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Welcome to the inaugural edition of The New Era of Health Care Reform which highlights important developments in health care reform under the Trump Administration.

## A FIRST LOOK AT HEALTH CARE PRIORITIES OF PRESIDENT-ELECT TRUMP AND THE NEW CONGRESS

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It's been just a week since the victory of President-elect Donald J. Trump took the country by surprise. Still, Mr. Trump and Congressional leaders have wasted no time in reaffirming that the repeal *and* replacement of the Affordable Care Act (ACA) remains one of the highest domestic priorities of the incoming Trump Administration and new Congress. What is less certain, at this time, is the mechanism to accomplish the ACA "repeal" and what reforms will be included in the "replacement" legislation. There is some early speculation that the legislative process to accomplish a *full* repeal and replacement package could possibly take up to two years. The timing for accomplishing Mr. Trump's goals could shift, particularly, since legislative language incorporating the market-based replacement principles embraced by Republican leaders in Congress has not been drafted and the budgetary process to pass such legislation in the Senate by a simple 51 vote majority (i.e., without Democratic support) can be cumbersome. The uncertainty has been further heightened by President-elect Trump's own remarks last Thursday, when Mr. Trump, following his meeting with President Obama, expressed an openness to consider retaining some of the positive aspects of ACA such as the ban on denying health insurance coverage to individuals with pre-existing health conditions and the ability of parents to maintain health insurance coverage for their adult children up to age 26. The President-elect further commented at that time that the pathway to achieving his ACA objectives could be through amending ACA or, alternatively, would involve repealing and replacing ACA.

Today, ACA is responsible for covering approximately 20 million individuals through a combination of health insurance offered through state-based and federally-run Exchanges and the expansion of Medicaid coverage (in those 19 states which elected to do so) to newly-eligible individuals with incomes up to 138% of the federal poverty limit. Statistics show that ACA has reduced the number of uninsured Americans to an historic low of approximately 8.9% of the U.S. population. In view of the millions of Americans enrolled in ACA coverage, it is widely believed that any repeal legislation would need to include a period of, perhaps, two years to permit an orderly transition to new health insurance coverage and subsidy options, which likely could be available under a replacement plan but at a lesser level than ACA provides. This view also has been rejected by some Republican lawmakers and conservative think tanks that prefer ACA be abruptly rendered moot as soon as possible to halt the adverse economic impact and excessive regulatory and tax burden which they contend ACA has wrought.

## What Might ACA Repeal and Replacement Options Look Like?

There are several approaches which may be used, alone or in combination, to repeal or dismantle ACA once Donald Trump is sworn in as President of the United States. Despite the Republicans' unified call to immediately scrap ACA, a full repeal of ACA – including the health insurance market reforms (e.g., guaranteed issue, prohibitions on pre-existing conditions, limited underwriting and rating bands, nondiscrimination prohibitions, essential health benefit requirements, medical loss ratio and more), employer coverage requirements, Medicare Advantage program payment reforms, health care provider payment and delivery system reforms and enhanced program integrity requirements – could take considerable time (some believe up to two years) to pass since it may need to garner support from a filibuster-proof vote of 60 in the Senate. An ACA replacement bill that addresses only a portion of the wide swath of areas covered by ACA could take as long for the same reason. And, it is unknown whether the current thinking on the scope of ACA replacement legislation would tackle only private health insurance, leaving solutions for Medicare and Medicaid for future legislation or attempt to replicate the broad coverage attempted by ACA.

Another approach could be that Congress re-introduces a bill similar to *Restoring Americans' Healthcare Freedom Reconciliation Act of 2015* (HR 3762) which defunded key parts of ACA. In addition to the repeal of taxes imposed on individuals and businesses under ACA, HR 3762 would have restricted federal funding of the Exchanges and phased out both Medicaid expansion and subsidies for private health insurance over a two-year period. The current Congress' parliamentarian ruled that HR 3762 could not repeal health insurance market reforms which were outside of the bounds of federal budgetary considerations (i.e., they were matters of policy unrelated to the federal budget). Still, HR 3762 was passed by the Senate through the budget reconciliation process which only requires the vote of 51 Senators. Although President Obama vetoed HR 3762 in January of this year, a President Trump may have no reason to. This defunding approach could be accomplished more quickly (i.e., in the first year) and likely would be viewed as a legislative accomplishment for a new President and the new Congress. Still, we would anticipate seeing a transition period comparable to that of HR 3762 to allow time for replacement legislation to be drafted, negotiated and passed in Congress, likely with the need of a 60-vote super-majority in the Senate.

Lastly, there do remain 'Day One' actions that President-elect Trump can take to fulfill his campaign promise. On Inauguration Day, then President Trump could sign Executive Orders to eliminate some of the more controversial interpretations of some of ACA's provisions (e.g., contraceptive coverage) or cause his Administration to stop implementing or enforcing certain ACA regulations issued during the past six years. Also, the Trump Administration could stop defending the lawsuit brought by House Republicans challenging the availability of federal subsidies to defray the cost of health insurance premiums for low income Americans. On the other hand, one health policy analyst suggested that, perhaps, health insurance companies and outside groups could intervene to keep these and potentially other lawsuits going. He, other commentators and some members of Congress believe it would be imprudent for the new Administration and Congress to abruptly end ACA health coverage and funding without replacement options for the millions of Americans who are covered by Exchange health insurance policies and Medicaid expansion options.

Although Republicans from both chambers of Congress have offered proposals that could be developed into ACA replacements, and Mr. Trump's health reform proposals remain largely consistent with those congressional proposals, traction seems to be gaining for Speaker Paul Ryan's "A Better Way" report to serve as a blueprint for ACA replacement legislation. From among the various ACA health insurance market reforms, *A Better Way* would preserve prohibitions on pre-existing condition exclusions and require guaranteed issue coverage if the consumer maintained continuous insurance coverage during the preceding year. *A Better Way* would extend modest tax benefits to individuals in the form of refundable tax credits that consumers could apply to reduce the cost of their health insurance policy. Individuals who choose a health plan that is less expensive than the tax credit could retain the difference in a health savings account. The use of health savings accounts is expanded under Ryan's plan in an effort to incent consumers to make smarter choices with their own funds. Other key features of *A Better Way* are support for state-level high risk pools for those who could not afford traditional health insurance coverage and the ability of health insurers to sell their insurance products across state lines in an effort to foster greater price and benefit competition in the individual insurance market. However, the Speaker's proposals have not yet been embodied in draft legislation.

In view of the number of topics that *A Better Way* covers, it could yield a complex piece of legislation that takes some time to wind its way through Congress. Although, next year, Republicans will control both the Executive and Legislative branches of government, *A Better Way* or some other ACA replacement model will still undergo scrutiny as partisans, Congressional Democrats and various health care industry participants (i.e., from health insurers to hospital systems, physicians, pharmaceutical companies, consumer groups and others) evaluate actual legislative language and the relative value of intended and unintended consequences of a concrete legislative proposal.

It would be a mistake, however, to assume that, because of the unwieldy nature of the legislative process, President-elect Trump's promise to repeal and replace the ACA will not come to fruition. Mr. Trump's popularity will be at its highest immediately after his swearing in. Mr. Trump has reiterated, since his election, his intention to repeal or change the ACA. The appointment of Breitbart head, Steve Bannon, as a senior White House advisor in the Trump Administration also signals that Mr. Trump will be consistently reminded of the promises that got him elected – his ACA promises foremost among them – and his need to act on those promises in order to maintain the support of his base. Taken together with the united leadership of Senate Majority Leader McConnell and House Speaker Ryan on this issue, there will not be a better time to repeal the ACA than in the initial months of Mr. Trump's presidency. It is also important to note that the incoming Senate Minority Leader, Chuck Schumer, has a longstanding relationship with Mr. Trump, and even received campaign donations from him in previous years. Although the Democrats' opposition to ACA repeal will be strenuous, there is certainly a possibility that President-elect Trump will use his relationship with Leader Schumer to his advantage and appease him through concessions on other issues such as immigration reform or infrastructure legislation.

## Other Aspects of Health Reform

It is also anticipated that Medicare and Medicaid will be prioritized by the next Administration. As part of any *full ACA*

repeal strategy, Congress will need to develop a transition plan to address ACA Medicaid expansion and the ACA quality and payment reforms now incorporated into the Medicare Advantage program and traditional, fee-for-service Medicare. There are current proposals that convert Medicare into a support program whereby seniors would be given an allowance to obtain services from traditional Medicare or purchase Medicare Advantage plans. And, both the Trump and Ryan plans would turn Medicaid into a block grant program, giving states autonomy (and financial responsibility) to determine how to spend a fixed amount of money overall on its Medicaid eligible citizens (irrespective of the number of eligibles) or a fixed amount of money per Medicaid eligible. The impact of the block grant proposals on long term care services, Medicaid reform and safety net providers cannot yet be estimated.

The other considerations which remain include whether the Trump Administration will embrace value based purchasing consistent with the provider payment and delivery system models now authorized by ACA, including the roll of the Centers for Medicare and Medicaid Innovation. And, although passed earlier this year in a bipartisan fashion, we will have to wait and see whether the Trump Administration fully embraces the alternative payment models and financial incentives now available under the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) for health care professionals participating in traditional, fee-for-service Medicare, and which are hoped to drive increased provider participation in risk-bearing coordinated care models across all payors (i.e., Medicare Advantage, Medicaid and commercial payors). Notably, Speaker Ryan's reform package contemplates closing the

Centers for Medicare and Medicaid Innovation, which suggests that many of the ACA's delivery system reform efforts would be abandoned.

Even with the early focus since Election Day on the dire fate of the ACA, many questions remain as to the means of repealing ACA and the legislative efforts, timing and details to achieve a full replacement of ACA. Thus, it's too early to determine whether the Trump Administration will herald in a brand new era of health reform or whether ACA's replacement will rely on familiar policies and consumer protections, but with a greater reliance on market-based solutions to hold down health insurance premiums and consumer out-of-pocket costs as opposed to ACA's regulatory approach aimed at achieving similar goals.

Despite Republican control of the Executive and Legislative branches of government starting January 20, 2017, we should expect health care industry participants and the Democratic minority to play an important role in shaping further health reform initiatives as well.

Over the coming months, Locke Lord's health care attorneys and Washington DC Federal Policy Group will bring you updates as health care policy and legislative efforts are shaped under the new Administration of President-elect Trump and the 115th Congress.

We hope you find this newsletter useful. Please contact the author or any member of the Health Care Core Group or Federal Policy Group listed below if you have any questions on the topics covered.

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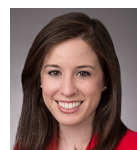


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