ACA in the 115th Congress: “Repeal and Replace” Strategy Moves Forward But Faces Hurdles

The top pre-election priority of Republicans in Congress and President-elect Trump was to “repeal and replace” the Affordable Care Act (ACA). And their push to do so has continued post-election. However, repealing the ACA and putting a new framework in its place is replete with practical, procedural and political challenges. It also, of course, raises significant substantive policy questions. While it remains to be seen what exactly is in store for the ACA in 2017 and beyond, there is value in exploring the hurdles facing the “repeal and replace” effort.

First, an ACA repeal, if enacted in this Congress, most likely would be partial, not full. Although Republicans will control both chambers of Congress and the White House, they will not have a filibuster-proof majority (60 votes) in the Senate. As a result, congressional Republicans and the incoming Trump Administration are working on proposed language to repeal parts of the ACA through the budget reconciliation process, which requires only 51 votes for Senate passage. Among other procedural and political hurdles, the budget reconciliation process limits the types of provisions the legislation can include to those that affect the federal budget, and it remains to be seen which provisions Republicans will seek to repeal and which ones they will seek to keep.

Second, the question of “what stays and what goes” in a partial repeal scenario also raises significant substantive issues that, to date, remain unresolved:

- Many health economists have concluded that various well-known parts of the ACA that are maligned as unpopular (e.g., the individual mandate) are necessary to support and sustain well-known popular parts (e.g., the ban on denials or exclusions based on pre-existing conditions). Thus, it is not clear how to keep certain “popular” provisions if certain “unpopular” provisions are repealed.

- A number of additional provisions have already been implemented and integrated into the healthcare system and, while popular among certain stakeholders, could be targets for potential repeal or restraint by the GOP. As just a handful of examples, the ACA created the Medicare Independent Payment Advisory Board (IPAB) and the Center for Medicare and Medicaid Innovation; expanded the 340B Drug Pricing Program; imposed taxes/fees on health insurers, pharmaceutical manufacturers and medical devices; amended healthcare fraud and abuse laws, including the anti-kickback statute; and created the Coverage Gap Discount Program as part of provisions that fill the Medicare Part D donut hole over a period of 10 years starting in 2010. Repealing these provisions...
would impose substantial costs and uncertainties for all healthcare stakeholders. It is unclear which, if any, of these ACA provisions congressional Republicans would seek to repeal (or could) under the reconciliation process.

Finally, and critically, the process to “repeal and replace” the ACA recently has given way to “repeal and delay”—as Republicans have not yet coalesced around a plan to replace the ACA. Nor is there a consensus on the length of the contemplated delay for developing, enacting, and implementing the replacement. Repealing significant ACA provisions without a replacement in place would create additional costs and uncertainties for the entire U.S. healthcare system, regardless of whether the repeal took effect immediately or was delayed. Further, even without repealing legislative provisions, the Republican-controlled Congress and Administration could refuse to fund or implement certain ACA provisions or could pursue litigation strategies that threaten the sustainability of the exchanges and other ACA-related provisions.

Meanwhile, President Obama plans to meet privately with congressional Democrats on January 4 to discuss ways to protect and defend the ACA against congressional Republicans’ repeal strategy. And, on January 6, the news website Vox will conduct a livestreamed interview of President Obama focused on the ACA and its future.

In subsequent posts, we will address these and other issues further, including potential Medicaid reform, ongoing ACA litigation, drug pricing questions, nomination proceedings and other key developments.

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work or

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