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## Navigating the uncertainty of potential ACA 'repeal and replace': A preliminary analysis

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Significant changes to the Affordable Care Act (ACA) and related legislation are under active governmental and public discussion, a result of the “repeal and replace” promises made by President-elect Trump and Congressional Republicans, the announced nominations of Representative (Dr.) Tom Price as Secretary of the Department of Health and Human Services (HHS) and Seema Verma as Administrator for the Centers for Medicare and Medicaid Services (CMS), and the current turbulence within the ACA exchange markets. However, the exact nature of the changes is not yet clear.

The President-elect has suggested his openness to amending the ACA, as well as repealing and replacing it.<sup>1</sup> Most Congressional Republicans, including Tom Price, continue to be focused on repeal and replace.<sup>2</sup> Over the past eight years, most of their healthcare proposals had little chance of becoming law. Now that Republicans hold control of the White House and House of Representatives, and have a simple majority in the Senate, they can pass some legislation with reasonable certainty it will be signed into law. However, bipartisan support is likely to be needed to ensure enactment of controversial pieces of legislation, given that Republicans do not have a super-majority in the Senate (60 votes). In addition, proposed changes to the ACA will likely affect the 20 million people who gained insurance coverage under it.<sup>3</sup>

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<sup>1</sup>“Either Obamacare will be amended, or repealed and replaced.” ([www.wsj.com/articles/donald-trump-willing-to-keep-parts-of-health-law-1478895339](http://www.wsj.com/articles/donald-trump-willing-to-keep-parts-of-health-law-1478895339))

<sup>2</sup> Tom Price Empowering Patients First Act. ([tomprice.house.gov/sites/tomprice.house.gov/files/Section%20by%20Section%20of%20HR%202300%20Empowering%20Patients%20First%20Act%202015.pdf](http://tomprice.house.gov/sites/tomprice.house.gov/files/Section%20by%20Section%20of%20HR%202300%20Empowering%20Patients%20First%20Act%202015.pdf))

<sup>3</sup> [www.hhs.gov/about/news/2016/03/03/20-million-people-have-gained-health-insurance-coverage-because-affordable-care-act-new-estimates](http://www.hhs.gov/about/news/2016/03/03/20-million-people-have-gained-health-insurance-coverage-because-affordable-care-act-new-estimates)

Given the present uncertainty, key questions can help stakeholders begin to navigate the uncertainty. These questions include:

- What kinds of action will be taken: complete repeal of the ACA, with a return to a pre-2010 health economy?<sup>4</sup> Limited action, with potential for continued market turbulence? Repeal and replace? Changes to Medicare?
- What is the timeline likely to be? Immediate action on both repeal and replace? Or immediate action on repeal and delayed action on replace?
- What will be done to ensure a smooth transition after repeal as the replacement is debated and potentially implemented?
- Will the next administration use existing regulatory authorities to modify key provisions of the ACA—and, if so, when? (For example, will the pending appeal of *House v. Burwell*<sup>5</sup> become a vehicle for significant turbulence in the Individual market?)

At present, these questions cannot be answered with certainty, especially because bipartisan support would be needed for a full repeal and replace of the ACA through the Senate. We therefore examine three issues:

- What the next administration and some Congressional Republicans have proposed
- The key proposals that could potentially affect the Individual, Medicaid, Medicare, Commercial Group markets, as well as payment innovations, and their potential initial impact for payors and providers
- The processes the next administration and Congressional Republicans could use to repeal and replace—or amend—the ACA

## TRUMP ADMINISTRATION AGENDA

How active a role the new administration will take in developing healthcare policy is undetermined as yet. Furthermore, it will take some time before senior officials of the new administration are confirmed by the Senate and can begin their work. The administration could choose to follow the agenda set by the Republican Congress (see below) or pursue a significantly different policy agenda.

Although limited details are yet available on President-elect Trump's policy agenda, he released a blueprint<sup>6</sup> in spring 2016 and references several ideas on his transition website.<sup>7</sup> The blueprint included:

- Repeal ObamaCare completely
- Enable the sale of health insurance across state lines

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<sup>4</sup> This would present numerous implementation challenges, such as provider reimbursements that have been paid since 2010 under the ACA's policies.

<sup>5</sup> Case 1:14-cv-01967, filed 11/21/14.

<sup>6</sup> [www.donaldjtrump.com/positions/healthcare-reform](http://www.donaldjtrump.com/positions/healthcare-reform)

<sup>7</sup> [www.greatagain.gov/](http://www.greatagain.gov/)

- Allow full deduction of health insurance premiums
- Facilitate the use of health savings accounts
- Promote price transparency from healthcare providers
- Use block grants for state Medicaid payments
- Remove barriers to entry for the sale of certain drugs
- Implement changes to Medicare to prepare for demographic trends

However, the President-elect's thinking about healthcare may be evolving. For example, during his campaign, he said repeatedly that the ACA would be one of his top three priorities once elected.<sup>8</sup> However, in a video released on November 21, he did not include repeal of the ACA as one of the priorities for the first 100 days of his administration.<sup>9</sup>

Some of the proposals President-elect Trump made during his campaign diverge from the proposals made by House and Senate Republicans. For example, he discussed using "concepts of Medicare" to address the uninsured, proposed that Medicare be allowed to negotiate drug prices,<sup>10</sup> and indicated that he did not plan to make changes to the Medicare program.<sup>11</sup> More recently, the President-elect indicated an openness to retaining guaranteed issue provisions in the Individual market.<sup>12</sup>

Key members of the new administration—Vice President-elect Mike Pence, potential HHS Secretary Tom Price, and potential CMS Administrator Seema Verma—are likely to play significant roles in shaping health policy. For example, as Governor of Indiana, Mike Pence implemented an ACA Medicaid expansion in 2015, with support from Seema Verma. Indiana's approach to expansion included several significant reforms to the way Medicaid benefits are typically delivered (e.g., Indiana requires eligible beneficiaries to contribute a monthly premium to POWER accounts; the state then contributes the amount remaining to fully fund the accounts<sup>13</sup>). Indiana's approach to Medicaid expansion may serve as an indicator of how the broader Trump administration may think about Medicaid policy development.<sup>14</sup>

As a member of the House of Representatives, Tom Price, who is a physician, co-chaired Speaker Paul Ryan's Better Way Task Force on healthcare. Thus, his nomination as HHS Secretary may indicate that the administration plans to coordinate closely with Congress in crafting its agenda.<sup>15</sup> In addition to Dr. Price's involvement in the 2016 Better Way proposals, he

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<sup>8</sup> [www.politico.com/story/2016/11/trump-congress-washington-takeover-2016-231181](http://www.politico.com/story/2016/11/trump-congress-washington-takeover-2016-231181)

<sup>9</sup> [www.youtube.com/watch?v=7xX\\_KaStFT8](http://www.youtube.com/watch?v=7xX_KaStFT8)

<sup>10</sup> [money.cnn.com/2016/03/03/news/economy/trump-health-care/](http://money.cnn.com/2016/03/03/news/economy/trump-health-care/)

<sup>11</sup> [www.latimes.com/politics/la-na-pol-trump-transition-20161129-story.html](http://www.latimes.com/politics/la-na-pol-trump-transition-20161129-story.html)

<sup>12</sup> [www.wsj.com/articles/donald-trump-willing-to-keep-parts-of-health-law-1478895339](http://www.wsj.com/articles/donald-trump-willing-to-keep-parts-of-health-law-1478895339)

<sup>13</sup> [kff.org/medicaid/fact-sheet/medicaid-expansion-in-indiana/](http://kff.org/medicaid/fact-sheet/medicaid-expansion-in-indiana/)

<sup>14</sup> [www.svcinc.org/our-team.html?view=employee&id=1](http://www.svcinc.org/our-team.html?view=employee&id=1)

<sup>15</sup> [abetterway.speaker.gov/?page=health-care](http://abetterway.speaker.gov/?page=health-care)

released his own plan in 2015.<sup>16</sup> The Price plan included a number of proposals advocated by organized medicine, and as HHS Secretary, he might work to advance those goals.

## CONGRESSIONAL PLANS

At this time, the Better Way plan released in June 2016 is the most comprehensive indicator of a future Republican agenda. It is the product of input from key Republican committee leaders, including House Budget Committee Chairman (now selected HHS Secretary) Tom Price, House Education and Workforce Chairman John Kline, House Energy and Commerce Chairman Fred Upton, and House Ways and Means Chairman Kevin Brady.<sup>17</sup> Some of the themes in the plan also appear in Senate proposals, such as the Patient Choice, Affordability, Responsibility, and Empowerment (CARE) Act.<sup>18</sup> House Speaker Ryan has said that Better Way will start the debate on “what we can achieve in 2017 and beyond.”<sup>19</sup>

While Better Way may be the most recent and broadly supported among Republican healthcare proposals, others have also released plans, including former Louisiana Governor Bobby Jindal;<sup>20</sup> Senator Bill Cassidy and Representative Pete Sessions;<sup>21</sup> and Senator Orrin Hatch, Senator Richard Burr, and Representative Fred Upton.<sup>22</sup> Proposals from these plans may also be discussed as the new administration and Congress debate the components of ACA replacement.

In general, Republican policy-makers have been cautious about taking actions that could substantially disrupt coverage for those who received it under the ACA. For example, the Better Way plan proposes using tax credits (structurally different from those under the current law) and describes them as “large enough to purchase the typical pre-Obamacare health insurance plan.”<sup>23</sup> Nebraska Senator Ben Sasse has discussed repealing and replacing the ACA, yet before the Supreme Court decided the *King v. Burwell*<sup>24</sup> court case in 2015, he stated that if the subsidies in the law were struck down, “Congress should offer individuals losing insurance the ability to keep the coverage they picked, with financial assistance, for 18 transitional months.”<sup>25</sup>

Some Republicans have expressed similar concerns about Medicaid expansion. Kentucky Governor Matt Bevin has discussed repealing and replacing the ACA, but also proposed reforming the state’s Medicaid expansion rather than completely reversing it.<sup>26</sup> West Virginia Senator Shelley Moore Capito said, “I’m from a state that has an expanded Medicaid population that I am very concerned about. . . I don’t want to throw them off into the cold, and I don’t think

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<sup>16</sup> [tomprice.house.gov/HR2300](http://tomprice.house.gov/HR2300)

<sup>17</sup> [www.speaker.gov/press-release/better-way-fix-health-care](http://www.speaker.gov/press-release/better-way-fix-health-care)

<sup>18</sup> [www.finance.senate.gov/ranking-members-news/burr-coburn-hatch-unveil-obamacare-replacement-plan](http://www.finance.senate.gov/ranking-members-news/burr-coburn-hatch-unveil-obamacare-replacement-plan)

<sup>19</sup> [www.speaker.gov/press-release/better-way-fix-health-care](http://www.speaker.gov/press-release/better-way-fix-health-care)

<sup>20</sup> [www.americanext.org/wp-content/uploads/2014/04/Executive-Summary.pdf](http://www.americanext.org/wp-content/uploads/2014/04/Executive-Summary.pdf)

<sup>21</sup> [www.cassidy.senate.gov/newsroom/in-the-news/icymi\\_wsj-sen-cassidy-maps-a-plan-to-overhaul-obamacare](http://www.cassidy.senate.gov/newsroom/in-the-news/icymi_wsj-sen-cassidy-maps-a-plan-to-overhaul-obamacare)

<sup>22</sup> [energycommerce.house.gov/news-center/press-releases/burr-hatch-upton-unveil-obamacare-replacement-plan](http://energycommerce.house.gov/news-center/press-releases/burr-hatch-upton-unveil-obamacare-replacement-plan)

<sup>23</sup> [abetterway.speaker.gov/assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf](http://abetterway.speaker.gov/assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf)

<sup>24</sup> 576 U.S. \_\_\_\_ (2015); Docket no. 14-114

<sup>25</sup> [www.wsj.com/articles/ben-sasse-a-first-step-on-the-way-out-of-obamacare-1424908814](http://www.wsj.com/articles/ben-sasse-a-first-step-on-the-way-out-of-obamacare-1424908814)

<sup>26</sup> [www.courier-journal.com/story/news/politics/2016/08/24/bevin-releases-revised-medicaid-plan/88797686/](http://www.courier-journal.com/story/news/politics/2016/08/24/bevin-releases-revised-medicaid-plan/88797686/)

that's a strategy that I want to see. It's too many people. That's over 200,000 people in my state."<sup>27</sup>

In addition to proposals affecting coverage, the Better Way plan and other Congressional plans include provisions to promote broad innovation in healthcare. Recent legislation, including the 21st Century Cures Act, has also focused on this area.

## KEY PROPOSALS

Outlined below are many of the proposals likely to be debated and potentially enacted in the coming months, organized by healthcare segment. (Note: this list is not comprehensive.) Most of the proposals were drawn from specifics in House Speaker Ryan's Better Way plan.

### Individual exchange market

- Offer individual, age-adjusted credit large enough to cover a typical pre-ACA health insurance premium (to those without an offer of employer-sponsored coverage)
- Expand contributions to and uses for health savings accounts
- Enable the purchase of Individual market policies across state lines (updates a provision of current law)
- Implement Individual market age rating at 5:1 (versus 3:1 under current law)
- Allow dependents up to age 26 to stay on their parents' plans (as under current law)
- Offer continuous coverage protection, with coverage at standard rates for those who have maintained it (replaces current law individual mandate and guaranteed issue)
- Offer funding (e.g., \$25 billion over 10 years) in federal money for state high-risk pools
- Provide states more flexibility to govern the Individual markets
- Challenge the administration's authority to make cost-sharing reduction payments without additional Congressional action<sup>28</sup>
- Repay the U.S. Treasury before paying insurers for reinsurance<sup>29</sup>

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<sup>27</sup> [www.salon.com/2016/11/30/congressional-republicans-lay-out-obamacare-rollback-game-plan-repeal-then-replace/](http://www.salon.com/2016/11/30/congressional-republicans-lay-out-obamacare-rollback-game-plan-repeal-then-replace/)

<sup>28</sup> While this is not part of Better Way, the House has challenged the administration's authority to make cost-sharing reduction payments: ([www.politico.com/story/2016/05/house-gop-wins-obamacare-lawsuit-223121](http://www.politico.com/story/2016/05/house-gop-wins-obamacare-lawsuit-223121))

<sup>29</sup> While this is not part of Better Way, the House Energy and Commerce Committee has released a memo from the Congressional Research Service questioning the payments to insurers before the Treasury ([energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/analysis/20160223CRS.pdf](http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/analysis/20160223CRS.pdf))

## Medicaid market

- Implement per-capita caps based on segmented populations<sup>30</sup>, or give states the option to opt out and receive a block grant of federal funding
- Offer states more flexibility to design Medicaid programs and benefits (e.g., adding work requirements for able-bodied individuals and additional cost-sharing)
- Repeal fiscal year 2018 through 2020 Medicaid disproportionate share hospital (DSH) payment reductions
- Reauthorize the Children's Health Insurance Program (CHIP)
- Modernize the federal waiver-granting process by including fast-track parameters and a waiver clock, and by minimizing the requirements to transition populations to managed care

## Medicare market

- Grow Medicare Advantage (e.g., by enabling broader use of value-based insurance design, repealing ACA benchmark caps, and broadening the enrollment period)
- Restrict cost-sharing rules for Medigap plans and implement a unified deductible under Medicare Parts A and B
- Implement additional means testing of Medicare benefits
- Repeal fiscal year 2018 and 2019 DSH payment reductions
- Create a national pool of uncompensated care funds
- Adjust the Medicare eligibility age to match that of Social Security
- Implement premium support (a defined contribution to private plans or fee-for-service set by competitive bidding) in 2024

## Commercial group market

- Place a cap on the employer tax exclusion "at a level that would ensure job-based coverage continues unchanged for the vast majority of health insurance plans"<sup>31</sup> (replaces the current law Cadillac tax)
- Preserve the current definition of stop-loss insurance (versus group health insurance)
- Preserve employee wellness programs
- Expand health savings accounts, including an increase to the annual contribution limits
- Promote defined contribution models through health reimbursement accounts that can be used to select coverage on "private exchanges"

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<sup>30</sup> The Better Way plan proposes to give states that have already expanded Medicaid under the ACA the same amount of dollars they receive under current policy. However, beginning in 2019, the enhanced match would be gradually reduced to a state's normal match rate.

<sup>31</sup> [abetterway.speaker.gov/assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf](https://abetterway.speaker.gov/assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf)

- Expand opportunities for pooling via association health plans (AHPs) that can negotiate lower prices with insurers

## Payment innovation programs

- Repeal the Independent Payment Advisory Board (IPAB)
- Repeal the Center for Medicare and Medicaid Innovation (CMMI) by 2020 (when the program's funding would otherwise be renewed)
- Repeal the current law ban on physician-owned hospitals

## INITIAL IMPACT

It could take a significant amount of time before most of the proposals the new administration and Congressional Republicans decide to pursue are enacted and implemented. The immediate issue for payors and providers is how the transition period will unfold, because there is potential for high volatility in the Individual market. Press reports<sup>32,33</sup> indicate that Congress is considering a process to repeal the budget and revenue provisions of the ACA through budget reconciliation (see below) as soon as January,<sup>34</sup> and then to later address the rest of the ACA through its replacement.

In an extreme downside, the stability of the Individual market could deteriorate if key budgetary provisions (e.g., cost-sharing reductions, premium tax credits, reinsurance, individual mandate) are repealed while non-budgetary provisions (e.g., guaranteed issue) remain. However, this approach may be inconsistent with the new administration and Congressional leaders' recently stated goals of a smooth transition to a new model. For example, Tennessee Senator Lamar Alexander said, "I imagine this will take several years to completely make that sort of transition — to make sure we do no harm, create a good health care system that everyone has access to, and that we repeal the parts of Obamacare that need to be repealed."<sup>35</sup>

The new administration will also have a set of authorities (e.g., 1332 waivers, implementation discretion around cost-sharing reduction subsidies and reinsurance payments) to address some of the non-budgetary regulations affecting the Individual market, but it is unclear how quickly these will be implemented. These decisions will likely influence insurer participation going forward. In some states, discussed changes around cost-sharing reductions and reinsurance could potentially lead to additional insurer exits from the public exchanges, which could then lead to the threat of a downward spiral without adequate support mechanisms in place. Conversely, other changes may lead to upside: if the Individual market is restructured (e.g., through 1332 waivers) in such a way that it becomes sustainable, it may attract additional uninsured consumers and retain insurers.

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<sup>32</sup> [www.nytimes.com/2016/12/02/us/politics/obamacare-repeal.html](http://www.nytimes.com/2016/12/02/us/politics/obamacare-repeal.html)

<sup>33</sup> [www.bloomberg.com/politics/articles/2016-12-01/gop-s-delayed-repeal-obamacare-strategy-faces-major-obstacles](http://www.bloomberg.com/politics/articles/2016-12-01/gop-s-delayed-repeal-obamacare-strategy-faces-major-obstacles)

<sup>34</sup> [www.nytimes.com/2016/12/06/us/politics/senate-republican-leaders-vow-to-begin-repeal-of-health-law-next-month.html?\\_r=0](http://www.nytimes.com/2016/12/06/us/politics/senate-republican-leaders-vow-to-begin-repeal-of-health-law-next-month.html?_r=0)

<sup>35</sup> [www.nytimes.com/2016/12/02/us/politics/obamacare-repeal.html?\\_r=0](http://www.nytimes.com/2016/12/02/us/politics/obamacare-repeal.html?_r=0)

Most of the other implications of the Republican proposals are likely to vary significantly depending on the design details. As a result, a wide range of scenarios could unfold. Among the decisions that will have to be made are these:

- What will be the actual value of the age-adjusted tax credits? Will there be additional cost-sharing support for lower-income individuals, similar to the cost-sharing reduction subsidies under current law?
- How will the first year of the proposed Medicaid per-capita caps be determined, and what will the annual index of the caps be?
- How will Medicare premium support be structured? How will geographic bidding options be defined? Will a weighted average of bids or the second-lowest bid determine the level of premium support? How will the basic Medicare benefits be defined?
- Will policymakers delay the Cadillac tax beyond 2020? Or will they replace it with a cap on the employer tax exclusion (potentially as proposed in the Better Way plan and the proposals released by Senator Orrin Hatch, Senator Richard Burr, and Representative Fred Upton)?
- Will policymakers continue emphasizing value-based payments, as both Republicans and Democrats have done in the past?<sup>36,37</sup> Or does the proposal to repeal CMMI in 2020 mean that private payors and providers will lead the efforts towards provider risk-sharing and vertical integration?

## PROCESS SCENARIOS FOR ACA-RELATED CHANGES

The new administration and Congressional Republicans could use a variety of processes, alone or in combination, to promote their healthcare agenda, including regular order through Congress (which would require a 60-vote approval in the Senate, if any Senators attempted to filibuster the proposal), budget reconciliation through Congress (which would require just a 51-vote approval in the Senate but could affect only spending and revenue programs), administrative waiver approvals granted to states, and other administrative actions (e.g., executive orders or implementation discretion).

**Pass ACA changes through regular legislative order:** Republicans could attempt full repeal and replacement of the ACA through the regular legislative process. However, while the Republicans hold the number of votes needed in the House of Representatives to pass legislation, they have only a 51-vote majority (and potentially a 52-vote majority, depending on the results of the Louisiana Senate runoff on December 10, 2016<sup>38</sup>) in the Senate at this time. Passing full repeal and replace would require the support of a number of Democrats. Thus, the Senate Majority might have to negotiate a deal with the Senate Minority, led by Senator Chuck Schumer of New York.

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<sup>36</sup> [www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2006-Press-releases-items/2006-10-13.html](http://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2006-Press-releases-items/2006-10-13.html)

<sup>37</sup> [www.congress.gov/bill/114th-congress/house-bill/2](http://www.congress.gov/bill/114th-congress/house-bill/2)

<sup>38</sup> [fivethirtyeight.com/features/louisianas-senate-runoff-probably-isnt-going-to-make-democrats-feel-better/](http://fivethirtyeight.com/features/louisianas-senate-runoff-probably-isnt-going-to-make-democrats-feel-better/)

**Pass ACA changes with reconciliation followed by regular legislative order:** Republicans could repeal major provisions of the ACA through a Senate process called budget reconciliation.<sup>39</sup> For example, in 2015 Congress passed (and President Obama vetoed) a bill to repeal budget-related provisions of the ACA via reconciliation that included a two-year transition for funding Medicaid expansion and exchange subsidies.<sup>40</sup> Generally, Congress must pass a budget that establishes procedures for the use of reconciliation. Congress could then use budget reconciliation to pass a bill repealing budget-related components of the ACA and then use the transition time to come to agreement on a replacement, using the deadline of expiring subsidies to encourage action. This approach would also give Republicans time to build support for a replacement plan, obtain scoring from the Congressional Budget Office, and move the plan through the legislative process. Recent statements from Texas Senator John Cornyn indicate that this approach is being seriously considered by the Senate Majority leadership: “We’re talking about a three-year transition now that we actually have a president who’s likely to sign the repeal into the law. People are being understandably cautious, to make sure nobody’s dropped through the cracks.”<sup>41</sup>

As discussed, however, this approach, without a clear path to a replacement, could lead to considerable uncertainty about the Individual market during the transition period, which could increase the risk that additional carriers exit the market. It is also possible that Congressional Republicans cannot reach alignment on the details of the replacement plan, which has the potential to stall legislative action indefinitely. In addition to modifying the ACA, Congress will have other competing priorities, including confirmation of a Supreme Court justice, tax reform, and national security issues.<sup>42</sup> It is therefore possible that Congress will find it difficult to reach broad alignment on modifying the ACA, and so may adjust its priorities to these other issues.

**Pass ACA changes as part of broader legislative initiatives:** Republicans could choose to include changes to the ACA within a broader set of legislative initiatives. There are a number of issues with deadlines for action in 2017, including an extension of the federal debt limit,<sup>43</sup> reauthorization of the Children’s Health Insurance Program (CHIP),<sup>44</sup> and authorization of the Prescription Drug User Fee Agreement (PDUFA).<sup>45</sup> If ACA changes are combined with these other initiatives, it might accelerate the process of developing an ACA replacement. However, it might instead significantly complicate passage of the initiatives facing deadlines.

**Use regulatory authority to modify the ACA:** The Secretary of HHS and the Administrator of CMS have a broad set of regulatory authorities they can use without direct Congressional action. These tools can affect key parameters of the ACA exchanges (e.g., Section 1332 waivers<sup>46</sup>),

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<sup>39</sup> This enables legislation to pass the Senate with a simple majority of 51 votes, but only for legislation making spending and revenue changes. This would likely occur early in 2017 once Congress passes a budget enabling the reconciliation procedure.

<sup>40</sup> [www.congress.gov/bill/114th-congress/house-bill/3762](http://www.congress.gov/bill/114th-congress/house-bill/3762)

<sup>41</sup> [www.politicopro.com/health-care/story/2016/12/obamacare-republicans-repeal-replace-139330](http://www.politicopro.com/health-care/story/2016/12/obamacare-republicans-repeal-replace-139330)

<sup>42</sup> [www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days](http://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days)

<sup>43</sup> [www.marketwatch.com/story/us-debt-ceiling-of-20-trillion-plus-to-be-reached-soon-in-next-presidency-2016-09-13](http://www.marketwatch.com/story/us-debt-ceiling-of-20-trillion-plus-to-be-reached-soon-in-next-presidency-2016-09-13)

<sup>44</sup> [kff.org/report-section/childrens-health-coverage-the-role-of-medicaid-and-chip-and-issues-for-the-future-issue-brief/](http://kff.org/report-section/childrens-health-coverage-the-role-of-medicaid-and-chip-and-issues-for-the-future-issue-brief/)

<sup>45</sup> [www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm144411.htm](http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm144411.htm)

<sup>46</sup> [www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section\\_1332\\_state\\_Innovation\\_Waivers-.html](http://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_state_Innovation_Waivers-.html)

Medicaid (e.g., 1115 waivers<sup>47</sup>), Medicare (e.g., Section 402 demonstration authority<sup>48</sup>), and other current programs, including CMMI.<sup>49</sup> Some of these tools could be used to make changes to the public exchanges very rapidly,<sup>50</sup> even while Congress debates full ACA replacement. However, if the new HHS Secretary offers Section 1332 (State Innovation Waivers affecting the exchanges) or Section 1115 waivers (affecting Medicaid), states would need to consent to the changes. Although states supporting repeal and replace may agree to major program changes via waivers, those states supporting the current ACA structure may not.

**Use a combination of legislative and regulatory tools:** There is a scenario in which Congress could quickly alter the structure of the ACA's spending and revenue provisions via the budget reconciliation process, and the new administration could use waivers to modify the rules governing the exchanges and Medicaid. This scenario would require a significant level of planning and coordination between the new administration and Congress. In addition, the new administration could choose not to appeal the ruling on cost-sharing reduction subsidies in *House v. Burwell*, which could lead to considerable Individual market turbulence in the near-term.

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The findings in this Intelligence Brief provide an introductory perspective on how the next US administration and Congressional Republicans may approach altering the ACA and related legislation. The information is based on publicly reported data released through December 8, 2016. Our Reform Center team is continuing to refresh this perspective on a real-time basis and is closely analyzing potential implications and economic impacts for each policy element under a full range of scenarios.

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<sup>47</sup> [www.medicaid.gov/medicaid/section-1115-demo/about-1115/index.html](http://www.medicaid.gov/medicaid/section-1115-demo/about-1115/index.html)

<sup>48</sup> [www.cms.gov/Medicare/CMS-Forms/CMS-Forms/downloads/cms10069.pdf](http://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/downloads/cms10069.pdf)

<sup>49</sup> [innovation.cms.gov/](http://innovation.cms.gov/)

<sup>50</sup> For example, in 2001 the Department of Health and Human Services offered states a streamlined waiver approval process called Health Insurance Flexibility and Accountability waivers.