



Election 2016: Early Insights for Stakeholders

Health Care Compliance Association
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Agenda

- Post Election Update
- Key Issues for 2017 Repeal/Replace
 - Executive Actions
 - Congressional Review Act
 - Budget Reconciliation
 - Major ACA replace concepts
 - Letter to Governors and Insurance Commissioners
 - Process Questions
 - Other Key Issues for 2017

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HHS Nominations: Secretary Tom Price, MD



- Chair of House Budget Committee
- GOP Representative from GA since 2005
- Orthopedic surgeon
- Author of a replacement plan, parts of which Speaker Ryan incorporated into the GOP's plan
 - Age-based tax credit to help people buy insurance
 - A cap on how much employers can spend on providing health care before they are taxed
 - Allowances for higher charges for people with preexisting conditions
 - A full repeal of Medicaid expansion

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HHS Nominations: CMS
 Administrator Seema Verma



- Owner and CEO of SVC Inc. – health policy consulting firm
- Vice-president of planning for the Health & Hospital Corporation of Marion County
- Director with the Association of State and Territorial Health Officials
- Helped to design Medicaid expansion waivers in: Indiana, Iowa, Ohio, Kentucky
- Helped design Tennessee’s coverage expansion proposal
- Provided technical assistance for Michigan’s expansion

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Congressional Leaders on Repeal/Replace

- Committee Chairs and Ranking Members
 - Leadership: Ryan, Pelosi
 - SFC: Hatch, Wyden
 - HELP: Alexander, Murray
 - E&C: Walden, Pallone
 - W&M: Brady, Neal

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**Key Issues for 2017:
 ACA Repeal/Replace**

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Executive Actions

- Executive orders
 - Rescind existing orders; issue new orders
 - Executive orders may be challenged in court
- Non-enforcement policies
 - In general, executive branch decisions with respect to where/how to spend enforcement resources are not subject to judicial review
 - Case law also recognizes limits, such as where the action is such that the agency is considered to have abdicated its statutory responsibilities

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Executive Actions (cont'd)

- Hold on regulations currently in progress
- Changes to final regulations
 - Generally, APA would apply
 - Case law recognizes a basis for challenge of retroactive changes, e.g., where the change interferes with a reasonable reliance interest of those affected
- Changes to sub-regulatory guidance

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Congressional Review Act

- Allows Congress to “disapprove” final regulations issued by prior Administration published **60 legislative days** before adjournment.
- Requires majority vote, filibuster-proof, and does not need to go through normal committee process; President’s role is signing the “resolution of disapproval.”
 - Invalidates entire rule, not a single or select provisions of it.
- Disapproval of the Labor Department’s overtime rule is a key priority
 - Estimates are that Congress would need to adjourn by Dec. 9 for CRA to apply to this rule (issued on May 23)
 - ACA section 1557 regulations were published in the Fed Reg on May 18

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Repeal and Replace Affordable Care Act

- Overhaul promised by incoming President-Elect
 - But interest in keeping pre-existing condition protections and 26 and under policy
- Senate Majority Leader McConnell predicts swift action
 - "I would be shocked if we didn't move forward and keep our commitment to the American people"
- But cautionary statements follow
 - "We are not going to rip health care away from Americans" – Rep. Kevin Brady
 - "I imagine this will take several years to completely make that sort of transition –to make sure we do no harm" – Sen. Lamar Alexander
- ACA repeal (at least partial) could be accomplished early in the session through reconciliation
 - Replacement could take longer ("repeal and delay")/transition period
 - "The view on that is in a constant state of evolution based on who you talk to ... [T]he question is what's the duration?" – Sen. John Thune (no. 3 GOP leader)

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Reconciliation 101

- Reconciliation
 - Reconciliation bills are considered by the full House and Senate under expedited procedures. In the Senate, reconciliation bills can pass with only a simple majority and are not subject to filibuster. Debate is limited to 20 hours and amendments must be germane to the bill. Senators may block provisions that are determined to be "extraneous" to the bill's basic purpose of **implementing budget changes** – the "Byrd Rule." House and Senate leaders must first pass budget resolutions containing "reconciliation instructions."

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Reconciliation Implications

- Reconciliation is an imperfect but expeditious mechanism for Congress to repeal, defund or delay the ACA
- Has potential to destabilize the mix of mandates and subsidies designed to achieve universal coverage
- Insurance reforms (GI, Pre-X, 26) are tenuous and subject to being tossed out, BUT
- Premium tax credits and cost sharing reductions, Medicaid expansion and DSH payments all likely nixed, jeopardizing ACA structure
- Obama Administration and veto power only impediment to action; GOP White House + GOP Congress = higher likelihood of reconciliation success

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Model for Repeal through Reconciliation

- HR 3762, vetoed by President Obama in January 2016
- Repealed the individual and employer mandates, premium tax subsidies, other ACA taxes and fees, Medicaid expansion (and a few other changes)
- After the House first approved H.R. 3762, the Senate parliamentarian ruled that the bill's provisions to repeal the individual and employer mandates were extraneous under the Byrd rule, so the Senate version kept the mandates but eliminated the penalties for noncompliance
- Delayed effective dates
- Most of the rest of the ACA was left intact, including the major market reforms
- House and Senate must first pass budgets before reconciliation takes place

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ACA Replace Concepts

- Market-oriented approach, with emphasis on consumer driven model
- Specific proposals include-
 - Trump plan <https://www.donaldtrump.com/positions/healthcare-reform>
 - House Republican blue print on health care reform <http://abetterway.speaker.gov/assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf>
 - The bi-cameral CARE Act, co-sponsored by House Energy and Commerce Committee Chrmn. Fred Upton (R-MI) (term limited in 2017), Senate Finance Committee Chrmn. Orrin Hatch (R-UT), and Sen. Richard Burr (R-NC), <http://www.finance.senate.gov/chairmans-news/burr-hatch-upton-unveil-obamacare-replacement-plan>
 - Tom Price (R-GA) current House Budget Committee Chair, and HHS nominee, Empowering Patients First Act, HR 2300. <https://www.congress.gov/bill/114th-congress/house-bill/2300>

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ACA Replace Concepts (cont'd)

- Expand Health Savings Accounts (HSAs)
- Foster defined contribution approach to employer health plans
- Allow small employers (and others) to form association health plans
- Funding for high risk pools
- Provide refundable tax credits for the purchase of health insurance
 - Credit amount could be a specified dollar limit; if price of insurance is less than the credit, the excess could go into an HSA
 - A deduction for the cost of health insurance is also possible
- Repeal the Cadillac plan tax, and instead -
 - Impose a cap on the amount of health coverage employees can exclude from income

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ACA Replace Concepts (cont'd)

- Some federal level requirements may still apply, such as –
 - Required coverage of dependent children until age 26
 - Prohibition on exclusions for pre-existing conditions
 - Prohibition on rescissions
 - Prohibition on lifetime limits on benefits (annual limits may be permitted)
 - Essential health benefits
- Persons with continuous health coverage could have protection from individual underwriting due to health status
- Preemption of state law
 - Allow health insurance to be sold across state lines
 - Express preemption provisions
- Foster State high risk pools for individuals who find themselves priced out of coverage
- Transition Issues

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Letter to Governors and Commissioners

- On December 2, House leaders wrote to state governors and insurance commissioners seeking input and recommendations:
 - What changes should Congress consider to grant more flexibility to states to provide options and lower premiums?
 - What legislative and regulatory reforms should Congress and the incoming administration consider to stabilize the individual, small group and large group markets?
 - What are key administrative, regulatory or legislative changes you believe would help you reduce costs and improve outcomes in your Medicaid program?
 - What can Congress do to preserve employer sponsored insurance and reduce costs?
 - *As part of returning more choice, control and access to the states and your constituents, would your state pursue establishing a high-risk pool if federal law were changed?*

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Governors and Commissioners (Continued)

- What timing issues, such as budget deadlines, your legislative calendar, and any consumer notification and insurance rate and form review requirements, should we consider while making changes?
- Has your state adopted any of the 2010 federal reforms into state law? What impact would repeal have on these state law changes?
- Responses due January 6, 2017
- Governor and commissioner from every state to meet in Washington early in new year.

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Process Questions

- Repeal could occur quickly through reconciliation (requires only 51 votes) but budgets need to be voted on first
 - How far does reconciliation go?
- How long if at all does GOP leave for transition
 - Freedom Caucus = limited transition: "The sooner we can get rid of it the better"
 - "We would like three years but in the House [some] insist on two," – Orrin Hatch (R-UT)
- Do Senate Democrats cooperate on replacement policies, which will likely need 60 votes
 - "If we repeal under reconciliation, we have to replace it under normal processes, and does anyone believe that the Senate Democrats, with their gentle tender mercies will help us?" – Rep. Charlie Dent (R-PA)
- Uncertainty could disrupt markets
- What role will states play to restore authority over insurance markets?

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December 6 AHIP Letter

- Eliminate HIT
- Make good on reinsurance payments
- Delay deadline for submitting 2018 Exchange products
- Adequately fund Medicaid
- Fund cost sharing subsidies
 - House case seeks to eliminate
 - Will Trump Administration continue to defend (unlikely!)
- Stricter rules on open enrollment periods and third party premium assistance

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Dec 7 AAA Letter

- Offering pre-x protections requires enrollment incentives
- Eliminating provisions encouraging enrollment would threaten stability
- Increasing risks could cause an increase in insurer withdrawals from the market
- Eliminating CSR subsidies could also cause insurers to withdraw from the market
- "Delaying the effective date of repeal while a replacement is worked out likely won't be enough to assure the stability and sustainability of the individual market."

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House v. Burwell

- House GOP succeeds in delaying appeal in *House v. Burwell* case challenging constitutionality of CSR subsidies
 - District Court ruled in favor of House because Congress had not appropriated funds
 - CSR subsidies available to individuals up to 250% of FPL – paid directly to plans
- If CSR subsidies are eliminated, insurers would have to raise premiums or exit the Exchange markets, which they are contractually able to do
- GOP could end litigation and let Trump Administration resolve the issue without market disruption

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Provider Implications

- Providers financed coverage expansion under ACA
- Unlikely past cuts will be paid back but advocates already seek financing assistance should repeal/replace lead to coverage losses
 - Restore DSH and other subsidy payments
 - End planned MBI and productivity adjustment cuts
- Delivery system reforms (MACRA) and work of CMMI, while potentially scaled back, likely continue but on more GOP terms
- Potential for medical liability reform

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Medicaid Reform

- Repealing Medicaid Expansion and enhanced FMAP
 - Enhanced FMAP available to states that expanded Medicaid; “expansion states” receive 100% federal funding for individuals “newly eligible” for Medicaid from 2014-2016; the matching rate phases down to 95% in 2017, 94% in 2018, 93% in 2019, and 90% thereafter
- Repeal would likely require a transition period and then new Medicaid policy. Potential outcomes include:
 - Enhanced FMAP goes away and states are only eligible for FMAP (statutory minimum of 50%; maximum of 83%); or
 - All FMAP goes away and states receive funding through alternative federal payments
- Block grants, per capita per member payments
- Allow states to pursue innovation waivers to design alternative coverage options

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Medicare Outlook

- **“Modernizing Medicare”**
 - Reference to *A Better Way* proposal and premium support
 - Could be included in a reconciliation vehicle
 - Combines Parts A and B and enhances Medicare Advantage
- **Significant and rapid change unlikely**
 - “I think President-elect Trump made it very clear in the course of the campaign that, as president, we’re going to keep our promises in Social Security and Medicare” – Vice President-elect Mike Pence
 - Medicare overhaul is “biting off more than you can chew” – Sen. Lamar Alexander
 - 2017 is a time for “taking steps, small, in preparing for larger steps to save Medicare for the long term” – Rep. Kevin Brady
 - “We say to our Republicans that want to privatize Medicare: Go try it. Make our day” – Senate Minority Leader Chuck Schumer

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Other Key Issues for 2017

- **In no certain order (but potentially done through reconciliation)**
- **Medicaid Reform**
 - Block grants or per capita caps; strong signal of interest and activity from Verma nomination
 - Give states innovation waivers to design alternative coverage options
- **Medicare Reform**
 - Despite campaign rhetoric to the contrary, Trump plan now includes “modernizing Medicare” – reference to the Ryan “Better Way” proposal and premium support. Could be included in reconciliation vehicle if there is one.
 - Modernizes Medicare by combining Parts A&B and enhancing Medicare Advantage
- **Children’s Health Insurance Program (CHIP)**
 - Medicare and CHIP Reauthorization Act of 2015 (MACRA) reauthorized CHIP through September 30, 2017; watch for action by June since most state budgets begin on July 1st
 - Could be a legislative vehicle for Medicare and Medicaid policies and extenders
 - Community Health Center Reauthorization

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Nov 22 Heritage Foundation Issue Brief

- Authors are now involved with HHS transition duties
<http://report.heritage.org/ib4631>
- Maximize the reconciliation process for repeal
- Execute aggressive regulatory rollback
- Accelerate state level action to restore authority over health insurance markets
- Begin the process for replacement
 - Adopt by 2017 for plan year 2019
 - Equalize tax treatment
 - Develop common market reforms
 - Modernize Medicare and Medicaid

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