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# ACA Watch

Highlighting Issues and Events Affecting Health Reform in California

## About ACA Watch

After six years of vigorous implementation of the federal Affordable Care Act (ACA), California cut the number of uninsured in the state by half and embarked on reforms and system transformations touching all aspects of the state's health care delivery system.

In the wake of the 2016 Presidential election, California's reform progress, and progress around the country, is at risk. President-elect Trump, and Republican members of Congress now in the majority in both houses, campaigned on a platform of repealing and replacing the ACA. It is, however, far from clear what comes next.

As the federal repeal and replace debate unfolds, ITUP's ACA Watch will periodically highlight emerging federal proposals, congressional and administrative actions and potential impacts for health care and health reform in California.

## Uncertain Future for the ACA

### FAQs on Repeal and Replace

While the President-elect committed to "repeal and replace" the ACA during the campaign, he has also recently indicated his desire to retain key ACA provisions, such as the prohibition against insurers excluding or limiting coverage for people with pre-existing health conditions and the requirement allowing dependents to age 26 to continue coverage under their parent's plan.

In addition, Congressional rules and procedures, as well as disagreements within the Republican Party, make the timing and method for repeal, and the elements of any ACA replacement, uncertain, with new policy and political possibilities unfolding daily.

This set of Frequently Asked Questions (FAQs) outlines key issues and procedural questions controlling the options and strategies federal officials have for moving forward with any ACA repeal.

#### 1. Can the current Congress repeal the ACA in its entirety?

Most likely the ACA will not be completely repealed, though substantial portions of the Act are at risk of repeal through the budget reconciliation process discussed in Question #2 below. Under the current rules of the Senate (which can be altered by a majority vote), it takes 60 votes in the Senate to end debate and proceed to a vote on a bill not created as a part of budget reconciliation. That means in the current Congress at least eight Democrats would be required to support the Republican agenda to reach 60 votes and end any filibuster.

In light of the current makeup of the Senate, any significant repeal or amendment of the ACA through the general legislative process would require some Democratic support and compromise. Significantly, many Republicans believe that moderate Democrats who are running for re-election in 2018 in conservative states may be supportive of Republican efforts to rollback or repeal portions of the ACA.

#### 2. What is the budget reconciliation and what can Congress change or repeal through the budget reconciliation process?

The reconciliation process was created by the Congressional Budget Act of 1974 and allows Congress to change existing laws to conform to the tax, spending and debt levels enacted in the budget. A budget reconciliation bill is not subject to filibuster in the Senate and therefore needs only a majority vote of the Senate (51 votes) to be heard and voted upon. If a reconciliation bill is passed, it is then sent to the President for signature or veto.

#### 3. What parts of the ACA can technically be repealed by Congress as part of budget reconciliation?

Those parts of the ACA that impact spending, revenue or the debt limit, which would include:

- Individual and employer mandate penalties;
- Medicaid expansion;
- Premium subsidies and small business tax credits;
- Cost-sharing reductions;
- Taxes, such as the Health Insurance Tax;
- Limits on the use of Health Savings Accounts, Flexible Spending Accounts (FSAs), and Medical Savings Accounts (MSAs) to purchase over the counter medications; and
- Limits on annual contributions to FSAs.

In 2015, Congressional Republicans sought to repeal these same provisions in budget reconciliation legislation (H.R. 3762), subsequently vetoed by President Obama, which could serve as a model for future ACA repeal legislation. The “Restoring Americans’ Healthcare Freedom Reconciliation Act of 2015,” did not repeal Obamacare in its entirety. Instead it affected key features of the ACA necessary to make the whole system work. It would have:

- Restricted the federal government from operating health care exchanges;
- Phased out funding for subsidies to help lower and middle-income individuals afford insurance through the health care exchanges;
- Eliminated tax penalties for individuals who do not purchase health insurance and employers with 50 or more employees who do not provide insurance plans;
- Eliminated taxes on medical devices and the so-called “Cadillac tax” on the most expensive health care plans; and
- Phased out the expansion of Medicaid over a two-year period.

#### **4. Are there elements of the ACA that cannot be repealed through the budget reconciliation process?**

Yes. Everything that does not involve spending, taxing or the deficit must go through the regular legislative process and is subject to filibuster in the Senate. Provisions of this kind that were not included in the 2015 reconciliation bill include, for example: private market reforms, such as limits on medical-loss ratios, prohibition on pre-existing condition exclusions, and premium rating rules limited to age within specified limits, family size and geography; the requirement that health plans in the individual and small group markets must offer “essential health benefits” at a minimum; and the prohibition on annual and lifetime dollar limits on coverage for essential health benefits.

#### **5. What type of reforms is President-elect Trump contemplating?**

It is too early to tell precisely what the President-elect will actually propose related to ACA repeal. His website at one point stated unequivocally that the individual mandate must be eliminated: “No person should be required to buy insurance unless he or she wants to.” According to his more detailed **health care plan**,<sup>1</sup> he would replace the ACA with tax-free health savings accounts that would be available to all family members, accumulate over time, and be transferable, tax-free to all heirs. Mr. Trump also seeks to allow insurers to sell policies across state lines and individuals who buy insurance to deduct the premiums on their tax returns. Medicaid would be managed and administered by the individual states via block grants and there would be funding for state high-risk pools for those who fail to maintain coverage and have pre-existing health conditions.

The President-elect’s approach is similar to the June 2016 “**Better Way**” white paper<sup>2</sup> on health reform prepared under the leadership of the Speaker of the House Paul Ryan.

As of this writing, many Republicans are supporting a legislative effort early in 2017 to repeal those ACA elements that can be repealed through budget reconciliation as described above, with a delay in the effective date to allow time for development and enactment of a replacement plan. This approach is sometimes referred to as “repeal and delay.”

#### **6. What ACA private market reforms did the House Republican Better Way agenda suggest should be retained?**

The “Better Way” agenda proposed retaining the following market reforms:

- Pre-existing exclusion prohibition;
- Guaranteed Issue (guaranteed availability);
- Community Rating (though modified);

- Bans on lifetime limits on essential health benefits (but not annual dollar limits); and
- Prohibition against coverage rescissions absent fraud or intentional misrepresentation.

## 7. What about all the regulations that implemented the ACA? Can Congress repeal those?

Congress lacks authority to repeal regulations absent a statute authorizing it to do so. However, the federal agencies that promulgated the regulations, such as the U.S. Department of Health and Human Services (DHHS), may repeal or revise existing regulations. The nominee to head DHHS, U.S. Representative Tom Price, has been a staunch opponent of the ACA.

Nonetheless, repealing ACA regulations would not be an easy task since federal regulations are subject to the Federal Administrative Procedure Act (APA). The federal APA requires, among other things, that any repeal of regulations be legally supported, after notice to the public and a public comment period.<sup>3</sup> Thus, while attempts may be made to repeal the regulations, absent a Congressional repeal of the federal statutory implementing provisions, an administrative repeal of the regulations may face difficulty passing judicial scrutiny.

## 8. Assuming Congress does make substantial changes to the ACA, will there be any disruption in coverage that currently exists?

Both the President-elect and Republican leadership have suggested that they wish to avoid disruptions in coverage, though the details on how they would accomplish that goal (other than delaying the effective date of repeal provisions) are yet to emerge.

## 9. What is the impact of a repeal of the ACA in California?

California has fully embraced the ACA and implemented all of its provisions. California has one of the most successful state-run exchanges in the country, Covered California. In 2016, more than 1.2 million Californians are receiving \$4.6 million in premium tax credits to help pay for coverage through Covered California.<sup>4</sup> Since the ACA expansion began, more than 4 million Californians gained coverage under Medi-Cal, California's Medicaid program. The combined total of federal ACA coverage expansion funds in California is estimated at \$20 billion annually, approximately \$15 billion in Medi-Cal and nearly \$5 billion for the insurance subsidies administered by Covered California.

Importantly, many of California's ACA implementing laws are contingent on the validity of federal law and are operative only as long as the federal law is effective, or for a limited period of time after the date of amendment or repeal of federal law. For example, if the federal individual requirement to have coverage is amended or repealed to no longer apply to the individual market, multiple provisions of California law affecting private insurance coverage would be automatically repealed 12 months later.

## References

- 1 Donald J. Trump. *Health Care Reform*. Available online at: <http://kff.org/health-reform/state-indicator/average-monthly-advance-premium-tax-credit-aptc>
- 2 Paul Ryan. *A Better Way: Our Vision for a Confident America (Health Care)*. June 22, 2016. Available online at: [https://abetterway.speaker.gov/\\_assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf3](https://abetterway.speaker.gov/_assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf3)
- 3 See 5 United States Code, Section 553.4
- 4 Kaiser Family Foundation. Estimated Total Premium Tax Credits Received by Marketplace Enrollees. March 31, 2016. Available online at <http://kff.org/health-reform/state-indicator/average-monthly-advance-premium-tax-credit-aptc>

**Insure the Uninsured Project (ITUP)** is a nonprofit, 501(c)(3) organization, founded in 1996, with offices in Santa Monica and Sacramento, California. ITUP's mission is to advance creative and workable policy solutions that expand health care access and improve the health of Californians. ITUP conducts policy-focused research and convenes broad-based stakeholders on health policy topics, acting as an honest broker among diverse health care leaders in the state. To assist with implementation of health reform in California, ITUP hosts an annual statewide conference in Sacramento and facilitates regional and statewide workgroups on topics affecting health and health care in the state.

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