-known is that some companies are fiercely and vocally resisting these efforts, including Costco, Apple, Microsoft, and LinkedIn.¹⁰ Many

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- 8 German Lopez, “A Constitutional Crisis? We’re Covering an Imbalance of Power in the Government,” *The New York Times*, February 7, 2025.
 - 9 Julian Mark, et al., “Trump Attempts ‘Death Blow’ to Diversity Efforts: Orders Shock Even Foes of DEI Programs,” *The Washington Post*, January 24, 2025.
 - 10 Nell Gallogly, “Some Firms Hold Fast to DEI,” *The New York Times*, January 23, 2025.

hospitals and other healthcare organizations have devoted considerable time and resources to DE&I initiatives. Substantial disparities continue to exist in health status and access to care for vulnerable patient populations, as well as disparities in the composition of the health industry workforce. Board members whose hospitals have adopted such programs should consider continuing to exercise leadership in this area and not let yourselves be bulldozed into accepting the extreme views of certain elected or appointed federal officials or self-designated “experts.” According to many legal scholars, the federal government actually has few (if any) ways to truly enforce its extremist DE&I ideology on hospitals that will withstand the inevitable legal challenges.

Key Board Takeaways

- Despite all the rhetoric coming from Washington, it is important to understand what all the new executive orders and policy pronouncements *do not do* so as to avoid overreacting in the near term. For example, if you have previously adopted a program to alleviate disparities in access and outcomes, and improve health status, for vulnerable patient populations, and address similar issues with your workforce, don't feel you need to abandon them precipitously.
- The courts will have a lot to say about which of the administration's many new policy proposals survive and which do not, and litigation takes time.
- Be prepared for efforts to enforce new arrest and deportation policies in your hospitals, by working closely with counsel to adopt clear procedures to protect the privacy and confidentiality of your patients and workforce.
- Take care to ensure that your board and management has uninterrupted access to accurate and actionable medical and scientific information and be prepared to support your management and clinicians in exercising leadership in refuting misinformation from any source.
- Reach out to your public health counterparts at the state and local levels to offer support for initiatives to strengthen public health infrastructure and services.
- Be prepared to educate policymakers at every level of government about the importance of adequate support for research.
- Also be prepared to alert policymakers about dangers to the health system of reductions in coverage, services, and reimbursement in federal health programs.
- Consider adopting a new dashboard for the immediate future, and perhaps creating an *ad hoc* board committee, to remain vigilant and informed about the key challenges represented by legislation, executive orders, regulations, and pronouncements to create new potentially harmful health-related initiatives or repeal previously adopted beneficial policies.

In conclusion, to govern effectively during the current period of chaos and confusion, it is also important to appreciate that you do not need to fight (or even win) every battle. You simply have to take steps to ensure that your board has in place policies that improve the health of your patients and protect your workforce. By paying attention to core “mission critical” issues, board members will be well-positioned to work with management to respond effectively to the most important challenges.

TGI thanks Larry S. Gage, Senior Counsel, Alston & Bird LLP, and Senior Advisor, Alvarez & Marsal, for contributing this article. He can be reached at larry.gage@alston.com.

