

# **Complimentary Webcast: A Deal Lawyer's Guide to the Impact of the Trump Administration on Laws Affecting M&A**

## **Impact on M&A of Potential Changes to the Affordable Care Act**

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**Sponsored by  
Penn State Law's Center for the Study of Mergers and Acquisitions  
January 19, 2017 | noon – 3:00 pm**

# Affordable Care Act (ACA)

Entitled  
e it enacted by the  
nited States of America in

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) **SHORT TITLE.**—This Act may be cited as the **Affordable Care Act**.

(b) **TABLE OF CONTENTS.**—

as follows:

Sec. 1. Short title; table of contents.

**TITLE I—QUALITY, AFFORDABLE CARE ACT**

Immediate Improvement  
to the P

# ACA Once Heralded by Some



# ACA Overview

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## ■ *Health Insurance Market Reforms*

- Guaranteed issue and renewability of coverage
- No pre-existing condition exclusions (no age limitations)
- Children covered until they reach age 26
- No eligibility rules based on health status related factors
- Insurance rating rules that constrain premium variation

## ■ *Qualified Health Plans (QHPs)*

- Standard plan designs for Exchange and outside Exchange markets in individual and small group market
- Essential health benefits, not subject to annual or lifetime limit
- Pre-defined actuarial values (metal plans + catastrophic coverage)

# Overview of ACA

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- *Health Insurance Exchanges*
  - Marketplace to facilitate apples-to-apples comparison of health plan options
  - Ease of eligibility determination and enrollment through 1 application
  - Portable coverage (not dependent on job or employment status)
  - Purchasing coverage through Exchange only way to access federal subsidies
    - Individuals and families with incomes between 133% - 400% of FPL are eligible for federal subsidies
      - 133% - 400% of FPL – All eligible for advanced premium tax credits
      - 133% - 250% of FPL – Only those purchasing Silver plans eligible for cost-sharing reductions
    - The U.S. Supreme Court in *King v Burwell* upheld the availability of federal subsidies for coverage purchased on both federal and state run exchanges

# Overview of ACA

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## ■ *Medicaid Expansion*

- Individuals and families with incomes up to 138% of FPL (133%+5% disregarded) eligible for ACA's Medicaid expansion coverage
- The U.S. Supreme Court in *National Federation of Independent Business v. Sebelius* upheld the individual mandate as a “tax” but agreed that ACA could not compel states to expand Medicaid
  - Therefore, under ACA, a state may elect to expand Medicaid and receive the federal government's greater financial support, but cannot be compelled to do so
- 31 States plus DC have adopted some form of Medicaid expansion (so, 19 states have not expanded Medicaid under ACA)

# ACA Seems Destined for Repeal

SOK

NOT EXACTLY  
**TRUE:**

IF YOU LIKE  
YOUR DOCTOR,  
YOU CAN KEEP  
YOUR DOCTOR.



NOT EXACTLY  
**FALSE:**

IF YOU FINALLY  
HAVE A DOCTOR,  
WE'LL TAKE AWAY  
YOUR DOCTOR.



# Where Might Repeal & Replacement Take Us?

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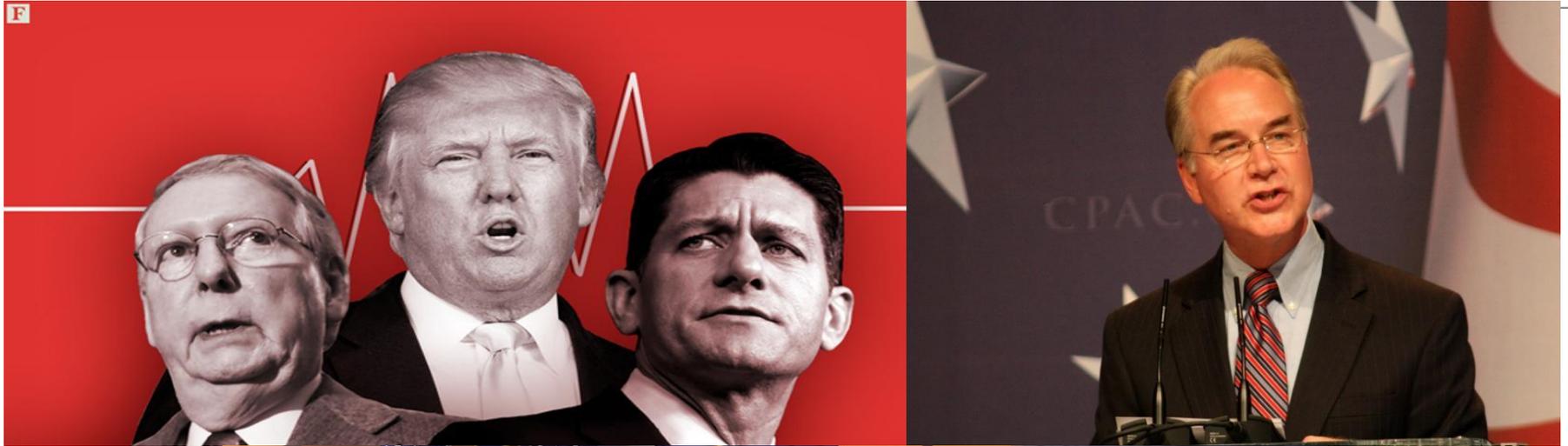
- From ACA's Three-pronged Policy Objective
  - Expand access
  - To quality health care coverage
  - At an affordable price
- To GOP's Two-Pronged Replacement Plan
  - Provide access
  - Health care coverage of your choosing

# How Might We Get There?

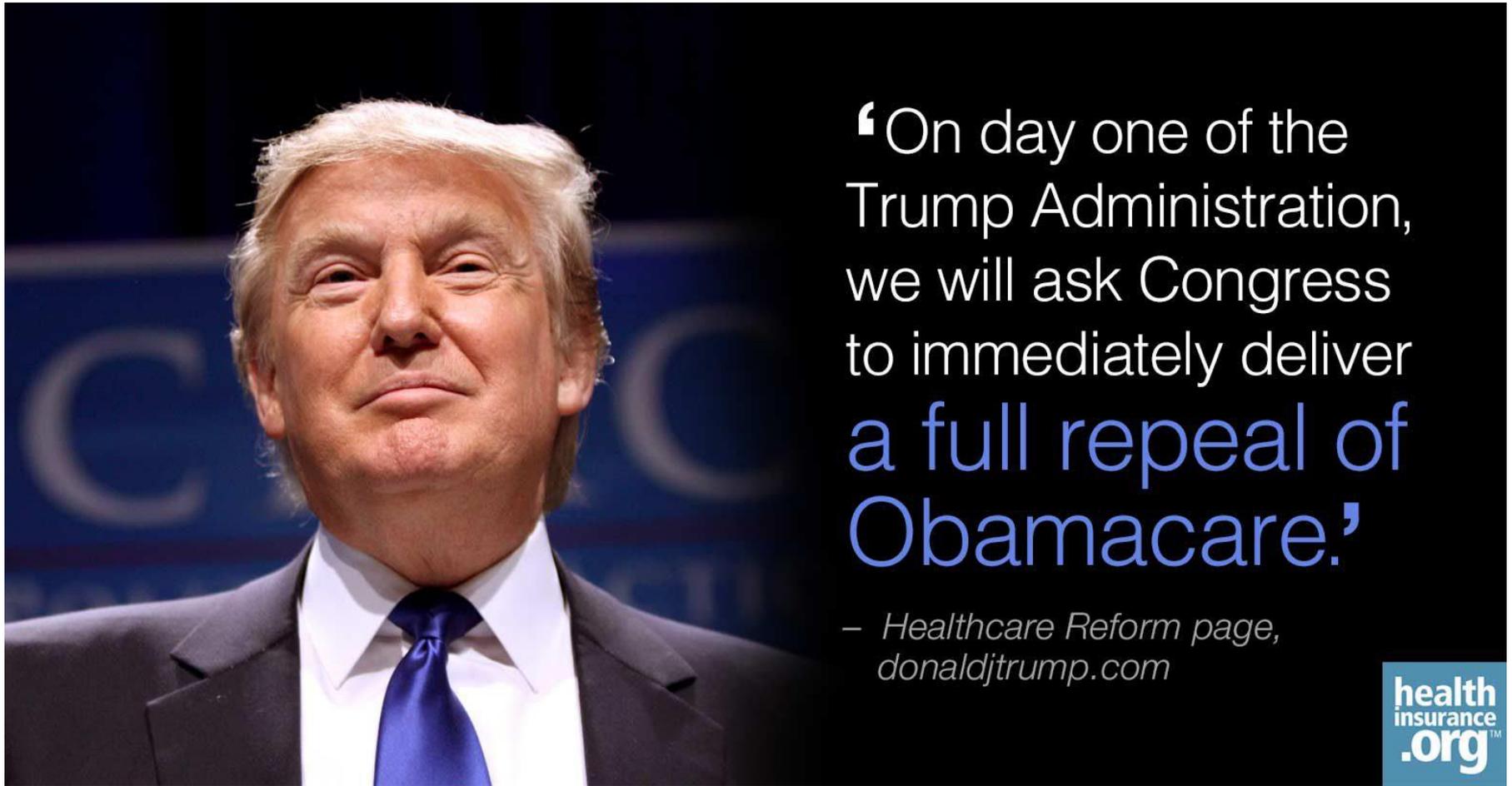
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- **Repeal ACA Through Budget Reconciliation Process**
  - Majority vote in the House of Representatives, *plus*
  - Simple majority vote of 51 in the Senate (no filibuster opportunity)
- **Executive Branch Action**
  - Trump signs **Executive Orders** nullifying Obama orders
  - New HHS Secretary takes **administrative actions** to deregulate and de-escalate ACA plans and insurer obligations
- **GOP Replacement Plan**
  - House approves new plan by simple majority vote, *plus*
  - Senate vote of 60 required to cut off debate (at least 8 Democratic Senators must vote with GOP, assuming all 52 GOP Senators vote along party lines)

# Choreographing the Dance of Repeal & Replacement Might Be Tricky



# Choreographing the Dance of Repeal & Replacement Might be Tricky



‘On day one of the Trump Administration, we will ask Congress to immediately deliver a full repeal of Obamacare.’

– *Healthcare Reform page, donaldjtrump.com*

# ACA Repeal – What We Anticipate

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- Congress Passed Necessary Procedural Action Last Week
  - Senate and House approved budget resolution instructing 4 relevant House committees to report out budget bill containing over \$1 billion in savings
  - Target completion date is January 27
- ACA Repeal Through Budget Reconciliation Legislation
  - Relates only to tax and spending measures and thus is filibuster-proof, requiring only simply majority vote of 51 in the Senate
  - New repeal Bill likely to mirror HR 3762, Restoring Americans Healthcare Freedom Reconciliation Act of 2015
    - Previously passed by Congress and vetoed by Obama in early 2016

# ACA Repeal – What We Anticipate

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- ACA Repeal Legislation Likely To Address (*cont'd*)
  - Private health insurance only
  - Restrict federal government from operating Exchanges
  - Eliminate advanced premium tax credits and cost-sharing reductions, subject to 2 year transition period while subsidies would be available
    - Note, the U.S. House of Representatives sued the Obama Administration alleging that the *cost-sharing reductions* were not properly appropriated by Congress and therefore are unconstitutional payments. The case is stayed until late February, 2017
  - Eliminate Medicaid expansion authorization, subject to same 2 year transition period (very well could end December 31, 2018)
  - Eliminate taxes on health industry – e.g., insurers, pharma and medical devices

# ACA Repeal – What We Anticipate

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- Repeal Legislation Likely To Address (*cont'd*)
  - Eliminate tax penalties for individuals who don't maintain insurance coverage and for large (50+) employers which don't offer minimum essential coverage to its employees
  - Cadillac surcharge (i.e., tax) on very rich employer-sponsored health coverage
  - Eliminate .9% Medicare surtax on high earners
    - Individuals with incomes over \$200,000
    - Couples with incomes over \$250,000
  - Eliminate 3.8% Medicare tax on net investment income
  - Prohibit federal funding of Planned Parenthood

# ACA Repeal – What We Anticipate

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- What is Likely Not to Change in the Short Term
  - Medicare Advantage star ratings and quality payment program
  - Cuts to Medicare fee-for-service, particularly those impacting hospitals and other facilities
  - Full revamp of Medicare and conversion to a Medicare support program – just too complicated for now and not enough support
  - Change Medicaid to a block grant program – could be addressed in subsequent legislation, but still will be met with stiffer opposition
  - What States are permitted to do if they so choose under State laws that are more expansive than the soon-to-be repealed (i.e., amended) ACA, including operating state-based Exchanges

# Trump Executive Orders

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- Timing – Some or All Could be Issued on Day One – i.e., 24 Hours From Now
- Political and Policy Matters
  - Eliminate contraceptive mandate
  - Eliminate CMS Innovation Center and/or cease mandatory and other demonstration programs
- Actions to Stabilize Insurance Market During 2-Year Transition Period
  - Address payments claimed by insurers under premium stabilization programs
  - Settlement of litigation in which the House Republicans are challenging legality of cost-sharing reductions

# HHS Administrative Actions

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- Secretary of HHS (Presumably, Rep. Tom Price) Will Likely Seek to Reduce Regulatory Burdens on Health Insurers
  - Focus will be on consumer plans, consumer choice and premiums
  - Goal will be to try to keep individual insurance market stable during 2-year transition period; protect consumers and their physician-patient relationship
- Timing – Could Be Immediate Upon Secretary’s Confirmation
- Examples of Simplification and Stability Strategy
  - Change rules developed around essential health benefits package – likely will be less rich benefit requirements, perhaps, immediately
  - Review ACA statutory provisions granting the Secretary discretion or further rulemaking is permissible – i.e., ‘the Secretary “*may*” . . .’ instead of “*shall*”
    - The new HHS Secretary will likely use his authorized discretion to roll back rulemaking in these *permissible* areas to make the underlying requirements less burdensome

# ACA Replacement Plan

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- What Might It Be?
  - Some combination or consensus incorporating Speaker Ryan's "A Better Way" framework, Rep. Tom Price's Empowering Patients First Act that intended to repeal and replace ACA and President Trump's own proposals
- Potential Elements of ACA Replacement Plan
  - Guaranteed issue and guaranteed renewability of coverage
    - Insurers may not deny coverage based on pre-existing conditions
    - Insurability may be dependent on maintaining prior continuous coverage, however
    - There may not be same level of rate protection for the insured
  - Modest tax credits for low income individuals to purchase coverage

# ACA Replacement Plan

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- Potential Elements of ACA Replacement (*cont'd*)
  - Expand the use of health savings accounts so that individuals may use tax advantaged funds to pay their out of pocket medical costs
  - Health insurance benefits will probably be less rich than ACA's essential health benefits package
    - Allow cheaper, lower actuarial value plans that cover a smaller share of medical costs
    - Allow broader use of catastrophic coverage plans for those who want to pay for routine care out of pocket
  - Public-funded high risk pools or reinsurance program for individuals with chronic or high cost conditions
  - Loosening age-restricted rating bands to allow insurers to more easily increase premiums
  - Allow insurers to sell insurance across state lines

# ACA Replacement Plan

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- Initial ACA Replacement Will Likely Not Address
  - Medicaid reform – i.e., turning it into a block grant program
  - Medicare reform – i.e., turning it into a premium support program
- How Does ACA Replacement Bill Get Passed in Senate?
  - Current thinking is that GOP would tie ACA replacement package to a bill that Democrats in the Senate ***could not afford to vote against***
  - E.g., A debt ceiling vote required before March 15, 2017 (In October, 2015, Congress suspended the U.S. borrowing limit until then)
  - E.g., Fiscal year 2017 continuing resolutions expiring April 28, 2017 (Congress must pass appropriation bills before then)
  - Other options – CHIP reauthorization; infrastructure bill; tax reform

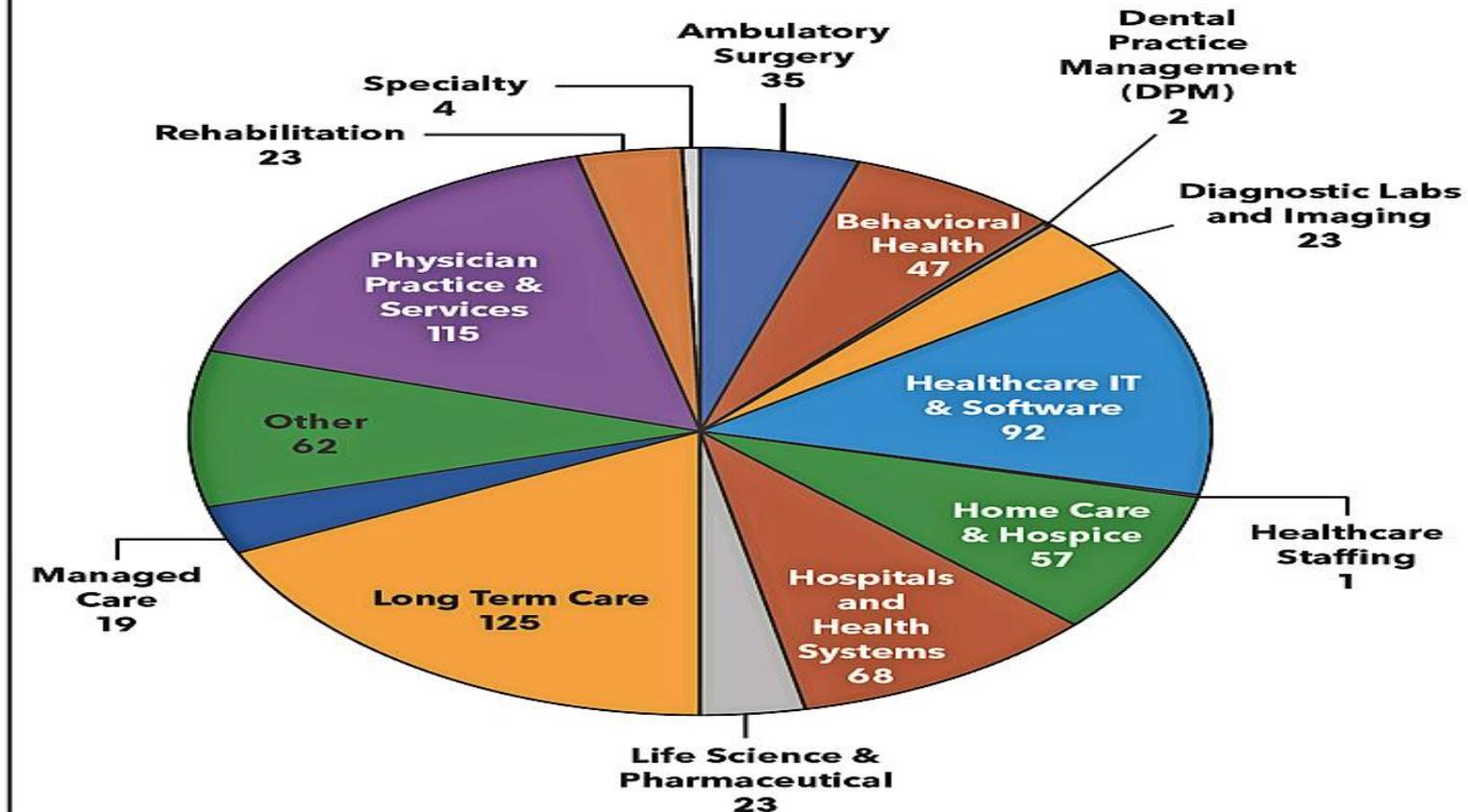
# Again, from Obamacare to Trumpcare

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- From ACA's Three-pronged Policy Objective
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# Health Care M&A in 2016

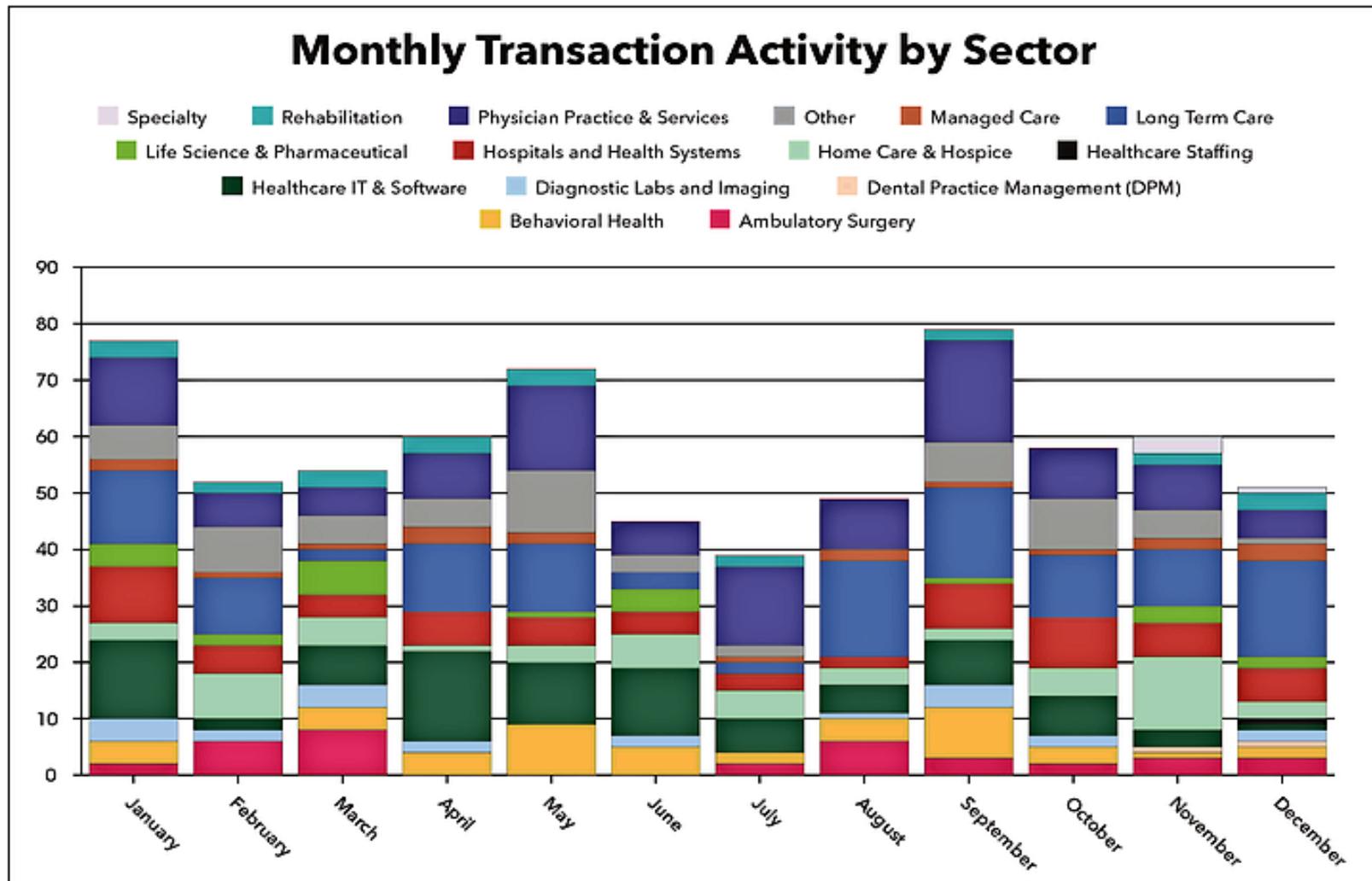
## Transaction Distribution Year-to-Date



Source: Bloomberg BNA

a Bloomberg BNA graphic

# Health Care M&A in 2016



Source: Bloomberg BNA

a Bloomberg BNA graphic

# Health Care M&A Trends in 2016

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- 2016 Deal Review (as reported by HartfordBusiness.com)\*
  - Record 1,536 deals in 2016, according to HealthCareMandA.com, published by Norwalk-based Irving Levin Associates
  - Exceeded 2015 by 1%
  - 940 deals in healthcare services
  - 596 in healthcare technology

\*<http://www.hartfordbusiness.com/article/20170118/NEWS/170119903>

# M&A Outlook in Wake of ACA Repeal & Replacement Plan

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- Too Early to Tell if ACA Changes Will Significantly Influence Health Care M&A Market
- Combination of Regulatory and Market Forces Have Been Driving Health Care M&A For Some Time
- Health Care M&A Trends
  - **Vertical integration** – e.g., health insurers purchasing, aligning or JV with providers; and providers seeking to acquire insurance companies or to become licensed as insurance risk-bearing entities (Consider, e.g., Aetna’s joint-ventured and private labeled health plans with large hospital systems in Virginia, Texas and Arizona; Vivity co-owned by hospital systems in California; and the Tandigm joint venture in Philadelphia between Independence Blue Cross and DaVita HealthCare Partners)
  - **Diversification and expansion of service lines, coverage and core business** – e.g., consider acquisition strategies of DaVita HealthCare Partners and United HealthGroup

# M&A Outlook in Wake of ACA Repeal & Replacement Plan

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- Health Care M&A Trends (*cont'd*)
  - Hospital and health system M&A (including non-profit member substitution)
    - Hospitals need capital, to diversify their payor mix, gain efficiencies, acquire good HIT and operational systems to participate in public and private sector value based purchasing initiatives
    - ACA repeal / replacement will put even more pressure on hospital's bottom lines because ACA Medicare cuts aren't being restored, but uninsured population / uncompensated care should increase
    - Hospitals probably will be hurt the most by ACA repeal – potential investors will need to be more cautious and focus on financial due diligence to make the case for merger

# M&A Outlook in Wake of ACA Repeal & Replacement Plan

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- Health Care M&A Trends (*cont'd*)
  - **Physician practice acquisitions**
    - Physicians, especially smaller or rural groups, are looking for suiters to bring them: scale; investments in HIT to better capture and analyze patient data; mid-level staff to do care coordination and treat more patients; and mature operating systems, policies and protocols to participate in value based purchasing
    - However, Secretary Price is focused on lessening the administrative burdens on physicians participating in public programs so they can spend more time with patients.
      - If this proves true, some physicians and physician groups may not be as keen to lose their autonomy to a suitor whose primary strategic value is the business acumen to manage the physician's practice and upfront cash for HIT investments

# M&A Outlook in Wake of ACA Repeal & Replacement Plan

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- Health Care M&A Trends (*cont'd*)
  - **Payor combinations, strategies and investment targets** have been varied
    - Vertical integration and provider alignment strategies
    - Acquisition of HIT to create efficiencies, better analytics and new ways of outreach to their customers as the health plan model is becoming an increasingly more “retail” model.

# M&A Outlook in Wake of ACA Repeal & Replacement Plan

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- Health Care M&A Trends (*cont'd*)
  - **Payor combinations, strategies and investment targets** have been varied (*cont'd*)
    - ACA repeal / replacement and other GOP strategies should make the insurance sector an even more attractive investment
      - Health and other insurers will be able to develop a wider array of products to potentially satisfy consumers with a diverse array of health insurance purchasing needs and desires
      - There is typically more profit margin from low actuarial and catastrophic coverage plans
      - New insurers may enter the market and insurers will be looking for investments to support a broader portfolio products and services, now permitted by the repeal legislation and supposedly being demanded by customers

# M&A Outlook in Wake of ACA Repeal & Replacement Plan

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- Health Care M&A Trends (*cont'd*)
  - **Payor combinations, strategies and investment targets** have been varied (*cont'd*)
    - ACA repeal / replacement and other GOP strategies should make the insurance sector an even more attractive investment (*cont'd*)
      - Still, the large employer market will continue to drive health insurers to innovate with provider network arrangements, population health, employee wellness and other consumer value-adds
      - If the Medicare and/or Medicaid programs substantially change, as some GOP policymakers desires, this will only increase the demand for private payors to participate in these public programs
        - Not every insurer has crucial experience in Medicare and/or Medicaid
        - Valuations for payors with significant footnote in these sectors would rise again

# M&A Outlook in Wake of ACA Repeal & Replacement Plan

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- Health Care M&A Trends (*cont'd*)
  - Investments in **long term care, post acute care and home health** has proliferated as the industry segments are scaling up to meet the needs of an aging population
  - **HIT and health software and technology innovation** continues strong, with both PE and strategic investments in start up and more mature companies
    - Providers and payors use HIT to improve data capture, analytics and predictive modeling
    - Consumers are using software and mobile apps to help manage chronic conditions, participate in wellness programs, participate in medication adherence programs and manage their health information
    - ACA repeal / replacement wouldn't seem to slow these investments; plus post-ACA consumers may be looking for more personalized tools to help them manage their care, a larger portion of which may be self-pay

# M&A Outlook in Wake of ACA Repeal & Replacement Plan

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- Health Care M&A Trends (*cont'd*)
  - **Pharmaceutical and biotech companies**
    - Reportedly, pharmaceutical mergers are down as pharma looks to invest in biotech
    - Pharma is searching for new blockbuster drugs as patents expire
    - Donald Trump has signaled that his attention is on pharma pricing and is a proponent of having the government negotiate for drug prices for Medicare and Medicaid
    - Trump's talking points also include desire to purchase drugs from Canada
    - Trump health care priorities could see wider adoption of trend to by brand drug manufacturers of purchasing generic manufacturers

# Other Legal Developments That May Impact Future Health Care M&A

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- Antitrust and Outcome of Health Insurer Mega Mergers
- HHS Secretary's Implementation of MACRA
  - In 2015, MACRA , passed in rare bipartisan fashion, to repeal physicians' Sustainable Growth Rate (SGR) formula
  - Starting this year (transitional year), changes way Medicare rewards physicians and other clinicians (i.e., for value instead of volume)
  - Streamlines multiple Medicare quality programs under new Merit-Based Incentive Payments System
  - Provides bonus payments for participation in eligible alternative payment models
  - Offers financial incentives for healthcare professionals to participate in risk-bearing, coordinated care models, and move from traditional FFS
  - Intended to drive increased participation in risk-bearing coordinated care models across all payors (i.e., Medicare Advantage, Medicaid and commercial payors), not just traditional Medicare

# Other Legal Developments That May Impact Future Health Care M&A

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- New HHS Secretary's Implementation of Phase 3 of Meaningful Use
- Whether, and to What Extent, Value Based Purchasing, ACOs and other Initiatives are Continued by new HHS Secretary
- Whether Congress Changes or Repeals Stark Law
  - Very generally, Stark prohibits physicians from referring Medicare or Medicaid patients to facilities in which the physician has a financial interest (as broadly defined)
- Other Fraud and Abuse Enforcement Priorities

# Conclusion/Q&A

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