

# Looking Ahead: The Future of the Affordable Care Act Under a Trump Presidency

Now that Donald Trump has won the White House, and Republicans have gained control in both the House and Senate, we will see modifications to the Affordable Care Act (“ACA”) in the future, although it is not entirely clear what those modifications will entail. Some consensus exists, however, on at least three issues related to the future of the ACA. First, change on-the-ground is not going to be felt immediately, even if bills modifying the ACA are signed in to law quickly. This means, importantly, that nothing is going to happen to the ACA exchanges in 2017. In both states-administered exchanges and federally-administered exchanges, those with existing ACA plans will be able to keep that coverage through January 2018 at a minimum. Second, the full text of the ACA will not likely be “repealed.” As we discuss more below, full repeal is impractical from a political standpoint because Democrats could filibuster a full repeal, and undesirable from a pragmatic standpoint as it would dismantle areas of the law that even Republican lawmakers consider to be good policy. Third, the ACA will be modified. While it’s hard to speculate about what changes will ultimately become law, by considering the issues Trump and Republican policymakers have focused on previously, we can start to map out what the landscape of the federal health law will look like in the coming years.

This post first describes the legislative processes we will see Republicans using to modify the ACA. It then discusses the challenges Republicans will face in implementing the changes they hope to make to the health law, and provides an issue-by-issue analysis of the provisions that are most likely to be modified. The issues covered include the individual and employer mandates|the preexisting conditions protections and the minimum essential health benefits requirements|ACA exchanges and subsidies|Republicans’ proposed new “replacement” policies|and health policy funding. We conclude by considering the broader challenges facing the U.S. healthcare system that Republicans will need to address in order to

make healthcare more affordable and accessible.

### **Congressional Process of “Repeal & Replace”**

The ACA was enacted through the passage of two laws: [Public Law 111-152](#), which Congress passed through a special legislative process known as “budget reconciliation,” and [Public Law 111-148](#), which passed using the regular legislative process.

Republicans will likely begin their modification of the ACA with the provisions found in Public Law 111-152, as Congress can use the budget reconciliation process to amend or repeal those provisions. Public Law 111-152 includes: the individual and business mandates|tax credits for low-income individuals to subsidize the premium cost of ACA exchange insurance plans|Medicaid expansion|and taxes levied on medical device manufacturers, “Cadillac” health plans, insurers, and wealthy individuals. For Congress to pass a bill using the reconciliation process, the bill must affect the federal budget. Since Congress implemented the ACA provisions in Public Law 111-152 using reconciliation, it is already established that they effect the federal budget. Budget reconciliation bills need only a simple majority to be passed, which Republicans will have in both chambers of Congress. Unlike reconciliation bills, non-budgetary bills can be filibustered in Senate. Republicans need 60 votes to overcome a filibuster by Democrats, which they will not have next session. Thus, changes to the ACA through the reconciliation process are more feasible for Republicans than changes that must pass through the regular legislative process.

Even if Congress uses the reconciliation process to modify the ACA as one of its first actions of the new term, the changes to individual healthcare and insurance will occur gradually. A transition period is likely before implementation for the law, especially with respect to existing ACA plans and subsidies. New regulations will take time to write, hold open for comment, and take effect. The Trump administration will also have to, like the Obama administration, educate the public about the changes. There are two existing proposals (summarized in a chart [below](#)) that Trump and Republicans could work from if they want to put together a plan quickly: a [2015 reconciliation bill](#) passed by Republican lawmakers, and [Paul Ryan’s](#)

[health care proposal](#), which he published in a white paper in October 2016. Even assuming they are able to unify around a proposal by January or earlier, its unlikely that individuals will feel the impact of the health law changes anytime soon.

## **Breakdown of the Issues**

Some of the ACA appears here to stay, largely for procedural reasons. A bill to repeal the whole ACA (ie both PL 111-148 and PL 111-152) would not be eligible as a reconciliation bill, meaning it must pass through regular legislation and defeat a democratic filibuster, assuming the democrats would indeed filibuster a full repeal. Democrats could also filibuster any specific attempts to repeal any of the following popular provisions of the ACA, which were not included in PL 111-152: (1) [the community ratings requirement](#) (prohibiting insurance companies from using an individual's health status in setting premiums)|(2) [the guaranteed issue requirement](#) (requiring insurers offering coverage to accept and insure individuals on any policies made available in an individual's home state)|and (3) [minimum essential health benefits requirements](#) (requiring individual and small group insurance plans to be equal in scope to the benefits covered by a typical employer plans, to cover ten essential health services, and to not impose annual or lifetime caps on these essential services).

In addition, the ACA is so interwoven with our health system that repealing the full Act would repeal provisions that have nothing to do with what Trump supporters thought of as "Obamacare." For example, repealing the full ACA would bring Medicare to a halt until new regulations could be issued. Further, despite Trump's campaign promise to "repeal" the entire ACA, in an [interview](#) on November 11 with the Wall Street Journal, the President-Elect said that he is considering keeping the popular protections for those with preexisting conditions and allowing children to stay on their parents' policies until age 26. Even Paul Ryan's proposed health plan and the Republican's 2015 bill "repealing" kept both of those provisions (right?). Despite all the election rhetoric, the fact is even most Republicans never truly wanted a full repeal of the ACA.

The most important issues to consider about future of the health law relate to

individual provisions of the ACA, and the critical ways in which those provisions work together. Here, we break down specific provisions of the health law and analyze the implications of their repeal and replacement with the proposals advocated for by Trump and Republican lawmakers. The issues discussed below include (1) the individual and employer mandates|(2) preexisting condition protections and minimum “essential health benefits” requirements|(3) ACA exchanges and subsidies|(4) new replacement ideas to supplement the health law|and (5) funding for changes to the health law.

**(1) Individual &|Employer Mandates:** While Republicans have consistently called for elimination of the individual and employer mandates, their fate remains far from clear. The individual mandate refers to the requirement that all individuals be insured or pay a tax penalty. The employer mandate requires all businesses with 50 or more employees to offer health insurance to employees. Both mandates can be cut using reconciliation, so if Republicans want to cut them, the Democrats can’t stop them. While the mandates have been targeted in the past, the individual mandate provides the stability that makes the protections for people with preexisting conditions economically possible, as discussed more below. The mandates are a central part of what Trump voters think of as “Obamacare,” so there will be pressure to eliminate them.

**(2) Preexisting Condition Protections &|Minimum Essential Health Benefits:** Trump and Republicans have indicated they will keep some protections for preexisting conditions, however, these protections will likely be less robust than current ACA protections. Currently, the ACA prohibits insurers from charging higher premiums or excluding individuals with health problems.

These parts of the law, often described as “preexisting conditions protections,” include two separate protections. First, under the community ratings requirement of the ACA, insurance companies are prohibited from using an individual’s health status in setting premiums, but they can use an individual’s age, tobacco use, geographic area, and whether the plan is for individual or family coverage when

setting premium rates. Second, under the guaranteed issue requirement, insurers offering coverage must accept and insure individuals on any policies made available in an individual's home state.

Paul Ryan and Trump have stated that they will keep these protections for people with preexisting conditions, but require individuals to have continuous coverage if they want to be protected from losing insurance or having premiums hikes due to an illness. Paul Ryan's plan would allow individuals to keep their coverage if continuously enrolled, but if an individual dropped coverage for any reason, then insurers can charge premiums based on health status when reenrolling in coverage. In addition, currently under the ACA, open enrollments occur annually, and insurers cannot consider preexisting conditions when enrolling individuals. Under Paul Ryan's Plan, there would only be a one-time enrollment without regard to preexisting conditions.

While it may sound promising that there will still likely be some protections for those with preexisting conditions, keeping these protections while eliminating the individual mandate could lead to disastrous effects. The central premise of the ACA was to raise revenues for insurance companies by getting more young, healthy people to buy insurance, and then in turn require insurers to provide coverage to people with preexisting conditions, which is expensive for insurers. By getting more healthy people on plans, insurers are able to spread the risk of providing coverage to people with preexisting conditions without hiking up premium rates across the board.

If insurers are required to keep unhealthy individuals on plans, and enrollment of healthy individuals drops, then insurers will have to make up for lost profits by raising premiums in plans that unhealthy individuals favor. This "death spiral" scenario, where premiums increase and healthier people drop out year after year, occurred in 1990s when some states passed preexisting condition protections. The ACA specifically tried to avoid this scenario, the U.S. Supreme Court pointed to this careful balance between the individual mandate, the premium subsidies, and the guaranteed issue and community rating provisions in defending the law in [\*King v. Burwell\*](#). Thus, the challenge for Trump and Republicans in Congress is figuring out a way to require insurers to cover individuals with preexisting conditions, while also

preventing insurers from hiking premiums up across-the-board to cover that cost.

If Republicans scrap the individual mandate and keep the preexisting conditions protections, they will need another mechanism to encourage young, healthy individuals to get insurance. One strategy for doing this would be to eliminate the ACA [minimum “essential health benefits” requirements](#). Under the ACA, all individual and small group plans must “be equal in scope to the benefits covered by a typical employer plans,” cover ten essential health services, and not impose annual or lifetime caps on the ten essential health services.

If these requirements are eliminated, insurers could sell low-cost and low-coverage plans with few benefits, high deductibles, and low annual or lifetime caps. These low-coverage plans limit insurance companies’ risk, and allow them to protect their profit margin. “Bare bones” coverage options would be offered for a low premium rate, thus attracting young healthy consumers and those with preexisting conditions. Flooding the market with low-coverage plans could encourage healthy people to get insurance, without an individual mandate, and would also allow insurers to grow profits.

The problem with this plan is that it leaves individuals without any real meaningful coverage. Republican’s have embraced reducing benefit requirements in order to promote “consumer choice,” but underinsurance was one of the central problems that led to numerous bankruptcies, sky high medical bills, and the need for health care reform. In addition to being bad for consumers, hospitals are likely to push back on loosening the minimum essential benefits requirements, because they will go back to incurring financial losses when patients with inadequate coverage undergo necessary medical services.

**(3) ACA Exchanges &|Subsidies:** Most importantly, no changes will affect the ACA exchanges and subsidies offered on the exchanges in 2017. Those with existing ACA plans will be able to keep that coverage and premium rates through January 2018 at a minimum. In the short term, things will remain the same. In the long-term, it’s not entirely clear what will happen to the ACA Exchanges. Currently, some of the exchanges are suffering from lack of competition and rising premium rates. Insurers

have increasingly pulled out of some state exchanges, resulting in only one insurer remaining in some markets. Hillary Clinton hoped to turn around this trajectory, if elected. Now, it is up to President-Elect Trump and the Republican Congress to determine what aspects of the exchanges to salvage, and which to scrap.

Republicans will exert the most control over the 26 states on the federal exchange. In the states where the federal government runs an exchange, Trump or Republican lawmakers could easily do away with the online federal “marketplace” where uninsured individuals can shop for insurance plans. Paul Ryan’s proposal encourages eliminating the federal marketplace and, in effect, the plans offered within, disrupting insurance for millions and returning them to their pre-ACA situation. While some spectators argue that Republicans will be wary of kicking so many people off plans purchased under the ACA exchanges, others counter that Republicans have been arguing in favor of just such a result since the passage of the ACA.

For states that operate their own exchange, states could continue to administer the marketplaces they have created, however, the federal government could do away with the subsidies that make plans offered on the exchanges affordable for many Americans. States could attempt to subsidize plans themselves, but offering these subsidies is an enormous expensive. Potentially losing Medicaid matching funds offered through the Medicaid expansion will compound the expenses and challenges faced by states following a significant upheaval of the ACA.

The future of all exchanges, both state and federal, seems tied to whether Trump and Republican lawmakers continue to make premium subsidies available for plans purchased exchanges. Currently, the ACA subsidies provide discounts on plan premiums based on an individual’s income and location. If the subsidies are gone, out-of-pocket premium costs would sharply increase if issuers are required to continue to provide comprehensive coverage that meets the minimum essential health benefits requirements. If Republicans eliminate the minimum essential health benefits requirements, insurers could offer low-coverage plans for lower premiums. If, however, the government continues to require insurance on the markets to provide essential benefits, the only way to make plans affordable to many uninsured Americans is to offer some sort of financial assistance.

One policy option many Republicans have embraced is repealing the current income-based subsidies, and replacing them with subsidies based only on an individual's age (giving older individuals more support) and location. These subsidies would be fixed dollar amount tax-credits, based on only those two factors, which uninsured individuals could use to pay for premiums. While this provides some financial assistance for uninsured individuals, eliminating income from the equation for calculating subsidy amounts will result in low-income Americans receiving less of a subsidy than they currently receive under the ACA.

**(4) New Replacements:** New ideas from Trump and Republicans include increased use of health savings accounts|allowing insurance sales across state lines|and creating high-risk pools for those with high healthcare costs.

**Health Savings Accounts (HSAs):** Trump and Republicans have supported the idea of increasing the use of HSAs. HSAs allow individuals to contribute their own money to pay for healthcare costs, and the contributions to the accounts are not subject to federal income taxes. HSAs purport to give individuals some “skin in the game” in hopes of eliminating wasteful healthcare spending. Unfortunately, HSAs are not particularly helpful for low-income individuals, who don't have a lot of expendable income to contribute to the accounts, and already pay little in federal income taxes, so any tax-savings they do receive would be negligible. Health services research demonstrates that while HSAs are associated with reduced healthcare spending, patients tend to cut back on both necessary and unnecessary care, which in some cases exacerbates medical conditions and resulted in higher spending.

**Selling Across State Lines:** Republicans have also proposed increasing insurance sales across state lines. This would allow consumers to buy insurance that is licensed outside of the state in which they reside. As we discussed in [our election blog post](#), states and insurers have [not been interested](#) in entering multi-state markets. The ACA already contains provisions that would let states allow insurers to sell across state lines, though perhaps not to the extent envisioned by Trump. So far, no state has taken advantage of the option to sell across state lines. Insurers have



not been interested in selling across state lines because establishing new networks of healthcare providers is expensive, and the barriers to entry make it hard for new plans to enter the market. Insurers operating in state markets have spent years negotiating prices with providers, and have significant bargaining power because their plans already cover many people in the state market. This makes it hard for an out-of-state insurer, with no market share, to enter in to the market and negotiate rates that would compete with the in-state plans.

If the minimum essential health benefits requirements are eliminated, however, the differences across state lines might be much greater, and the potential benefits from offering lower cost/lower coverage plans in states with numerous insurance coverage requirements will increase. In addition, opening up state lines could also potentially push insurance consolidation, as the biggest insurers with the resources to expand seek even greater market power. If the largest insurance companies do decide to take advantage of the opportunity to move into interstate sales, one danger is that this would create a “race to the bottom,” with insurers fleeing to states with the least stringent regulation of insurance sales. In order maximize profits from interstate sales, insurers may flood the market with bare-bones plans licensed in states with the least consumer protections.

**High Risk Pools as a “Backup”:** Republicans do aim to keep some protections for preexisting conditions, but they suggest creating high risk pools as a backup for those who are kicked off plans or can’t get coverage. High risk pools are insurance plans for people with high healthcare costs. A majority of states have tried creating high risk pools before, but the plans failed in every state due to inadequate funding. These plans are expensive to run and difficult to make affordable. When implemented without adequate funding, these plans have had extremely high premiums and caps on the number of enrollees. If high risk pools are going to be a solution to covering people with preexisting conditions, Republicans need to figure out how to set aside enough funding to make them affordable.

**(5) Funding:** Finally, Republicans must identify funding mechanisms for replacing major parts of the ACA. Many of their ideas, including tax subsidies, high-risk pools,

and HSAs, are very expensive. The ACA brought in hundreds of billions of dollars of revenue through taxes on hospitals, health insurers, medical device manufactures, and high-income taxpayers. According to the [Congressional Budget Office](#), repealing these taxes would increase the federal deficit by as much as \$350 billion dollars. If the Republican's decide to do away with these taxes, they will need to find other funding for their replacement ideas if they don't want to grow the federal deficit.

One option for this is cutting funding for Medicaid, which many Republicans have endorsed. Some have called for turning Medicaid into a "block grant" program, which would give states a defined amount of funding, rather than matching funds. While this would potentially save money, it would also reduce coverage in many states, because it would eliminate federal rules that require certain people and services to be covered. In addition to being allowed to provide less coverage, states would have more flexibility to decide how to spend the reduced funds provided from the federal government. Republicans could also try to continue efforts to drive down the overall costs of Medicaid, including tightening requirements for Medicaid value-based payment programs. The benefit of payment reform is that it addresses the fundamental high level of spending behind the health system challenges in the United States.

### **Looking Forward: The Big Picture**

Trump and Republican lawmakers will likely follow through on their promise to dismantle the ACA in some form or another. Despite this, individuals covered by ACA plans will be able to keep their insurance and subsidies through at least January 2018. After that time, Republicans will either need to offer some type of financial assistance for those losing ACA premium subsidies, or eliminate the minimum essential health benefits requirements in order to keep premium costs affordable. If the minimum essential health benefits are eliminated, we are likely to see a resurgence in medical bankruptcies and sky high medical bills, which hurts both consumers and hospital systems. Because of the complexities in the health law, President-elect Trump and Republican leaders will have to invest a large amount of time and political capital in order to make any changes to the ACA.

The ACA has been unpopular with a portion of the public due to frustrations with high out-of-pocket healthcare expenses. While these frustrations are justified, the provisions of the ACA that Republican lawmakers have criticized did not cause the high expenses that consumers are currently experiencing. The high premiums that consumers pay for health insurance result in large part from the fact that healthcare providers in the United States can demand significantly higher prices than providers in other comparable countries, often due to their market power. Even though the United States pays more than other countries for care, that spending does not result in higher quality care for Americans. The ACA's competition-based solutions sought to address high healthcare spending, through policies like incentives for providing value-based care, but the ACA did not bring change fast enough for Americans to feel the effect.

One conclusion that can be drawn from the challenges to our healthcare system, and from the shortcomings of the ACA's competition-based solutions, is that promoting competition, without more, will not provide enough protection for healthcare consumers. Indeed, this is the conclusion that those calling for a single-payer healthcare system have reached. If the majority of politicians continue to reject a single-payer system, then the only solution is to make the current environment work effectively by prompting and protecting competition. We will have to wait and see whether Republican lawmakers can live up to the challenge of crafting policies that promote a competitive market, while also protecting consumers from healthcare market failures which make it difficult for many Americans to have meaningful healthcare coverage.

## **Existing Republican Proposals**

### **2015 Republican Reconciliation Bill**

In 2015, Republicans passed a reconciliation bill that repealed many provisions of the ACA, which Obama vetoed. That bill could serve as a template for repeals in the next term, which would be signed by Trump. The 2015 bill would have done the following:

### **Paul Ryan's "A Better Way" Plan**

Paul Ryan has published a white paper detailing his vision for health policy, which gives us some clues about what replacement policies may be implemented. Here is a summarized list of what that plan includes:

<p><b>Repeal:</b></p> <ul style="list-style-type: none"> <li>· Individual mandate</li> <li>· Employer mandate</li> <li>· Tax credits that subsidize premium costs for plans purchased on Exchanges</li> <li>· Medicaid expansion for adults up to 138 percent of the federal poverty level</li> <li>· Tax credits for very low-income individuals to subsidize deductibles and co-pays for plans purchased on Exchanges</li> <li>· Tax credits for small businesses who pay at least half of employee health insurance premiums</li> <li>· Taxes levied on medical device manufacturers, “Cadillac” health plans, insurers, and wealthy individuals, to help fund the ACA</li> </ul> <p><b>Keep:</b></p> <ul style="list-style-type: none"> <li>· Preexisting conditions protections</li> <li>· Children on parents’ insurance until age 26</li> </ul>	<p><b>Repeal:</b></p> <ul style="list-style-type: none"> <li>· Individual mandate</li> <li>· Employer mandate</li> <li>· Tax credits that subsidize premium costs for plans purchased on Exchanges based on income</li> <li>· Medicaid expansion for adults up to 138 percent of the federal poverty level</li> </ul> <p><b>Keep:</b></p> <ul style="list-style-type: none"> <li>· Children on parents’ insurance until age 26</li> </ul> <p><b>Modify:</b></p> <ul style="list-style-type: none"> <li>· Preexisting conditions protections – only if individual has continuous coverage one-time enrollment period (versus annual under current ACA)</li> <li>· Subsidies based on age and location (not income) for uninsured</li> <li>· Insurance can charge older / sicker customers x5 more (capped at x3 under ACA)</li> <li>· Medicare becomes a defined-contribution program. Cap Medicaid spending, and leave allocation of funds and regulation to the states.</li> </ul> <p><b>Add:</b></p> <ul style="list-style-type: none"> <li>· Cap on tax exclusion for employer plans</li> <li>· More use of HSAs</li> <li>· Insurance sales across state lines</li> <li>· High risk pools</li> </ul> <p>Note: Plan provides no numbers describing how much the proposal would cost, how it would be financed, or how many Americans would gain or lose health insurance</p>
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