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SCOTUS Upholds Health Law – What Happens Next

On June 28, 2012, the Supreme Court of the United States (SCOTUS) upheld most of the 2010 Patient Protection and Affordable Care Act (ACA) in a five to four ruling. The decision of the court's majority stunned proponents and critics alike by choosing to uphold the law on a narrow interpretation of Federal taxing authority. SCOTUS found that each of the controversial provisions (the individual mandate and the Medicaid expansion) were constitutional, with the limitation that states may now choose whether to expand their Medicaid programs to increase eligibility to 133 percent of the Federal Poverty Line (FPL) with federal funding assistance, instead of the ACA's "*all or nothing*" funding choice.[1] Although the anticipation of the Court's decision is gone, there is still a considerable level of concern as to the impact of the ACA's implementation and a continued question as to whether the ACA will remain as it currently stands.

Individual Mandate

As a result of SCOTUS finding that the individual mandate, and its associated "*tax*," is constitutional, in 2014, all U.S. citizens will be mandated to obtain health insurance. At that time, while it will not be illegal to ignore the ACA's mandate to obtain insurance, it will be illegal to "*not buy health insurance and not pay the resulting tax.*"[2] With a large number of insured individuals projected to join the market, insurers will need to determine whether to participate in the state insurance exchanges (also mandated under the ACA) and limit rebates required under the new medical loss ratio, which are estimated to reach $1.3 billion in August 2012.[3] Although increased access and better coverage may improve revenues for many hospitals; academic medical centers; long term care facilities; and, physician practices, many providers continue to have decreased payments due to reimbursement cuts and may need to consider innovative payment models or collaborations to maintain a competitive market presence.[4]

Medicaid Expansion

While SCOTUS upheld the constitutionality of the ACA Medicaid expansion provision, the Court held that Congress cannot threaten to remove *existing* Medicaid funding if a state were to refuse to expand its coverage past its *existing* levels. Under the Court's decision, states may choose not to expand coverage.[5] 54 percent of the roughly 8.5 million potential new Medicaid patients are residents of the 26 states that challenged the law in court[6], leaving the number of states that will participate uncertain.[7] As of early July 2012, 11 states have planned not to implement the Medicaid expansion provision. Ten states have chosen to participate, and 26 are still undecided.[8] To date, the states that have spoken against Medicaid expansion have cited primarily financial reasons.[9] Conservative leaders have written an open letter to state governors urging them to eschew Medicaid expansion and state-run exchanges in an effort to "*ultimately assist in replacing the law*."[10] These letters against participation noticeably omit the impact that opting out may have on hospitals, who would continue to bear the brunt of unpaid medical bills from services to the uninsured, let alone the patients affected.

Under the ACA, states that choose to participate in the Medicaid expansion would receive 100 percent federal subsidization for all *newly* eligible individuals for the three year period from 2014 to 2016. Subsidies are not available prior to 2014, and will be dispersed in decreasing increments starting in 2017, i.e., 95 percent in 2017; 94 percent in 2018; 93 percent in 2019; and, 90 percent in 2020 and thereafter.[11] It should be noted that the above federal funding would not cover new enrollees who were *previously* eligible for participation in the Medicaid program. To receive federal funds states will be required to provide an "*[e]ssential health benefits*" package, sufficient to satisfy the individual mandate requirement, to all new Medicaid recipients.[12] This requirement illustrates the importance of the 2014 implementation of the state exchanges, mandated under the ACA.

For some states, participation may be untenable. Despite federal funding incentives, there it expected to be a ten percent increase in cost after five years.[13] For those states that choose not to participate, state-run insurance exchanges will be crucial for low-income individuals. Otherwise, hospitals may have to continue to pay for the increasing cost of uninsured care at an unsustainable rate.

Future Congressional Action Against the ACA

Since the enactment of the ACA in 2010, various members of Congress have staged at least 33 votes to repeal the legislation, albeit unsuccessfully.[14] In the aftermath of the SCOTUS decision, ultimately

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upholding the law, there are three potential political scenarios (resulting from the coming 2012 elections) that could significantly alter the progression of the ACA: (1) a Republican president is elected; (2) a Republican majority controls the House and/or Senate; and, (3) both of the prior events occur. Any of these results could lead to the defunding, undercutting, amendment, or repeal of the ACA.

Despite any action a Republican President may take against the ACA, a full repeal would be unlikely, as there would be an insurmountable Democrat filibuster in the Senate. However, the President, whether Democrat or Republican, will be able to exercise his extensive political ability to attempt to both push his political agenda through Congress and create regulatory changes through the Department of Health and Human Services (HHS).[15] The ACA gives the President discretion in implementing many of its provisions, such that a President that was against the continued implementation of the ACA could significantly undercut programs including: employer contributions to health savings accounts (HSAs); quality improvement measures for providers who contract with private insurers; and, CO-OP insurer tax-exempt status. However, the President would have little influence over ACA provisions that require specific rules, including insurance for adult children under their parents' insurance.[16]

In the event of a Republican Senate majority, a full repeal of the ACA would also be unlikely, as even a Republican Congress would need to overcome a Democratic filibuster in the Senate. However, Congress could easily vote to reduce or cut the law's discretionary funding appropriations.[17] The ACA establishes its own budget authority within the law, so any attempt to defund its mandatory spending provisions would be impossible without a Senate super-majority (60 votes). Despite the super-majority requirement, an amendment is not out of the realm of possibility, as funding for the Prevention and Public Health Fund (PPHF) has already been cut by $5 billion over 10 years by the Middle Class Tax Relief and Job Creation Act of 2012.[18] Discretionary spending provisions for programs such as Pediatric Accountable Care Organizations and Rural Hospital Flexibility Grants, *inter alia*, are at more risk of defunding, as they are subject to annual budget appropriations review.[19]

Though unlikely, should the fall elections result in a Republican Landslide, i.e., Republican President, a Republican House majority, and a Republican super-majority in the Senate, such a landslide would open a path for full repeal of the ACA if partisan politics remain as divided as they have been since the ACA's passage in March of 2010. A slight variance of this scenario would be a lack of a super-majority by Senate Republicans, but includes the so-called "*nuclear option*," which is a change to Senate cloture rules to eliminate, or severely constrain, the filibuster.[20] Again, this scenario is unlikely, but not impossible, and should be viewed as another path for full repeal of the ACA.

CONCLUSION

Regardless of the outcome of the 2012 election, a full repeal of the ACA is unlikely. Even with significant funding cuts, the healthcare industry has already adopted a new focus on quality, transparency, and lower costs. The drivers of healthcare are present, with or without the law, and have already lead to the development of commercial counterparts to several of the ACA provisions, including: commercial accountable care organizations; federal transparency initiatives; and, the movement to value-based purchasing based on evidence based medicine.[21] While many healthcare industry stakeholders touted the ACA and the SCOTUS decision as a step forward, hospital and health system executives (proponents and critics of the ACA alike) have indicated that the SCOTUS decision has not changed their current strategic plans.[22] Whether states choose to participate in the Medicaid expansion, they are not immune from the other provisions of the ACA, and will have to prepare accordingly.

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4 Ibid, p. 4.
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6 "Florida, et al., v. Department of Health and Human Services, et al." Writ of Certiorari, Motion No. 11-400, November 14, 2011.
7 "The Supreme Court's PPACA Decision: Substance and Implications for HLS Clients" Oliver Wyman, June 28, 2012, p. 4.
8 "Letter to Governors Concerning Medicaid Expansion and Health Insurance Exchanges" Alfred Regnery, Paul Revere Project, et al., to Governors of the United States of America, July 2012, Accessed at http://www.scribd.com /doc/100253543/Letter-from-Conservative-Leaders-to-Governors-about-Health-Care-Law#download (Accessed 7/18/12).
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11 42 U.S.C. §1396d(y)(1) (2010); "Medicaid Coverage and Spending in Health Reform: National and State-by-State Results for Adults at or Below 133% FPL" by John Holahan and Irene Headen, Urban Institute, To Kaiser Commission on Medicaid and the Uninsured, Washington, D.C.: Kaiser Family Foundation, May 2010, p. 14.
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15 Oliver Wyman, June 28, 2012, p. 6.
16 Ibid, p. 9.
17 Ibid, p. 6.
18 Ibid, p. 8.
19 "Discretionary Spending in the Patient Protection and Affordable Care Act (ACA)" By C. Stephen Redhead, et al., Congressional Research Service Report for Congress, May 18, 2012, p. 34-35.
20 Oliver Wyman, June 28, 2012, p. 7.
21 PriceWaterhouseCooper, July 2012, p. 1.
22 "CEOs: Now It's Time to Address Affordability" By Philip Betbeze, HealthLeaders, June 29, 2012, http://www.healthleadersmedia.com/print/LED-281811/CEOs-Now-Its-Time-to-Address-Affordability (Accessed 7/16/2012); "CIOs and CMIOs Speak Their Minds about the Supreme Court Decision" By Scott Mace, July 3, 2012, http://www.healthleadersmedia.com/print/TEC-281957/CIOs-and-CMIOs-Speak-Their-Minds-about-the-Supreme-Court-Decision (Accessed 7/16/2012)

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