

Legal Sidebar

Affordable Care Act Executive Order: Legal Considerations

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On January 20, 2017, President Donald J. Trump issued an [executive order](#) (EO) declaring his intention to “seek the prompt repeal of the Patient Protection and Affordable Care Act [ACA]” while minimizing “economic and regulatory burdens of the Act,” ensuring that the ACA is “efficiently implemented,” and preparing to allow states “more flexibility and control.” Broadly, the EO issues the following three directives to executive branch agencies:

- First, it directs agencies with authorities or responsibilities under the ACA to “waive, defer, grant exemptions from, or delay the implementation of” any ACA provision that would impose a fiscal or regulatory burden on states or a host of private entities (including individuals, health care providers, health insurers, and medical device manufacturers).
- Second, the EO directs those same agencies to provide greater flexibility and cooperation to states in implementing healthcare programs.
- Third, the EO directs all agencies with responsibilities relating to healthcare or health insurance to encourage the development of a free and open interstate market for health services and health insurance.

While the EO does not amend any prior agency action or policy, it may potentially be seen as an articulation of the Administration’s views on how the ACA should be implemented by executive agencies. Notwithstanding the significant modifications it may foreshadow, the EO does not purport to repeal the ACA, nor could it. Additionally, as is common practice with executive orders, the EO acknowledges that its directives are to be implemented to the extent permitted by law, including requiring the use of notice-and-comment rulemaking where required by the [Administrative Procedure Act](#) (APA).

By directing agencies to use all available authority and discretion to provide waivers, deferrals, exemptions, and delays of ACA requirements, the EO may raise questions about the authority and discretion agencies currently have to implement the ACA, and the procedures that may be required in the exercise of those authorities. Additionally, some may ask how the policy enunciated in the EO will translate into action by the Trump Administration in the context of pending lawsuits challenging the ACA. In light of these questions, this analysis provides some initial impressions and takeaways.

The ACA is a complex statute, and the Administration appears to have broad authority, at least with respect to certain provisions of the Act, to interpret and execute its requirements. In some cases, this authority can include the express power to waive an ACA provision, as in the case of the hardship exemption from the ACA’s requirement to purchase health insurance (the so-called [individual mandate](#)), or the authority beginning in 2017 to provide [state innovation waivers](#) (under which a state may apply to the Secretaries of Health and Human Services (HHS) and Treasury for a waiver of specified ACA requirements with respect to health insurance coverage within that state). In other cases, the statutory text may be ambiguous such that an agency’s interpretation of a provision will potentially be afforded [Chevron deference](#) by a reviewing court, so long as the interpretation is reasonable. An example of this situation is the [recent decision](#) by the U.S. Court of Federal Claims upholding the Obama Administration’s

implementation of the [risk corridors program](#) created under the ACA. However, in making any potential changes to existing regulations, agencies may need to provide a reasoned explanation ([such as noting changed circumstances or addressing reliance interests generated by the agency's prior position](#)) in order to survive [judicial review](#).

A potentially more difficult category of administrative discretion is exemplified by certain actions taken by the Obama Administration to temporarily delay enforcement of certain provisions of the ACA. Described as “transition relief,” these actions included [delaying enforcement of certain insurance requirements](#) and [delaying enforcement of the ACA's employer mandate and associated insurance reporting requirements](#) beyond their respective statutorily effective dates of 2014. [Several commentators](#) have questioned whether these delays are within the relevant agency's available authority under the ACA. The delays have also been the subject of several lawsuits. However, in these particular instances, the delays were permitted without impediments as these suits were dismissed on [procedural grounds](#) without deciding the merits of the agencies' asserted authority. At the same time, other non-enforcement policies created by the Executive in other contexts have been [enjoined](#) on the basis that such actions were not authorized by law.

Because the discretion available to the agencies covered by the EO is dependent in part upon the relevant statutory framework, the scope of that authority is not necessarily static and might be subject to adjustment by Congress. For example, the Regulatory Accountability Act of 2017 ([H.R. 5](#)), recently passed by the House of Representatives on January 11, 2017, would make a number of changes to agencies' rulemaking procedures. It also includes a [provision](#) that purports to curtail the deference generally afforded to agency interpretations of rules in light of statutory ambiguity and may potentially narrow the scope of agencies' discretion if enacted.

The process and timetable for changes to the implementation of the ACA contemplated by the EO may depend on the specific administrative action at issue. As noted above, the EO recognizes that some of the actions it directs may be subject to the requirements of the [APA](#). In the context of rulemaking, the APA generally [requires](#) that an agency publish a notice of the terms or substance of the proposed rule, or a description of the subjects and issues involved, and provide interested parties a “meaningful opportunity” to comment on the proposal (historically, this has included a comment period of at [least 30 days](#)). Once finalized, the rule generally must be published again at least [30 days](#) before its purported effective date. Non-legislative rules – such as interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice that do not carry the force and effect of law – are generally exempted from this notice-and-comment procedure (see more [here](#) and [here](#)), and a large number of ACA [guidance documents](#) issued by the Obama Administration arguably fall within this latter category. Additionally, an agency [may forgo](#) notice-and-comment procedures after finding, for [good cause](#), that the procedures would be impracticable, unnecessary, or contrary to the public interest.

The APA's requirements for rulemaking may affect the potential timing of some agency actions to delay implementation of the ACA, particularly if the Trump Administration would be seeking to repeal or amend existing rules previously finalized by the Obama Administration. Courts [have previously held](#) that an agency must follow the same notice-and-comment procedure when amending or repealing an existing rule, as it did when the rule was first promulgated. For example, significantly changing the existing ACA regulations on “[special enrollment periods](#),” which define the circumstances in which insurers are required to accept new enrollees outside of the annual “[open enrollment period](#),” may require going through the notice-and-comment process, assuming no exceptions apply. On the other hand, numerous ACA-related guidance documents issued by the Obama Administration, including on [those related to the private health insurance market reforms of the](#) ACA, did not go through traditional notice-and-comment rulemaking procedures.

Like the scope of discretion enjoyed by an agency, the requirements for rulemaking under current law are subject to modification by Congress. As noted above, H.R. 5 would impose a number of [additional procedural requirements](#) on agency rulemaking proceedings, including [advanced notice](#) and [formal hearings](#) for “[high-impact](#)” rules. Additionally, the Regulations from the Executive in Need of Scrutiny Act ([H.R. 26](#)), passed by the House on January 5, 2017, would require Congress to enact a resolution of approval before major rules finalized by agencies could go into effect. While such legislation broadly addresses agency rulemaking, if enacted, it might have implications for the manner in which executive agencies carry out the directions of the ACA-specific EO.

The EO may also foreshadow changes in the executive branch's position in existing ACA litigation. Since the date

of its enactment six years ago, the ACA has been the subject of litigation, and many cases challenging the Act's implementation are currently making their way through the courts (see more [here](#)). The Secretary of HHS and various federal agencies are parties in many of these lawsuits, and they are currently defending various administrative actions that have been taken to implement the Act. While the EO does not explicitly direct federal agencies to take any specific action with respect to these pending cases, the order may signal a desire by the Trump Administration to change its litigation posture in at least some of these cases (or potentially, in any future lawsuits) to be more consistent with the desire espoused in the EO to relieve individuals, health insurers, and others from requirements that the Administration deems to be burdensome. Additionally, it is possible that the EO may lead agencies to amend regulations and guidance that have been at issue in these cases, and such changes potentially could stop such current litigation in its tracks, or provoke new litigation

For example, there are a number of pending cases addressing the requirement to provide contraceptive coverage, issued as part of [HHS guidelines](#) pursuant to the ACA. The contraceptive coverage requirements sparked a well-publicized clash between the Obama Administration, which viewed the provision of this coverage as an important public health objective, and certain employers, who have argued that the mandatory provision of this coverage to their employees violates the employer's constitutionally and statutorily protected religious beliefs. In order to address this conflict, current [regulations](#) provide for an "accommodation" for certain "eligible organizations" that have religious objections to providing contraceptive coverage, under which these organizations can refuse to provide contraceptive coverage, and the applicable plan's insurer or third-party administrator must provide this coverage to employees instead. The Supreme Court declined to rule on the merits of this issue in [Zubik v. Burwell](#) and instructed the lower courts to assist the federal government and employers in reaching a compromise. However, agreements have yet to be reached in this litigation (see more [here](#)). It is possible that President Trump's Administration could amend the guidance requiring contraceptive coverage, take action to change the regulations governing the accommodation for eligible employers, or otherwise change the federal government's stance with respect to these cases.

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