

**SAN FRANCISCO
HEALTH SERVICE SYSTEM**

Affordable, Quality Benefits & Well-Being

MEMORANDUM

DATE: December 8, 2016
TO: Randy Scott, President, and Members of the Health Service Board
FROM: Catherine Dodd, PhD, RN
Director SFHSS

On November 17, 2016, Congress passed a Continuing Resolution which will continue funding for government programs at the 15/16 level through March 2017. Prior to then, Congress will need to pass additional legislation to fund the government through the rest of the fiscal year which ends September 30, 2017. One mechanism through which Congress is expected to repeal the Affordable Care Act (ACA) is through something called a budget reconciliation bill. This will be an opportunity to take an initial pass at repealing parts of the ACA. Budget reconciliation is “privileged;” it only requires 50+1 votes in the Senate and cannot be stopped by the 60 votes required for cloture if the Democrats attempted a filibuster. Budget reconciliation bills can include specific instructions to committees to make “tax and spend” changes to the law. The only “rule” that limits what a reconciliation bill can do is the “Byrd rule” in the Senate. The Byrd rule requires that meaningful changes cannot be made in revenue or spending and it cannot cause increases to the deficit in future years. Decisions on whether the Byrd rule can be invoked and the legislation killed are made by the Senate parliamentarian who reviews every section of the legislation.

The Republican Congress has tried to repeal the Affordable Care Act several times in the past 4 years so they know what will and will not invoke the Byrd rule. Repealing protection against discrimination based on pre-existing conditions, coverage up to age 26 for dependents, and the IPAB (Independent Payment Advisory Board) violate the Byrd rule which is likely why they have been offered up as being parts of the ACA President-elect Trump is willing to preserve.

Congress is currently in a “lame duck” session and passed the “Cures” bill on December 7. This bill includes funding for rare disease research, it loosens regulations on FDA approval of new drugs, it includes Mental Health funding and funding for the “cancer moonshot” recommendations.

This clears the runway for the new Congress to complete last year’s budget work. The Republicans will have another opportunity to pass a second budget resolution (requiring only 50+1 votes) between April and September 30 for the 17/18 budget year.

Challenges: The financing of the ACA including guaranteed coverage regardless of pre-existing condition – “or guaranteed issue” and subsidies require the employer and individual mandate. Healthy individuals are needed to balance a risk pool with people with cancer and chronic illnesses. Figuring out the financing of a replacement of the ACA will take time.

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Considerations

OVERVIEW

In 2017, the post-election American health insurance market is anticipated to change dramatically. On December 19, 2016, the Electoral College is anticipated to formally elect Donald Trump as the President. On January 3, 2017, the House of Representatives and the Senate, both now controlled by Republican majorities, will begin the 115th United States Congress. During the campaign season, Republican leadership made promises and policy proposals to “Repeal and Replace” the Affordable Care Act (ACA), suggesting when and how the ACA will be repealed, and what an alternative will look like.

WHAT HAS BEEN PROMISED

1. By President-elect Trump:

The [Healthcare Reform Paper](#) on the President-elect’s campaign website states: “On day one of the Trump Administration, we will ask Congress to immediately deliver a full repeal of Obamacare.”

Promises for efforts to replace the ACA called for by President-elect Trump include:

- **Complete Repeal of the ACA**, including the individual mandate to buy insurance, but still allowing child dependents to remain on their parents’ plans up to age 26
- **Promoting Cross-State Sales of Health Insurance Plans**
- **Tax Return Deductions For Health Insurance Premium Payments By Individuals**
- **Promoting Health Savings Accounts (HSAs)** for individuals coupled with high-deductible insurance plans, with tax-free contributions that can be passed on penalty-free to heirs
- **Price Transparency** requirements for healthcare providers, organizations and doctors
- **Medicaid Transformation To Block-Grants for States** instead of the current entitlement
- **Promoting Safe Pharmaceutical Drug Importation** to reduce consumer drug prices
- **Establishing High-Risk Insurance Pools For Individuals Without Continuous Coverage**
- **Reforming Mental Health Programs and Institutions**

Additional campaign promises that the President-elect has made include:

- Reducing eligibility for Medicaid and the Children’s Health Insurance Program (CHIP)
- Cutting Health Care for Undocumented Immigrants
- Allowing States to Legalize the Use of Medical Marijuana
- Advancing healthcare research and pushing the FDA to streamline drug approval review

POLICY PROPOSALS TO REPEAL THE ACA

1. By U.S. House Speaker Paul Ryan and Republican Leadership: ‘A Better Way’ Plan

Speaker Ryan outlined the Republican leadership’s Health Care plans in the June 22, 2016 Policy Paper, [A Better Way: Our Vision For A Confident America](#), which indicates reform will come through multiple pieces of legislation and regulatory changes, all centered on five principles:

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- **1) Repeal of The ACA**
 - Elimination of Individual Mandate to have insurance with penalties for no insurance
 - Elimination of taxes, including “Cadillac tax” and Health Insurance Providers Fee; but, capping Employer-Sponsored Insurance (ESI) tax-preference exclusion levels
 - Regulatory: (age-rating restrictions, benefit mandates, minimum actuarial values)
 - Expansion of the permissible uses of individual Savings Accounts to pay premiums and purchase drugs, including **Health Savings Accounts** (tax-advantaged accounts, tied to High-Deductible Health Plans, used to pay for certain medical expenses)
- **2) Providing more choices, lower costs, and greater flexibility for health insurance**
 - Per Capita Allotment reform for Medicaid in 2019 and Using Block Grants
 - Portable refundable tax credit payments for health insurance purchases
 - Medical Liability Reform, including supporting caps on non-economic damages
- **3) Changing Coverage Options**
 - *Preserving pre-existing condition requirement* for health insurance coverage and not allowing insurance companies to drop patients who get ill when they renew plans
 - Eliminating requirements, including California’s, for abortion service coverage
- **4) Promoting Healthcare Innovation**
 - Streamlining FDA drug approval process and eliminating taxes on medical devices
 - Supporting biomedical research
 - State Innovation Grants rewarding state-based healthcare reform
- **5. Preserving Medicare and Medicaid**
 - Reduce entitlement expansion and discouraging outdated payment systems
 - Medicare Advantage (MA) plan reform including repealing benchmark caps and giving flexibility to switch MA plans during the first three months after Open Enrollment
 - Repealing: 1) Independent Payment Advisory Board (IPAB); 2) Center for Medicare and Medicaid Innovation (CMMI) in 2020; 3) the ban on physician-owned hospitals; and 4) CMS geography-based adjustments of payments to hospitals for wage indexes

The plan praises reforms from the *Medicare Prescription Drug, Improvement, and Modernization Act* of 2003, including: 1) Health Savings Accounts (HSAs) and consumer-directed health care; 2) Medicare Advantage 3) Medicare Part D; and, 4) quality reporting and tying reimbursement to value.

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Structural reforms to Medicare that the “A Better Way” plan proposes include:

- Transforming Medicare to a fully competitive market-based model (with the government offering premium support- aka vouchers) beginning in 2024 to allow private plans to compete with traditional Medicare programs on a newly created Medicare Exchange
- Medicare Advantage plan design flexibility; a comparison website; restricting Medi-gap
- Uncompensated Care Reform, to restore Disproportionate Share Hospital payments
- Increasing Medicare retirement age in 2020 to correspond with Social Security

2. By Incoming Health and Human Services Secretary Hon. Tom Price (R-GA)

On Tuesday, November 29, 2016, President-elect Trump chose the Hon. Rep. Tom Price (R-GA), an orthopedic surgeon who chairs the House Budget Committee and has been a vocal critic of the *Affordable Care Act*, to serve as Secretary of the U.S. Department of Health and Human Services, which administers Medicare and Medicaid. Secretary Price was supported by the American Medical Association and has been a vocal supporter of eliminating abortion coverage, and the requirement for insurance plans to cover contraception and birth control costs, under the ACA.

Two pieces of legislation drafted by Rep. Price, which passed both the House and the Senate before each being vetoed by President Obama, provide insight his policy preferences as Secretary: the *Empowering Patients First Act* (H.R.2300) and the *Restoring Americans’ Healthcare Freedom Reconciliation Act* (H.R. 3762).

The Empowering Patients First Act (H.R.2300)

In the 114th Congress, in May 2015, Rep. Price, introduced Bill H.R. 2300, the *Empowering Patients First Act*. The Act, first introduced by Rep. Price during the 111th Congress, provides a replacement for the ACA.

Major changes within the 242-page Empowering Patients First Act include:

- **Sec. 2: Fully Repealing the ACA**, including: government-run insurance; eliminating individual mandates; and federal tax credits to subsidize the insurance of lower income Americans.
 - **Sec. 101: Replacing the ACA with refundable fixed tax credits** pegged to age (not income), to promote consumer-driven purchasing of private market insurance
 - \$1,200 (age 18-35); \$2,100 (age35-50); \$3,000 (50+); \$900 per child under 18
 - **Sec. 102:** Allowing individuals to opt out of Medicare or Medicaid for tax credits
- **Subtitle B: Expand Health Savings Accounts permissible usage**, while allowing members of other government health programs such as the VA or Medicare to contribute to HSAs
- **Sec. 131: Imposing a cap on amounts employers can deduct to defray health insurance costs** (limiting the annual employer tax exclusion to \$8,000 /individuals and \$20,000/families)
- **Sec. 132: Limit abortion funding** (no IRS credits for or federal funds of abortion)
- **Sec. 134: Equal Employer Contribution Rule to grant employees a pre-tax benefit through a ‘defined contribution’ option**

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- **Sec. 201**: Providing grants to states to ensure “high risk” populations in risk pools
- **Sec. 221**: Maintaining the pre-existing medical condition coverage requirement, provided a member has continuous insurance for 18 months prior to getting a new policy. Otherwise, if someone lets a policy lapse, they may be charged up to 150 percent of the standard premiums for the next two years under the Act.
- **Sec. 301**: Allowing cross-state sales of health insurance
- **Sec. 601**: Sets forth Transparency requirements for Claim Information Reporting
- **Sec. 702**: Establish Performance-Based Quality Measures for Medicare Physicians’
Repeal expanded Medicaid coverage

The Restoring Americans’ Healthcare Freedom Reconciliation Act (H.R. 3762)

First passed by the House on October 23, 2015 as a Budget Reconciliation Bill to appeal the major provisions of the Affordable Care Act germane to the budget, and then passed by the Senate on December 3, 2015 by a vote of 52-47, this Act was vetoed by President Obama. The House failed to override the veto in a vote taken on February 2, 2016.

Table 3 of a recent November 10th, 2016 Congressional Research Service report, entitled *Legislative Actions to Repeal, Defund, or Delay the Affordable Care Act*, summarized all of Rep. Price’s Reconciliation Bill provisions, which is attached to this Memorandum for reference.

3. By Other Republicans Which Are Likely To Appear In Any ACA Replacement Policies

A number of other Congressional legislative proposals have attempted to repeal various provisions of the ACA since it was first enacted in March 2010 during the 111th Congress. Some of the most germane provisions to the San Francisco Health Service System are detailed below:

- **H.R. 7** (Smith, C.) – *No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2015*
 - Prohibits exchange applicants from getting premium tax credits or cost-sharing subsidies to help purchase health plans that cover abortions, and would prohibit tax credits for health plans offered by an employer that include elective abortion coverage.
 - Efforts to eliminate abortion coverage under the ACA have passed the House since as early as 2011, including **H.R. 358** (Pitts) – the *Protect Life Act*.
- **H.R. 30** (Young, T.) – *Save American Workers Act of 2015*
 - Amend the ACA’s definition of full-time employees to those who work on average to at least 40 hours per week (also likely to be included in any ACA replacement)
- **HR 4015** (Burgess) – *Sustainable Growth Rate (SGR) Repeal and Medicare Provider Payment Modernization Act of 2014*
 - This bill would have replaced the SGR formula with new systems for payment rates.
 - The future of Value-Based Repayment reforms such as the Medicare Access and CHIP Reauthorization Act (MACRA) reform, to replace fee-for-service Medicare payments with payments tied to quality of care, is uncertain under the Trump

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administration. Rep. Tom Price has complained in the past that CMS exceeded its authority by requiring doctors and hospitals to participate in mandatory bundled payment reforms without sufficient stakeholder input.

HOW POST-AFFORDABLE CARE ACT REPEAL CHANGES MAY COME

1. **Through The Courts:** Two major American healthcare components may be impacted by litigation making its way through the court system: the legality of ACA cost-sharing subsidies and healthcare insurance mergers and acquisitions.

ACA Cost-Sharing Subsidies: On July 30, 2014, the House voted along party lines to file a lawsuit challenging the President's implementation of the ACA. On May 12, 2016, Judge Rosemary Collyer of the federal district court for the District of Columbia decided that the Obama administration cannot constitutionally reimburse insurers for the costs they incur in fulfilling their obligation under the ACA to reduce cost sharing for marketplace enrollees with incomes below 250 percent of the poverty level. If the Trump Administration does not move forward with an appeal of this decision, a major component of funding the ACA insurance system will cease to be legal.

Healthcare Insurance Mergers and Acquisitions: In July 2016, the U.S. Department of Justice with the support of numerous state Attorney Generals including California AG Kamala Harris (the U.S. Senator-elect), brought two blockbuster antitrust cases to block proposed health insurance industry mega-mergers, arguing that allowing Anthem to buy Cigna and Aetna to merge with Humana would harm millions of Americans, raise prices and eliminate competition. Opening arguments for these cases began to be heard in November 2017 in Washington, D.C., with DOJ lawyers arguing such mergers would harm Medicare Advantage plans.

Through Budget Cuts: If the U.S. Congress fails to provide appropriations to fund aspects of the ACA that are unpopular with Republicans, such as cost-sharing subsidies or enforcement of penalties for the individual mandate, then this may be an alternative to passing repeal legislation. This is unlikely to be a necessary method of repeal in 2017 given the bi-cameral Republican majority in the legislature and the Republican control of the executive branch.

Through State Innovation Waivers and State Grants: Numerous Republican policy proposals promote state grants to innovate in healthcare, including converting Medicaid to a block-grant system with less federal oversight typically required of entitlement-style programs. This may allow states to innovate in how they spend on healthcare and replace the Affordable Care Act.

2. **Through Budget Reconciliation:** Pursuant to the obscure Byrd Rule of the U.S. Senate, during under the Congressional Budget Reconciliation process between the U.S. House Budget that gets passed and the Senate Budget that gets passed, the Senate Parliamentarian may block legislation if it purports significantly to increase the federal deficit beyond a ten-year term or is otherwise an "extraneous matter" as set forth in the Budget Act. Therefore, it is uncertain whether certain promises and proposals of Republicans to repeal the ACA, such as allowing for health insurance to be sold across state lines, could be achieved through Budget Reconciliation immediately in 2017, or would require separate stand-alone legislation to be passed by Congress.

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CONCLUSION

While Congress may seek to repeal the ACA on Day 1 of the 115th Congress on January 3, 2017, reports coming out this week have indicated Republicans are discussing deferring ACA repeal and replacement effective dates until 2019 after the midterm Congressional elections, providing time to negotiate what alternatives look like after repeal. Therefore, seismic systematic health insurance overhaul is unlikely to immediately occur, given the implications to the health insurance market and political pressure. Nevertheless, the Affordable Care Act as we have known it is likely to undergo imminent, substantial change that will require employers such as SFHSS to adjust to the new moving target of healthcare insurance laws.