



President Trump's Executive Order on the Affordable Care Act

What it means for government entities

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There continues to be significant focus and attention on the future of the Patient Protection and Affordable Care Act of 2010 (ACA).¹ This issue brief provides a short overview of Executive Order 13765, signed by President Trump during his first day in office, to “minimize the economic burden” of the ACA pending its repeal.²

Executive Order 13765 directs the Department of Health & Human Services (HHS) and all other federal agencies with ACA authority to:

- Waive, defer, grant exemptions from, or delay the implementation of any provision or requirement that would impose a fiscal burden on any state or a cost, fee, tax, penalty, or regulatory burden on:
 - Individuals
 - Families
 - Healthcare providers
 - Health insurers
 - Patients
 - Recipients of healthcare services
 - Purchasers of health insurance
 - Makers of medical devices, products, or medications
- Exercise all authority and discretion available to them to provide greater flexibility to states and cooperate with them in implementing healthcare programs

- Encourage the development of a free and open market in interstate commerce for the offering of healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers.

What might this mean for our state and federal government clients?

As discussed in KPMG’s December 2016 brief, “[What is, and is not, possible with repeal of the Affordable Care Act?](#),”³ Executive Order authority is one of many mechanisms the Trump Administration can take to change federal policy. In this instance, Executive Order 13765 did not change federal policy. While authority to stop enforcing existing regulation is within the power of the Executive branch, it must come from the administering agency, but it does send a clear signal that the new administration will support legislative repeal of the ACA, nonenforcement of certain provisions of the law (albeit the specific provisions are unknown), and greater state flexibility to design and implement healthcare programs.

For example, while “economic burden” has not been defined in this context, HHS could loosen enforcement of the individual mandate by broadening the definition of the hardship exemption. An individual who qualifies for a hardship exemption is not required to pay a fee for months without health insurance; it is within HHS’s authority to change the definition so that more individuals have access to this exemption.⁴

1 <https://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>

2 <https://www.federalregister.gov/documents/2017/01/24/2017-01799/minimizing-the-economic-burden-of-the-patient-protection-and-affordable-care-act-pending-repeal>

3 <http://www.kpmg-institutes.com/institutes/government-institute/articles/2016/12/will-the-affordable-care-act-be-repealed-.html>

4 <https://www.healthcare.gov/health-coverage-exemptions/hardship-exemptions/>

HHS may also use waivers, such as the current 1332 State Innovation Waiver that “permits states to pursue innovative strategies for providing their residents with access to high quality, affordable health insurance while retaining the basic protections of the ACA,” to give states even greater flexibility.⁵ However, any changes to the scope of the 1332 State Innovation Waiver program, such as broadening state flexibility, would require HHS to go through a formal rulemaking process (any regulatory changes are subject to the Administrative Procedure Act,⁶ as acknowledged in Executive Order 13765).

What can our state and federal government clients be doing now?

While immediate changes resulting from Executive Order 13765 are unknown, government entities should take the following into consideration over the next few weeks and months:

- Once the HHS secretary and other senior presidentially appointed officials, such as the administrator of the Centers for Medicare & Medicaid Services,⁷ are in place, the pace of change will likely greatly intensify.
- If Congress repairs the ACA or ACA-related provisions as is being discussed (with some suggesting it may happen in spring 2017), Executive Order 13765 may not come into play at all; however, many of the same principles will likely carry forward in future regulation.

- Final rules for the 2017 Health Insurance Marketplace have been released, making changes to these rules and/or the reinterpretation of marketplace policy difficult. Additional administrative changes in 2017 could cause significant disruption for both consumers and industry stakeholders alike.
- The bulk of regulatory change is likely to follow legislative action on the ACA. Typically, the rulemaking process takes a year or longer (although emergency regulations can be issued more rapidly) and, in fact, a significant portion of the rules related to implementation of the ACA were not finalized until 2012 or 2013, two to three years after the March 2010 passage of the ACA.

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⁵ https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers.html

⁶ <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-partI-chap5-subchapII.pdf>

⁷ <http://www.kpmg-institutes.com/content/dam/kpmg/governmentinstitute/pdf/2017/seema-verma-profile.pdf>

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