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Trumping Obamacare: Some Likely Effects of the Election on Health Care

Just last week, House Speaker Paul Ryan [acknowledged](#) that a Hillary Clinton presidency would have cemented the Affordable Care Act (Obamacare) into American life. With the election of Donald Trump, the future of Obamacare looks very different. While the Republican mantra of “repeal and replace” has a much likelier path to success, there are still tea leaves to be read about what will be repealed and/or replaced, and what will remain intact. This Alert discusses some of the likely effects of the Trump presidency on Obamacare specifically, and health care more generally.

Legislative Limitations on “Repeal and Replace”

Donald Trump’s promise to call a special session of Congress to repeal and replace Obamacare can succeed only partly without 60 votes in the U.S. Senate. Portions of Obamacare – essentially those dealing strictly with spending, revenues or the debt ceiling – may be repealed with a simple majority through the budget reconciliation process. A likely example would be eliminating the federal subsidies of individual healthcare coverage bought through the exchanges. The Congress passed such a [repeal bill](#) last year (vetoed by the President), which may provide a pretty good guide to what the Trump repeal would look like.

Other provisions of the law may not be susceptible to repeal in this way. Likely examples would be the “Sunshine Act” provisions requiring drug and device manufacturers to report payments to physicians and teaching hospitals, and the law’s private insurance market regulatory reforms.

In addition, House Republicans adopted a [road map for replacement](#) last summer. Replacement, however, would require new legislation, which in turn would require 60 votes in the Senate. For example, replacing the Obamacare subsidies with the House’s “Better Way” – refundable tax credits and health savings accounts – would require getting the agreement of a fair number of Democrats, meaning there would have to be negotiation and compromise if President Trump wants to repeal and replace Obamacare. Because President-elect Trump has been less than precise about what parts of Obamacare he would want to retain and what a replacement would look like, the repeal bill passed last year and the House road map may provide the best guide to what we could expect on Obamacare in the first 100 days of the Trump presidency.

A strong caveat to this prediction is that simply removing health insurance from the approximately 20 million Americans who have coverage through Obamacare could be a political nightmare for the new Congress and Administration, and could create chaos in the health care industry. It is unclear how much this will affect the ultimate shape of legislation, though it will almost certainly require a timed transition to the post-Obamacare world.

The remainder of this Alert explores each of these areas in greater depth.

Repeal

Through budget reconciliation, which requires only 51 votes in the Senate because of the limitation on debate that eliminates the possibility of filibuster, President Trump and his Republican allies could eliminate with simple majorities in both houses of Congress several of the key features of Obamacare. The [bill that Congress passed last year](#) likely would serve as a model for the reconciliation approach to repeal:

- Federal funding for the expansion of Medicaid, which presumably would lead many states to revert to their pre-Obamacare levels of coverage.
- Federal subsidies to middle-income Americans to buy health insurance on the exchanges, which would greatly increase the cost and eliminate a huge number of potential customers, which in turn would likely lead to rapid withdrawal of insurers from the exchanges.
- The tax penalty “mandate” that is intended to encourage people to buy health insurance.
- Other taxes intended to pay for Obamacare, including the medical device excise tax, the prescription drug maker annual fee, the Cadillac tax for high-cost plans, and the health plan annual fee.

On the other hand, portions of Obamacare that are not subject to the reconciliation process – a decision that ultimately is made by the Senate Parliamentarian, but that in broad strokes means everything that isn’t about spending, revenues, or the deficit – will require new legislation, which means 60 votes in the Senate. Provisions of this kind might include “Sunshine Act” (requiring drug and device makers to report their payments and transfers of value to physicians and teaching hospitals) and private insurance market reforms like the constraints on medical loss ratios (requiring insurers to limit their administrative expenses to 15% of the premium dollar).

Replace

Perhaps more significant, if the Trump plan is truly to “repeal and replace” Obamacare, the replacements would have to come through legislation that would require overcoming the Senate 60-vote impediment. The “[Better Way](#)” that House Republicans produced last summer contains familiar Republican ideas, some of which President Trump might be inclined to endorse, including:

- Everybody gets a tax credit to buy private insurance, which if not used can be deposited in a health savings account.
- Increased funding and other encouragements for Medicare Advantage.
- Transition Medicaid to a block grant (or per capita) program and transition Medicare to a voucher program, with certain protections for those nearing retirement.

Because replacement would require the votes of some Senate Democrats, some compromise would be required. Here it is difficult to speculate what the sausage-making would look like. As one possible example, while his discussion of healthcare this year has been more nuanced, in the past candidate Trump expressed support for universal health coverage, citing the Federal Employee Health Benefits plan as a model. Under that program, the federal government makes payments to private plans to insure federal employees. Although the plan is generally regarded as more expensive than Medicare, it is also popular because the benefits are regarded as good. There could be Democratic support for such a model. It is unlikely, however, that the tax credits contemplated under the House Republican “Better Way” would be sufficient to allow most of the people currently earning subsidies to afford this kind of coverage. So even if the new President is favorable, it is questionable whether the idea of tax-supported premium subsidies for health insurance would be sufficiently popular with Republicans in Congress.

Retain

Finally, certain provisions of Obamacare are broadly popular, and it seems highly unlikely that Republicans would even attempt to repeal them. Candidate Trump mentioned his support for maintaining the prohibition on denial of coverage for pre-existing conditions. The House Republican “Better Way” agrees, and also would retain the following features:

- Protection for children to stay on their parents' plans through age 26.
- Prohibition on plans' ability to cancel or non-renew a policy due to the beneficiary's illness.

Other Implications: Value-Based Healthcare

While the House Republican "Better Way" calls for eliminating the Center for Medicare and Medicaid Innovation, the concepts of population health management and value-based healthcare – essentially, making health insurance payment depend more heavily on outcomes and paying for the quality of care provided rather than the number of procedures – pre-existed Obamacare and are broadly perceived as ways to "bend the cost curve." Another potential area for negotiation, then, could be additional grant or demonstration programs to test out market-based innovations. Likewise, the popularity of value-based healthcare has been leading to considerable consolidation within the healthcare industry, as hospitals, doctors, other providers, and makers of medical products seek to integrate to better control costs and provide a valuable patient health experience. There is little reason to think at this point that a Trump presidency would change this direction of the healthcare industry.

Conclusion

While the Trump presidency almost certainly means the demise of many features of Obamacare, legal and political considerations suggest that some popular provisions will survive, and that the process of obtaining repeal of other provisions may present room for genuine bipartisan cooperation. We will all be watching closely to see what the president-elect and key members of Congress have to say about this over the next several weeks and months.