



# What is, and is not, possible with repeal of the Affordable Care Act?

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## An issue brief from KPMG's Government Health and Social Services Task Force for Presidential Transition

With Donald Trump's election, there is significant attention and focus on the future of the Patient Protection and Affordable Care Act of 2010, commonly known as the "ACA" or "Obamacare." Throughout his campaign, President-elect Trump promised to "repeal and replace" the ACA with a new form of healthcare reform. Naturally, there are many questions about what this might mean. While it is too early to know exactly what a replacement law might look like, it is important for government entities to understand what is, and is not, possible relative to "repeal and replace." This issue brief summarizes the facts around five key questions government officials have asked since the election.

### *1) Can the Affordable Care Act actually be repealed?*

The answer is surprisingly not straightforward. A full repeal of the law would almost certainly face a Democratic filibuster in the Senate, which Republicans would be unable to stop since they lack the 60-vote majority needed to invoke 'cloture' and end debate on most bills. What is more likely is that Republicans could use the Budget Reconciliation process to repeal or defund key provisions of the law; only a simple majority is needed to approve Budget Reconciliation. Reconciliation is the process of amending sections of bills or laws that have a bearing on revenues, spending, or the national debt. It is important to note that Congress has not passed a budget for fiscal year (FY) 17. As a result, Reconciliation has not yet occurred and cannot occur without a FY 17 Budget. The new Congress could still adopt a FY 17 Budget and Reconciliation could occur at that time or thereafter. If this does not occur, a next focus could be the FY 18 Budget and its Reconciliation.

### *2) If the president-elect rescinds all of President Obama's Executive Orders, what kind of impact will that have on the ACA?*

The simple answer is not much. KPMG's analysis shows that as of the issuance of this issue brief, there were only three Executive Orders materially related to the ACA still in effect and none have a material impact on healthcare reform programs and operations that states may have in place:

1. Executive Order 13507 – Establishing The White House Office Of Health Reform
2. Executive Order 13535 – Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion
3. Executive Order 13544 – Establishing the National Prevention, Health Promotion, and Public Health Council

President-elect Trump could, however, use Executive Order authority to amend federal policy regarding the ACA. To date, there have been no indications whether the president-elect and his new administration will exercise that authority and, if so, what it would mean.

### *3) Will the new administration change any of the regulations put in place regarding the ACA?*

There are likely to be many twists and turns in this regard; but yes, expect significant changes. The actual process of changing regulations is generally (with some specific exceptions) lengthy, requiring the drafting of new rules, posting for public comment, comment response, and finally posting of the final rule(s). That said, the new administration could simply stop enforcement of existing regulations or grant waivers to states (as was done by the Obama Administration related to Medicaid expansion).

The bulk of regulatory change is likely to follow legislative action on the ACA. Typically the rulemaking process takes a year or longer and, in fact, a significant portion of the rules related to the implementation of the ACA were not finalized until 2012 or 2013, two to three years after passage of the ACA. As a result, government entities should not expect a lot of immediate changes in regulations.

#### *4) Can the new administration end the 90/10 funding for Medicaid systems?*

It is important to note that the issuance of 90/10 funding is not related to the ACA in any direct way. The availability of 90/10 funding for Medicaid eligibility systems originated from a change in the definition of “mechanized claims processing systems” as described in 42 CFR Part 433. The new definition extends the availability of enhanced funding to include systems used for eligibility and enrollment, a nuance now codified in a final rule published in December 2015. As a result, any changes to roll back the availability of such funding would require formal action via the rulemaking process which, as described in our answer to #3 above, would likely take time. That said, the new administration could slow or restrict approvals of new Advance Planning Documents (APDs) or create new requirements for approval.

#### *5) What will happen to the A-87 Cost Allocation Waiver?*

Currently, the time limited exception for the A-87 cost allocation requirements for integrated eligibility systems is set to expire on December 31, 2018. It is also important to note that, like the 90/10 funding, the A-87 waiver is also not directly tied to the ACA itself. Prior to the election, the industry, most notably the American Public Human Services Association (APHSA), had begun to take steps to advocate for a further extension of this waiver or possibly to have it made permanent. It is unclear at this time if the new administration would be agreeable to such action.

That said, if the incoming leadership were opposed to the cost allocation exception, they could simply let the current exemption expire at the end of 2018. Given that the A-87 waiver was granted via a directive of the Office of Management and Budget (OMB), the same approach could be used to issue a new directive to potentially move up the date of its expiration. It is

unclear how this might play out with so many states currently in flight on initiatives that were planned and budgeted based on the availability of the exception.

### **Key takeaways**

Regardless of who was elected president, changes were to be expected to the ACA to correct some of the issues related to the financial sustainability of the law that have emerged as we enter the third year of coverage availability. The change in political party leading the Executive Branch will produce a fundamental change in philosophy and execution, which will have a direct impact on the degree and nature of ACA changes. It is too early to tell exactly what form those philosophical changes may take; however, they promise to be significant, and it is important for government entities to be mindful of the answers to the five questions presented here as they prepare to react to these changes. Most specifically, the key takeaways are:

- Immediate wholesale repeal is unlikely, or at least wholesale repeal that would be effective immediately.
- Reconciliation will likely be the vehicle for repeal and could be highly disruptive if not timed to coincide with the implementation of a replacement law.
- It is possible that some incremental changes could be enacted early in the new presidency.
- Many policy items related to healthcare reform and important to government entities (such as the availability of 90/10 funding and the A-87 waiver) are not actually a part of the ACA at all.

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