

President Trump Issues Executive Order on ACA

On January 20, 2017, President Donald J. Trump signed an *executive order* (The Order) regarding reforms to the 2010 *Patient Protection and Affordable Care Act* (ACA).¹ The Order's impact on existing regulations and guidance issued pursuant to the ACA is likely of limited significance; however, it does indicate the clear intention of the Trump Administration to pursue more effective and material changes to the ACA.² The legal effect on the ACA will likely be negligible, as it is restricted to merely guiding certain executive branch officials on where to broadly divert their resources.³ Despite its limited impact, an understanding of the Order in its entirety shows it will, in fact, significantly affect the ACA, and provides an outline of the more powerful actions the Trump Administration will take in regard to the ACA and healthcare reform generally.⁴ This *Health Capital Topics* article will discuss the contents of the Order and analyze its practical effects on the ACA and the healthcare industry in general, as well as its limitations.

The Order contains six (6) sections:⁵

- (1) Section One states the Trump Administration's intention to seek the immediate repeal of the ACA, and, in the meantime, to ensure that:
 - a. The ACA is being efficiently implemented by federal agencies;
 - b. Requirements associated with the ACA are limited to the extent that they are economically and legally burdensome; and,
 - c. The States possess increased flexibility and control to create a more free and open healthcare market;
- (2) Section Two focuses on reducing fiscal and regulatory burdens of the ACA by allowing the responsible parties to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement;
- (3) Section Three directs the named parties to provide greater flexibility to States and to cooperate with them in implementing healthcare programs;
- (4) Section Four encourages the development of a free and open market in interstate commerce for the offering of healthcare services and health insurance to preserve the maximum amount of options for patients and consumers;

(5) Section Five states that the heads of agencies must comply with the Administrative Procedure Act⁶ and other applicable statutes in carrying out the directives of the Order; and,

(6) Section Six notes that nothing in the Order can impair or otherwise affect the authority or functions granted to federal agencies, and that the Order must be implemented consistent with applicable law and does not create any right or benefit by any party against the United States and related entities.

Sections Two through Four of the Order direct the Secretary of the *U.S. Department of Health and Human Services* (HHS) and the heads of all other executive departments and agencies with authorities and responsibilities under the ACA to take the aforementioned actions with regard to certain provisions of the ACA to the maximum extent permitted by law.⁷

As mentioned above, the effective impact of the Order is far more symbolic in terms of noticeable policy effects, as it serves as an announcement of the Trump Administration's intentions.⁸ Substantively changing the law would involve amending or repealing statutes. This process begins with drafting language, then submitting the proposal for a comment period lasting months, possibly running the proposal by the federal Office of Management and Budget, and finally allowing time for an effective date, all of which takes a significant amount of time.⁹ Instead, the Order provides insight into possible healthcare policy approaches under the new administration, which may include deregulation, reducing taxes, transferring responsibility for health coverage to the states, and increasing marketplace competition.¹⁰ The most likely change under the ACA in 2017 will be an expansion of hardship waivers for the Individual Mandate, as the Trump Administration could theoretically interpret the requirement in a more lenient way such that more people would not be penalized for not having health insurance.¹¹ The IRS has already begun changing how they handle healthcare reporting, in that the agency will process tax returns for individuals who refuse to report health insurance coverage.¹² This could result in a substantial weakening of the Individual Mandate under the ACA by effectively allowing persons to bypass this requirement; this consequence may affect funding of various ACA programs, as many of the law's

coverage provisions rely on payments from healthy people to support the costs of sicker individuals.¹³

Additionally, states are likely to receive more autonomy in how they manage State Medicaid programs, including a lower standard for states' requests for waivers, allowing them to utilize various models to oversee Medicaid.¹⁴ Medicaid law provides a process by which states can waive many of the program's usual rules to attempt "demonstration projects."¹⁵ This would primarily include models already proposed by Republican governors and state legislators, such as charging higher premiums or copayments, providing a less generous and expensive package of benefits, or requiring some able-bodied adults to engage in work activities as a condition of receiving Medicaid coverage.¹⁶ The Order relieved constituent pressure on Congress, both by minimizing the burden on consumers and effectively giving lawmakers more time to assess how to best replace the ACA.¹⁷

Despite the potential of the Order to affect various portions of the healthcare industry and undermine certain provisions of the ACA, its practical effects are still largely limited.¹⁸ Generally, executive orders have limited effect, as they are not authoritative if they are contrary to the U.S. Constitution or federal law.¹⁹ When executive orders are issued pursuant to a statute or the Constitution, they are legally binding, but they cannot repeal or amend existing laws or regulations.²⁰ President Trump's executive order was likely more of a communication strategy than a practicable attempt at repealing or replacing the ACA, and was largely signed to speak to the constituency who wanted the repeal and replacement of the ACA to be a priority of the Trump Administration.²¹ The Order does not substantively modify ACA provisions, including:²²

- (1) The Individual Mandate;
- (2) The tax-credit premium subsidies; or,
- (3) Changing the key rules imposed on insurers.

These actions can only be substantively modified by an act of Congress or through new legislation.²³ The major

mechanisms of actions proscribed by the Order will be tied to the Obama Administration's prior actions in implementing the ACA, as the legality of current executive action is often evaluated by a comparison to prior executive practice.²⁴ Due to the fact that the Obama Administration was somewhat aggressive in asserting its authority in granting waivers, deferring burdens, and delaying implementation of various ACA provisions, even where the law did not authorize such acts, it is conceivable that the Trump Administration could also take steps to change the way certain provisions of the ACA are implemented.²⁵ Consequently, the Trump Administration may be able to change certain aspects with regard to implementation of ACA provisions without seeking prior approval from Congress.

President Trump's executive order is indicative that further federal governmental action will be taken regarding the ACA, but it does not serve as a major repeal or reformation of the ACA. The Order reiterates the Trump Administration's commitment to repealing and replacing the ACA in the future, and attempts to make certain changes in how the law is currently administered. However, repeal and replacement must occur in accordance with current federal laws, within the parameters of authority granted to the HHS Secretary and other heads of federal agencies. To the extent that the Order conflicts with ACA-associated statutes, regulations, and guidance, the Order must defer to them, or the Trump Administration must comply with alternative methods of issuing new law, including through legislative and administrative action.²⁶ Currently, any ACA repeal bills are on hold, despite the fact that the Senate voted to approve a budget resolution instructing the House of Representatives and Senate committees to begin work on legislation to repeal major portions of the ACA on January 12, 2017.²⁷ President Trump has suggested that the ACA may not be replaced until 2018, but this Order shows his intention to move forward with repeal plans.²⁸

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3 "Can President Trump's Executive Order Unravel the Affordable Care Act?" By Jonathan H. Adler, The Washington Post, January 23, 2017, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/23/can-president-trumps-executive-order-unravel-the-affordable-care-act/?utm_term=.2e255290069f (Accessed 1/26/17).

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