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)
ACA Once Heralded by Some
ACA Overview

- **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

- **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

- 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

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?

■ 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?

- **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

- 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

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

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

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

- **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 Republications are challenging legality of cost-sharing reductions
HHS Administrative Actions

- 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

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

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

- 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

- From ACA’s Three-pronged Policy Objective
  - Expand access
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  - At an affordable price

- To GOP’s Two-Pronged Replacement Plan
  - Provide access
  - Health care coverage of your choosing
Health Care M&A in 2016

Transaction Distribution
Year-to-Date

- Ambulatory Surgery: 35
- Managed Care: 19
- Health Care & Hospice: 57
- Long Term Care: 125
- Hospitals and Health Systems: 68
- Life Science & Pharmaceutical: 23
- Managed Care: 19
- Home Care & Hospice: 57
- Other: 62
- Specialty: 4
- Rehabilitation: 23
- Diagnostic Labs and Imaging: 23
- Healthcare IT & Software: 92
- Dental Practice Management (DPM): 2

Source: Bloomberg BNA
Health Care M&A in 2016

Monthly Transaction Activity by Sector

Source: Bloomberg BNA
Health Care M&A Trends in 2016

■ 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

■ 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

- 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

- 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

- 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

- 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

- 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

■ 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

■ 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

- 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

- 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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