The Trump Administration: The Future of Health Care

December 6, 2016

The election of Donald J. Trump as the 45th President of the United States, along with the Republican control of the majority of both the House of Representatives and the Senate, will likely set in motion a major overhaul of the nation's health care system. As a candidate, President-elect Trump strongly echoed calls to “repeal and replace” the Patient Protection and Affordable Care Act (“ACA”) and also called for other reforms that would potentially affect Medicaid funding, pharmaceutical regulation, and the health insurance industry. Given the relative lack of detail in his policy proposals, it remains to be seen what specific health care policy changes the Trump Administration will present when President-elect Trump takes office in January 2017. However, a number of sources provide guidance as to potential policy proposals, including: (i) the Health Care page on the GreatAgain.gov website, (ii) the Health Care page on the Donald J. Trump campaign website, (iii) the 2016 Republican Party Platform adopted by the delegates to the Republican National Convention, (iv) House Republicans’ “A Better Way” healthcare reform plan, (v) H.R. 3762, 114th Cong. (2016), a reconciliation bill that would have, had it not been vetoed by President Barack Obama, effectively repealed certain provisions of the ACA, and (vi) the Empowering Patients First Act, a bill put forward by Congressman Tom Price, President-elect Trump’s designated nominee for Secretary of Health and Human Services (“HHS”). This memorandum covers the various areas of potential change within the nation's current health care system that may be brought about by the Trump Administration, as well as the potential implications of such change.

The Affordable Care Act

The Current Law

The ACA, enacted by President Obama on March 23, 2010, was designed to increase access to quality and affordable health care by (i) providing subsidies to help low and middle income individuals to purchase private health insurance, and (ii) expanding Medicaid coverage to individuals under 65 with incomes up to 133 percent of the federal poverty level who were previously ineligible. In order to facilitate a market for the purchase of health insurance by low and middle income individuals, the ACA mandated the creation of health insurance exchanges offering
qualifying health plans in each state (and federal default exchanges). Individuals who met a certain income threshold yet chose to remain uninsured faced a tax penalty.

In 2012, in response to legal challenges to the ACA, the United States Supreme Court upheld the individual mandate but made Medicaid expansion voluntary. Thirty-one states and the District of Columbia expanded Medicaid voluntarily, with those states that declined to do so citing cost concerns as a primary factor. Under the ACA, the federal government covers the entire cost of Medicaid expansion through 2016, decreasing to 97 percent in 2017 and 90 percent in 2020 and thereafter. Nonetheless, numerous states continue to decline the Medicaid expansion under the ACA.

The Proposed Changes to the Law

Republicans have been nearly unanimous in their opposition to the ACA, especially with regard to eliminating the individual mandate provision. The proposal articulated by President-elect Trump with respect to the ACA on the Donald J. Trump campaign website is to “Completely repeal Obamacare.” However, reflecting the preference of many Republican lawmakers, President-elect Trump has indicated that he is in favor of keeping certain aspects of the ACA, including both the requirement that insurers offer coverage to people with pre-existing health conditions and the provision allowing parents to keep children up to age 26 as dependents on their health insurance. He has not, however, stated whether he would be in favor of preserving other insurance-related consumer protection provisions of the ACA, such as the community-rating regulations that allow insurers to set premiums based only on age, smoking, and geography without considering sex or health status, and minimum standards for covered benefits.

The success of any repeal requires the Trump Administration to put forth a workable alternative that takes into account the difficulty in unwinding a major law in its sixth year of existence that currently provides insurance coverage for millions of Americans who may not be insured otherwise. Specifically, since its passage, approximately 22 million additional people have gained health insurance, 10 million of whom purchased health insurance on the state health insurance exchanges.

President-elect Trump’s specific proposals to “replace” the ACA are aimed at promoting consumer choice, stimulating competition, and enabling a wider range of health coverage options. His campaign platform contains the following proposals:

1. Removing the borders traditionally constraining health insurance markets by allowing insurers and consumers to market and purchase insurance across state lines;
2. Providing premium assistance in the form of a full tax deduction of premium costs; and

3. Expanding the use of flexible, tax-free health savings accounts.

Repeal Strategy – Budget Reconciliation

While Republican control of the majority of both the House of Representatives and the Senate makes major revisions to the ACA possible, Senate Republicans do not hold the “super-majority” of 60 seats in the Senate necessary to override any potential filibuster of legislation by Senate Democrats. Accordingly, a full repeal of the ACA is unlikely.

However, many of the central aspects of the ACA, including the individual mandate, are subject to the budget reconciliation process requiring only a simple majority in the Senate to pass. The budget reconciliation process enables Congress to effect substantive changes to law that affect spending, revenues, and the federal debt limit under strict procedural rules. Specifically, reconciliation can be used to address most entitlement programs, such as Medicare and Medicaid, but not Social Security.

Budget reconciliation would require the House and Senate to first agree on a budget resolution containing “reconciliation directives” to specified committees. Each committee that receives a directive prepares and adopts proposed legislation through a committee vote. If a committee fails to meet its budget targets, special procedures enable each chamber of Congress to fill any gaps before the bill goes to the full House or Senate for vote. However, provisions of reconciliation bills that are extraneous to the purpose of implementing budget changes may be blocked in the Senate. If it passes both the House and the Senate, the reconciliation measure is then presented to the President for signing.

In 2016, Congress unsuccessfully attempted to undo portions of the ACA using budget reconciliation. That bill, which passed both houses of Congress, but was vetoed by President Obama, would have eliminated: (i) the expansion of Medicaid coverage for adults up to 133 percent of the federal poverty level, (ii) subsidies for middle-income Americans to buy insurance in the state marketplaces, (iii) tax penalties for the uninsured, and (iv) many of the taxes created to fund the ACA program, including the “Cadillac” tax. The bill provided for a two-year period before such

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1 The House Republicans’ plan also looks to the tax code to aid consumers in affording health insurance, and such plan may possibly be adopted as a stronger alternative. Instead of a tax deduction, the House Republicans proposed in “A Better Way” to provide an advanceable, refundable tax credit adjusted for age to be used for purchasing health insurance. Any funds leftover after premium costs would automatically be applied to a health savings account.


3 While not a repeal of the “individual mandate” and the “employer mandate,” the bill eliminated the penalties associated with non-compliance.
provisions were repealed. This attempt ostensibly provides a blueprint for the Trump Administration, should it decide to dismantle the ACA through budget reconciliation.

**Potential Impact**

If the Trump Administration follows through with its plan to repeal major portions of the ACA, without replacing them with measures that would preserve health care insurance for those currently covered, the market impact of millions of people losing insurance would be significant. Hospitals and insurance companies would likely be affected negatively. For hospitals, increased insurance under the ACA has led to greater demand for care, increased revenue, and lower uncompensated care provided to the uninsured. In addition, insurers could lose millions of customers, both from the individual market and under state Medicaid programs.

The problem of “adverse selection” may become more pronounced without an individual mandate provision, as it is likely that some individuals may not purchase insurance unless and until they need it. If the Trump Administration remains committed to eliminating the individual mandate but chooses to maintain the requirement that insurers offer coverage to people with pre-existing conditions, significant risk-pool problems could arise, with insurers being forced to cover a sicker and more costly population without attracting enough healthy enrollees. Indeed, the ACA’s coupling of the individual mandate and the pre-existing condition rule was meant to address this problem.

**Changes Outside of the ACA**

President-elect Trump’s campaign platform also includes proposals addressing Medicaid, Medicare, and pharmaceutical regulation and pricing.

**Medicaid Policy**

Currently, federal Medicaid funding to the states is determined by the federal Medical Assistance Percentages (“FMAP”), which use measures such as per capita income to determine the amount of federal matching funds provided to the states. According to this guideline, for every $1 in state funds spent on Medicaid, states can draw at least $1 additional from the federal government based on the FMAP minimum, up to as much as $2.85 in certain states. As a result, there is no ceiling on federal Medicaid expenditures. Because the current system for financing Medicaid concerns budget outlays and appropriations, numerous Congresses have attempted to alter it through the budget reconciliation process.

The Republicans, President-elect Trump included, envision shifting more control to the states in order to maximize “state flexibility.” President-elect Trump proposes to “block-fund” Medicaid, pursuant to which states would be required to administer their Medicaid programs with a fixed
amount of federal funding. The intended result is to make states more prudent in the administration of Medicaid and create a greater incentive to eliminate fraud, a perennial concern of many Republicans. House Republican’s “A Better Way” proposal is broader and offers the states a choice between a per capita allotment or a block grant to fund care provided under Medicaid. These reforms could have a significant budget impact on states. The states that have expanded Medicaid under the ACA generally stand to see a negative impact, which may require such states to restrict eligibility and/or limit benefits within their respective Medicaid programs.

Medicare Policy

President-elect Trump’s campaign website and his GreatAgain.gov transition website are largely silent with respect to addressing Medicare, with references to “modernizing Medicare.” Because the Republican Party Platform and the House Republican’s proposals are intended to expand consumer choice, also a dominant feature in President-elect Trump’s proposals, it is possible that the Trump Administration would closely consider such proposals or adopt them entirely.

Payment Structure

Currently, Medicare provides two general options for beneficiaries: traditional Medicare or Medicare Advantage. In traditional Medicare, reimbursement is made to providers through a fee-for-service system. Medicare Advantage, on the other hand, allows beneficiaries to enroll in private insurance plans approved by Medicare. Medicare pays the private insurance plan a monthly capitated fee. The Republican platform broadly calls for introduction of an alternative option to traditional Medicare, a “premium-support model designed to strengthen patient choice, promote cost-saving competing among providers, and better guard against fraud and abuse . . .” Although Medicare has been partly privatized through the Medicare Advantage Program, the House Republicans’ proposal clarifies that this option would offer a range of different coverage plans, unlike Medicare Advantage, which requires identical benefits be offered to all beneficiaries regardless of differences in health status.

Value-Based Care

The ACA included a series of reforms to the way in which Medicare reimburses health care providers, which were designed to decrease utilization and increase quality through broader provider integration, capitated payments and coordination of care. This was consistent with the seemingly wide consensus over the need to tie Medicare and Medicaid reimbursement to quality measures. Medicare Advantage, for example, is looked upon favorably by most Republicans and is lauded as a successful model of promoting value-based care in the House Republicans’ reform plan. However, because of the interplay between the ACA and its emphasis on accountable care, a complete repeal of the law would also mean ending important initiatives to promote and develop
successful models for value-based care, a key example of which is the ACA-funded CMS Innovation Center which was created by the ACA for the purpose of testing innovative payment and service delivery models to decrease expenditures while preserving or enhancing the quality of care for beneficiaries of Medicare, Medicaid or Children's Health Insurance Program. The House Republican's proposal contemplates eliminating the CMS Innovation Center and shifting the role of developing innovative payment and service delivery models to the states by promoting state innovation grants. Congressman Price has been a vocal opponent of certain mandatory “bundled payment” initiatives. Notwithstanding any repeal of the ACA, it is likely that the market-place drivers of value-based care and pay-for-performance will continue to push the health care payors, public and private, in this direction.

Drug Regulation and Pricing

Similar to President-elect Trump's proposals related to health insurance, it is likely that the Trump Administration will also seek to remove barriers to open competition in the pharmaceutical market. Specifically, the President-elect has called for allowing the importation of drugs from abroad, and the first 100 day plan includes “cutting the red tape at the FDA” in order to speed up the process for “over 4000 drugs awaiting approval.” President-elect Trump has also called for allowing Medicare to take advantage of its market power and negotiate directly with pharmaceutical companies for lower rates.

Appointment of Tom Price

On November 29, 2016, the Trump Administration stated that it would appoint Congressman Tom Price as Secretary of HHS and Seema Verma, a health-care consultant, to run the Centers for Medicare and Medicaid Services (“CMS”).

HHS is an executive level agency responsible for administering federal health care programs and executing laws under its authority. It oversees over 100 programs nationwide and implements parts of the ACA that deal with private and public health insurance. HHS also regulates and enforces laws related to health information privacy, clinical research, and civil rights. HHS is headed by the Secretary. It is the overseeing agency of a number of sub-agencies, including the Food and Drug Administration and CMS, which administers the Medicare program and along with the states, Medicaid and Children’s Health Insurance Program. Both the Secretary of HHS and the Administrator at CMS are appointed by the President and confirmed by the Senate and serve without fixed terms.

Congressman Price is the U.S. Representative for Georgia's 6th congressional district, serving since 2005. He currently serves as chairman of the House Budget Committee and was previously chairman of the Republican Study Committee and the Republican Policy Committee. A former
physician and veteran lawmaker, he has been a staunch critic of the ACA. Price has proposed legislation that, if passed, would have replaced the ACA.

First introduced in the 111th Congress, the Empowering Patients First Act sponsored by Price has as its first provision the repeal of the ACA. In its place the bill would provide for a tax credit and deductions to offset the cost of insurance. In addition, the bill would allow individuals to opt out of Medicare, Medicaid, and other government payment programs and instead receive a tax credit to purchase health insurance, without losing Social Security benefits. The legislation also calls for the promotion of state-based high-risk insurance pools and the creation of individual and small employer membership associations and association health plans. Other aspects of the bill are similar to proposals put forth by House Republicans, including the “A Better Way” proposal.

As Secretary of HHS, Congressman Price will have significant influence in shaping the administrative agenda of the agency. Congressman Price would be in a position as Secretary to exert significant input in developing the legislation to replace of the ACA. It would then fall to HHS to draft most of the rules needed to implement whatever legislation is passed. We anticipate that any replacement to the ACA, like the ACA itself, would require significant regulatory input to address the numerous detailed aspects of insurance regulation, Medicare, Medicaid, and other elements.

**Centers for Medicare and Medicaid Services**

CMS has responsibility over the administrative simplification standards under the Health Insurance Portability and Accountability Act, quality standards in long term care facilities and laboratories, and oversight over HealthCare.gov, the website operated by the federal government to facilitate the health insurance exchanges under the ACA. CMS is authorized to formulate rules through notice and comment and has thereby implemented numerous significant administrative rules impacting many facets of health care. Importantly, CMS works with states in connection with the expansion of Medicaid under the ACA.

Seema Verma is the CEO of a health policy consulting firm who has worked in designing Medicaid expansion in a number of Republican leaning states, including Indiana and Kentucky. As head of CMS, Verma would be in position to set the policy agenda of the agency in line with the Trump Administration. In particular, CMS would be in charge of implementing reforms to Medicare and Medicaid such as switching to a block grant system, which the Trump Administration has proposed. If the ACA were to remain, CMS would have significant control over the waiver process pertaining to the expansion of Medicaid.

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Takeaways

While the election of Donald J. Trump as the 45th President of the United States, along with the Republican control of the majority of both the House of Representatives and the Senate, will result in changes to ACA, a full repeal of such legislation is unlikely and any changes will likely be phased in over at least a two year period. This is in part due to the complexity of drafting an alternative that addresses the concerns of individual consumers, health care providers, and insurance companies. We will continue to monitor changes in legislation or agency rulemakings and policies that will impact the health care marketplace.

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