**What We Know About ACA Repeal & Replace**

**Introduction**

After six years of campaigning to repeal the Affordable Care Act (ACA) and over 50 votes held to undercut the law, Republicans in Congress will be ‘shooting with real bullets’ in the 115th Congress – thanks in part to the election of Donald Trump – and will finally be positioned to deliver on their long-held position that President Obama’s healthcare law should be repealed as expeditiously as possible. But without a concrete replacement plan in place, Republicans remain at a crossroads over what set of policies should encompass their ACA alternative, and face the politically challenging prospect of deciding how – and how quickly – they will be able to achieve consensus.

The ACA repeal vote will not be easy. There are a handful of crucial sticking points that have divided Republicans – particularly the length of the “sunset” window for repeal of many major ACA provisions. As it stands now, the Republican leadership is eyeing a plan – with work on a reconciliation bill set to begin on Jan. 3 – that would sustain the ACA for two or three years while they get to work on replacing it. But some in the GOP have expressed concern with the plan to push through repeal without a replacement in waiting. And in the Senate, where Republicans will hold the slimiest of majorities, Majority Leader Mitch McConnell (R-KY) will need to have buy-in from across the caucus to put a repeal bill on Trump’s desk during his first few weeks in office. Meanwhile, stakeholders from across the health care community – hospitals, consumer groups, and insurers, and others – are lining up to oppose repeal without a contemporaneous replacement plan.

When it comes to replacing the ACA, Senate Republicans have already signaled that they will attempt to pass a bill through regular order, requiring 60 votes to pass and the bipartisan support of at least 8 Senate Democrats. “We’re not going to pass another 2000-page bill like the Democrats have,” Senate Majority Whip John Cornyn (R-TX) recently said. “The way to realistically address this is to go step by step, to build consensus, get 60 votes and pass those various pieces.” But even if it has Democratic fingerprints on it, any ACA replacement will largely be shaped by Republicans. Some of the common proposals among GOP-backed plans include fixed-dollar, age-adjusted premium tax credits to take the place of the ACA’s means-tested tax credits; an expansion of health savings accounts; a requirement to maintain continuous coverage to avoid preexisting condition exclusions; federal subsidies for state high-risk pools; and authorization of the sale of insurance across state lines. Whether a handful of Democrats would be willing to sign on to a plan with those major elements remains to be seen. But consider that a starting point.

This Issue Brief outlines and summarizes the most recent developments around the key factors that will underpin the repeal and replace debate in the 115th Congress. Specifically, we examine the timing
for a repeal vote, the likely scope for repeal via budget reconciliation, the potential impact of ACA repeal on the insurance markets, and the likely components of a replacement package.

**TIMING FOR ’REPEAL’ VOTE**

The politically charged environment around ACA repeal – which is laced with severe policy ramifications – leaves the GOP in a difficult predicament. Come January 2017, Congressional Republicans can either: (1) use the tools available through budget reconciliation to quickly pass a repeal bill that phases out major ACA provisions over two to three years, and then work fervently to hold hearings, accept stakeholder input, coalesce around the principles for a replacement, draft legislative language, pass a bill, and implement a lengthy comment and rulemaking process; or (2) walk back their campaign promise to repeal the ACA “very very quickly,” and give themselves time for the policymaking process to catch up with their “repeal and replace” rhetoric.

*Commitments from Leadership*

So far, Republican leaders appear willing to accept the political risks of repealing the ACA without a replacement plan on tap. In the House, Speaker Paul Ryan (R-WI) and Majority Leader Kevin McCarthy (R-CA) appear poised to lead an aggressive charge that could put ACA repeal at the top of the priority list when Congress returns in the new year. “The first bill we’re going to be working on is our Obamacare legislation,” Speaker Ryan said on CBS’s ’60 Minutes’ last Sunday. “We want to make sure that we have a good transition period, so that people can get better coverage at a better price.”

In the Senate, leadership appears to be reading from the same playbook, and are already positioning themselves to take quick action next year – perhaps even before President-elect Trump is sworn into office on January 20. In a press conference Tuesday, Majority Leader Mitch McConnell said that lawmakers were working on a budget resolution that would be ready by the time Congress reconvenes on Jan. 3.

*Voices of Concern*

But as Republican leaders attempt to chart a clear course for ACA repeal, warring factions inside the party – including a few influential voices – are questioning the approach being mapped by party bosses. Senate HELP Committee Chairman Lamar Alexander (R-TN) – who coined the transposed phrase “replace and repeal” – has set a marker as one of the more cautious voices in the GOP over their tactics on healthcare reform. “I agree with President-elect Trump, who said those things should be done simultaneously,” Alexander said recently. “And I think if you replace and repeal Obamacare simultaneously that you have to figure out how you’re going to replace it.” Likewise, Sen. Susan Collins – one of two Republicans who voted against the reconciliation-repeal bill that Congress passed in 2015 – has said that she may not vote to repeal the ACA without a detailed replacement. With an incoming majority of just 52-48 (most likely), Senate Republicans will effectively have to sell every one of their members on their repeal strategy, as just a couple of defections could torpedo their efforts in the most public of venues.
In the House, where Republicans will maintain a 46-seat advantage, the prospect of success for an ACA repeal vote are decidedly more certain. Nonetheless, there have been notable departures from leadership. We’ve been told that a handful of Tuesday Group members – centrists, including Reps. Charlie Dent (R-PA), Ryan Costello (R-PA) and John Katko (R-NY) – voiced concerns about the “repeal first, replace later” plan during a caucus meeting last Friday.

Democrats, for their part, have warned of the potential challenges ahead. At a press conference on Tuesday, Senate Democratic leaders cautioned that repealing the law without an alternative in place would cause immediate harm and that promises of a “better way” to bolster health care access were hollow. “Believe me,” said incoming-Minority Leader Chuck Schumer (D-NY), “just repealing Obamacare, even though they have nothing to put in its place, and saying they’ll do it sometime down the road, will cause huge calamity, from one end of America to the other. They don’t know what to do. They’re like the dog that caught the bus.”

**WHAT WILL BE IN ACA ‘REPEAL’?**

The 2015 Reconciliation Bill

Republicans already have a playbook on the shelf that would allow them to quickly repeal many of the most controversial provisions of the ACA through budget reconciliation, allowing it to bypass 60-vote thresholds in the Senate. We expect that the package Congress could take up next month will be similar to the one that the Republican-led Congress passed last year – and was ultimately vetoed by President Obama in January. That bill included a repeal of major ACA provisions including the individual and employer mandates, the premium tax credits, and the Medicaid expansion. The measure also included a two-year delayed effective date for repeal of these major provisions, designed to give lawmakers time to come up with a replacement for the coverage expansions.

The bill would have also removed current caps that limit the amount of premium tax credit overpayments that the IRS can claw back at the time individuals who receive advance tax credits file their taxes. These caps currently provide some protection for low-income individuals who underestimate their income for a year and thus must pay back excess credits. Additionally, the legislation provided that the ACA’s reinsurance program would be unable to make payments or collect contributions as of January 2016.

The bill also repealed the ACA’s revenue provisions which financed coverage expansion. Included in the tax repeals is the Cadillac tax along with more than a dozen other revenue repeals. A few of those include the indoor tanning tax, a provision that eliminated tax subsidies for the purchase of over-the-counter drugs from HSAs, and repeal of the increased Medicare payroll and capital gains taxes. Overall, these repeals would cut government revenues by $1.2 trillion over 10 years, resulting in a net reduction in the deficit of $300 billion after the tax cuts are offset against the cuts in Medicaid, premium tax credits, and cost-sharing reduction payments. Among its other provisions, the legislation would terminate the ACA’s Prevention and Public Health Fund, increase funding for the Community Health Center Program, end federal funding for Planned Parenthood, and repeal the ACA’s reduction in disproportionate share hospital (DSH) Medicaid payments.
What Didn't Make it into the Last Reconciliation Package?

If it sounds like that repeal bill was wholly comprehensive, don’t be fooled. There are over four-hundred provisions in the ACA, including many which have done little to attract the ire of opponents. Broadly speaking, these include the law’s Medicare reforms, workforce provisions, Medicaid program refinements, biosimilars pathway, transparency requirements, and hundreds of other items. In fact, some conservative groups have taken notice, and are looking to push Republicans to go further in their approach to ACA repeal.

Earlier this week, Heritage Action released a strategy memo calling on Republicans to repeal every line of the ACA by the time Trump takes the oath of office on January 20. The paper calls last year's repeal effort “a floor, not a ceiling” for what a Republican Congress can do., and argues that Republicans have ways around two hurdles that others say prevent full repeal under reconciliation rules: (1) the requirement that legislation passed under reconciliation have a budgetary impact, and (2) the rulings of the Senate parliamentarian, who has to decide if there is a budgetary impact. Heritage argues that the Senate parliamentarian’s rulings can be overturned by the Senate’s presiding officer and a majority vote of senators.

So far, leading Republicans have expressed little appetite to expand on the ACA “repeal” bill they passed last year. Majority Whip John Cornyn said earlier this week that the Senate plans to take up a reconciliation bill that “will be very similar to what we passed last year.” Meanwhile, Budget Committee Chairman Mike Enzi (R-WY) recently indicated that he’s been talking with the Senate Parliamentarian for a year about what a reconciliation package to repeal the law could like; he has yet to indicate whether a new package could go further than last year’s.

Two or Three Year Sunset?

One of the early points of contention among Republicans has been the sunset date for the major ACA provisions which Republicans plan to repeal. Some of those disagreements are deeply ideological; others are rooted in the fact that Republicans know replacing the law will not be easy. As a reminder, the first year of ACA open enrollment started in October 2013 – over two-and-a-half years after the bill had initially passed. That window of opportunity allowed for the Obama administration to draft and revise at least 10,000 pages of implementing regulations, for insurance carriers to digest those rules and design their offerings, and for stakeholders to conduct extensive enrollment and outreach campaigns. And despite the 30-month cushion, there were still well-documented technical issues related to the rollout.

Based on our conversations with both GOP leadership and rank-and-file Members, private discussions are currently underway on whether to sunset the provisions after two years – per the 2015 reconciliation bill – or three years, which would give lawmakers more time to craft and implement a replacement plan. Several Republican members of the Senate Finance Committee have told us in recent weeks that a three-year window for replacement is most realistic. But that timeline may not satisfy those who would like to see the ACA dismantled as soon as possible, and several
conservative senators have told us that they would prefer a two-year window to “capitalize on Trump's momentum.”

In the House, meanwhile, members of the hard-line Freedom Caucus are pushing back firmly on the prospect of a three-year window, suggesting that the ACA should be repealed and replaced “during the 115th Congress.” We’ve heard from lawmakers this week that the Freedom Caucus is in talks about pushing for as short as a 6-month window. If Republican leaders were to meet this demand for a sunset period of less than two as part of a ‘repeal then replace’ strategy, Congress and the Administration would be under immense pressure to complete the protracted legislative and regulatory process in such a short period of time.

**Potential Impact of ACA Repeal**

*The Individual Market*

Discussions over repealing the ACA have led many to speculate as to how the already-shaky individual insurance market might react to the uncertainty that could occur with a phasing out of the market reforms. According to a study released this week by the left-leaning Urban Institute, repealing the ACA would drive the nation's uninsured population to levels even higher than before the law went into effect. The number of uninsured people would more than double, under their estimates, increasing by 29.8 million people by the end of Trump's first term. It does not predict how Republicans would replace the law, citing a lack of “consensus” on alternative plans. Instead, it underscores the potentially damaging effects of the GOP's repeal plan without a replace. The effects of repeal would be swift and immediate, they conclude, leading to a “near death spiral” of the individual marketplace.

As a practical matter, if the ACA disappeared overnight, insurance would still be regulated and to some extent financed by the states. The effect of repeal would vary from place to place, but most states simply lack the capacity to fully absorb the effects of repeal on lower-income and high-cost individuals. Keep in mind that the ACA was enacted in 2010 because the states had struggled to address the affordability and accessibility problems that the law was intended to address. Insurer participation in the marketplaces is also voluntarily, and most plans are not dependent on Exchange business for survival. In the end, insurance carriers will have to look to their own financial viability, and given the uncertainty, it’s likely that many could decide to pull out of the market ahead of the 2018 plan year.

*What if Republicans Don’t Replace It?*

Then there’s the matter of what would happen if Republicans never got around to replacing the law. If allowed to lapse without a replacement, a repeal of the ACA’s coverage provisions would leave millions of Americans who currently have coverage without it – many of whom gained affordable coverage for the first time under the law. Repeal of the Medicaid expansion would leave a significant burden on the states, Medicaid managed care insurers, and health care providers. And an end to premium tax credits, cost-sharing reduction payments, and the Exchanges could leave millions of Americans without access to affordable coverage and insurers and providers holding the bag.
Meanwhile, some have come to speculate that replacing the ACA could become a “cliff” – a decision Congress might repeatedly delay as Republicans remain divided over replacement. Based on our discussions with many rank-and-file Republicans, there is a tenable lack of enthusiasm around a significant package to replace the ACA. While the political forces of gravity – a Trump Administration, congressionally leadership, and party stalwarts leading committees of jurisdiction – will all be pulling in the direction of replace, a certain group of conservatives have said that their only promise to voters is to achieve repeal.

**DEVELOPING REPLACEMENT LEGISLATION**

*Context for Reaching Consensus*

Critics have panned Republicans for failing to coalesce around an ACA alternative after spending six years campaigning on “repeal and replace.” So far, though, they haven’t had any impetus to flesh out their plans in a way that could expose them to politically-charged criticism. But you don’t have to go back too far in history to establish some precedent.

When Democrats held the levers of power in 2009-2010, lawmakers spent more than a year developing the framework for the bill that would eventually become the ACA. Although Democrats fundamentally agreed on the general principles of how to reform the insurance market, there were differences in the bills being considered on each side of the Capitol. Towards the very end of 2009, competing bills that had passed the House and Senate. There didn't seem to be an urgent need for Democrats to reconcile both bills immediately, because the Massachusetts special election (scheduled for Jan. 2010) was almost certain to fall to the Democrat, Attorney General Martha Coakley. It wasn’t until that election unexpectedly went in favor of Scott Brown (R-MA) – reducing the Democrats’ 60-vote supermajority in the Senate to just 59 – that lawmakers quickly acted to establish a consensus. Without the 60th vote in the Senate to end debate, Democrats opted to have the House take up the identical bill that the Senate had already passed, and on March 23, 2009, President Obama signed the bill into law.

**Covering the Sick**

Republicans are not quite as far along in developing their ACA plans as Democrats were at the end of 2009 – at which point both chambers of Congress had passed legislation – but they have put forth plans that share many common elements. The most prominent of these is Paul Ryan’s “Better Way” proposal. Another plan that has gotten increased attention of late is a proposal from Rep. Tom Price (R-GA), who Trump has tapped for Secretary of Health and Human Services. Conservative think tanks have also put forth proposals of their own, and may also offer ideas that will be considered in the health reform discussion. We’ve examined these proposals in detail in a previous Issue Brief, “Potential Components of ACA Repeal & Replace Legislation.”

As outlined in a recent article, the most common approaches they offer for covering high-cost individuals are continuous coverage requirements and high risk-pools, both of which are included in the “Better Way” and Price proposals. Continuous coverage provisions would ensure that as long as
an individual remains continuously insured, insurers could not refuse coverage or exclude pre-existing conditions for that individual and might not be able to increase premiums to account for risk. High-risk pools offer coverage to individuals who are not insurable in the standard coverage market because of health issues. High-risk pools could be an alternative to a continuous coverage requirement or could operate in tandem with it, offering coverage to those who had failed to satisfy the continuous coverage requirement.

**Affordability Provisions**
Another key element of among replacement plans are affordability provisions, and ACA replacement proposals have offered a broad range of alternatives for addressing the problem of affordability of health care for lower-income Americans. The most common among these proposals include some of the following elements: (1) fixed-dollar, age-adjusted premium tax credits to take the place of the ACA’s means-tested tax credits; (2) a dramatic expansion of health savings accounts; (3) loosening benefit requirements; (4) authorization of the sale of insurance across state lines; (5) association health plans, and (6) medical liability changes.

- **Tax Subsidies** – ACA replacement proposals offer a broader range of alternatives for addressing the problem of affordability of health insurance and health care for lower-income Americans. To begin, many of them would continue to offer subsidies through the tax system. These could take the form of either tax deductions or tax credits. They could be adjusted for age and geography, even for health status if underwriting were rewritten. Some proposals would retain some level of means testing.

- **Health Savings Accounts** – The solution that most replacement plans offer for covering cost-sharing obligations is the health savings account (HSA). Since 2003, Americans have been able to invest money tax free in HSAs, which can accumulate interest or investment income tax free; users can withdraw money from the account tax free to cover medical expenses. ACA replacement proposals would generally increase the amount that could be deposited in HSAs, make them broadly available for government programs, and relax other program requirements. Some would even offer tax credits to partially fund HSAs.

- **Loosening Benefit Requirements** – A common complaint about the ACA is that the essential health benefits package is too expensive and requires individuals to pay for coverage they do not need or want. While many of the essential health benefits were covered in the individual market before the ACA was adopted, a few services were less commonly covered, including maternity coverage and mental health and substance use disorder services. Most replacement proposals will need some definition of a minimum benefit package that can qualify for tax subsidies, and a serious debate would be expected as to what current essential health benefits can be eliminated. Consider the law’s contraception coverage among those hotly contested issues that could ensue on benefit requirements.
Conservative health reform plans have also typically included reforms to liberalize the age bands, which currently prevent insurers from charging older people any more than three times the premium charged to younger people (a 1:3 age rating band limit).

- **Interstate Insurance Sales** – Donald Trump has asserted on the campaign trail that allowing interstate insurance sales will introduce greater competition into insurance markets, bringing down prices. And many of the conservative repeal plans include this element. Depending on how it was implemented, the widespread sale of insurance across state lines could undermine state regulation, including state benefit mandates; this might put further impetus on Congress to impose federal minimum benefit requirements.

- **Association Health Plans** – Policies fostering association health plans could encourage non-employer groups such as community, civic, charitable, and religious organizations to form associations to bargain for lower rates from insurers. While they remain legal under the ACA, they have lost much of their luster because they are limited in their ability to underwrite. Opponents argue that to the extent that association health plans can offer lower rates, it may be because they can cherry pick their enrollees and avoid covering high-cost individuals, rather than because they can purchase coverage less expensively.

- **Medical Malpractice Reform** – Republican-backed proposals include caps on non-economic damages, limitations on attorney’s fees and incentives for states to adopt additional solutions to settle disputes – from expert panels to health courts to medical review panels. The Better Way proposal also mentions loser-pays, proportional liability, medical safe harbor provisions, and patient compensation reforms.

**Medicaid Expansion**

The future of Medicaid and the fate of the expansion population is among the most important questions that remains to be answered – and may be the issue that animates public health advocates more than any other. Under Paul Ryan’s plan, most states would transition to a per capita allotment. In the first effective year, a total federal Medicaid allotment would be available for each state to draw down based on its federal matching rate. States that have already expanded Medicaid under the ACA would receive the same number of dollars they receive today under the plan in the first year, but going forward, the enhanced federal contribution for the expansion population would be slowly phased down year-over-year until it reached the state’s normal FMAP level.

Additionally, Ryan’s plan contemplates a new Medicaid financing block grant option for states, under which a state can opt out of the per capita allotment in favor of a block grant for their federal funds. Under this approach, funding would be determined based on pre-ACA expansion levels. With this option, states would receive the most flexibility for the management of eligibility and benefits.

The one thing supporters of Medicaid expansion are likely to take away from Ryan’s plan is that it provides no guarantee of coverage for the estimated 11 million who gained coverage under the ACA – some beneficiaries would inevitably lose coverage as the FMAP level for the expansion population
is reduced. Several Republican governors, meanwhile, have expanded Medicaid under the ACA in their own states, and could be influential in encouraging Congress to maintain the federal funding commitment made by the ACA. In Michigan, for example, 443,000 people have gotten coverage under the State’s expansion. In Arizona, it's 336,000. Many of these governors are unlikely to sit by idly as Congress moves to repeal Medicaid expansion. In fact, we’re already starting to see it.

**CONCLUSION**

Many of the most important questions about Republican’s plans to repeal and replace the ACA remain unknowable. The timing and scope of a repeal vote, the fate of the law’s insurance exchanges, and the elements of a GOP-backed proposal all remain somewhat uncertain. With that in mind, there are a few things we can be sure of: (1) Republicans will be under immense political pressure to deliver on their promise to repeal the ACA; (2) a number of proposals have been introduced that lend clues to what could be included in the GOP’s replacement plan; (3) there will be fierce intra-party cacophony before Republicans ultimately settle on a replacement plan; and (4) at least 8 Senate Democrats would be needed to approve of any plan advanced by Congressional Republicans.

The painstaking process of finalizing the details of an ACA replacement package have not yet begun in earnest, and new considerations – most especially the fact that whatever is included is likely to truly become the law of the land – must be taken into account. We hope this is helpful in preparing you for the complex and robust debate that will begin to unfold early next year. We look forward to working with you to closely track this process and follow any key developments as the next Congress unfolds.