MEMORANDUM

To: AAHKS Board of Directors
From: Epstein Becker & Green, P.C.

Date: November 9, 2016
Re: Post-election Analysis: Health Care

Just as the Trump Campaign proved polls and political experts wrong during the Republican primaries, he has now shocked the world with an unexpected win in the general election. The Republican Party has won the White House and retained the Senate and House of Representatives. The only constant this election year has been the widespread failure to predict either Trump’s performance or the nation’s reaction to it.

**White House and Administration**

- Republican Donald Trump has won the Presidency, but what kind of Republican will Donald Trump be?

- The Trump Campaign did not hire more than a nominal policy staff and offered only a cursory two-page health care platform (encompassing repealing the ACA, re-importation of lower-priced pharmaceuticals, block granting Medicaid to states, and others). Any of his health care commitments must be re-evaluated in the context of what is to be prioritized and passable in Congress.

- The Trump Transition Team has been quietly staffed by many former officials of the Department of Health and Human Services. They have been working since the summer on policies that could immediately implemented under either a Democratic or Republican Congress.

- Expect political appointments to CMS and HHS leadership positions to be drawn from a pool of industry and government professionals similar to that staffing any Republican Administration.

**Senate**

- Republicans retain the Senate, albeit by a narrower margin.
The window for Senate Republican action in coordination with the White House is extended as Republicans are expected to gain numerous additional Senate seats in the 2018 election, when Democrats will be defending many closely contested states.

**House of Representatives**

- Republicans retain the House albeit by a narrower margin.
- Paul Ryan is expected to maintain the Speakership when House leadership elections occur next week.
- A member of the Republican Freedom Caucus (Tea Party) is expected to be elevated to join the Speaker’s leadership team.
- The dynamic is likely to continue in which a minority of the majority (the Freedom Caucus) actually controls the action of the House.

**Lame-Duck Session**

- The prospects of a unified Republican government in 2017 increases the likelihood that Congress will pass a short-term continuing funding resolution this Fall, deferring major government funding legislation until March.
- The Obama Administration has 71 remaining days in office and may be expected to finalize as many outstanding policy goals as possible through regulatory and executive action. Though the White House has admitted today that it had not been preparing for this eventuality.

**Affordable Care Act**

- The issue on which Trump and Congressional Republicans agree is repeal of the ACA. Though it is unclear what that means beyond dismantling of the exchange marketplaces and ACA tax provisions.
- The Trump Transition Team will have reviewed all legal options to slow or halt the exchanges through executive action on the first day of the Administration. The first opportunity for formal “repeal” legislative action will be during the Congressional budget process in March.
- Senate Republicans lack the 60 votes needed to overturn a filibuster and pass major legislation. But they can use a complicated budget tool called reconciliation, which does not allow a filibuster and allows passage of bills with 51 votes only. Any repeal plan would have to go through elaborate review to make sure it complies with intricate budget rules and Democrats can challenge the results.
Congressional Republicans successfully adopted this strategy last year and passed legislation would have repealed the ACA provisions related to the government spending and the tax code:

- individual and employer mandates,
- the subsidies to help people buy insurance,
- Medicaid expansion; and
- taxes on medical devices and high-cost health plans.

This was ultimately vetoed by President Obama.

- It is not certain that the votes exist now for similar legislation. Unlike last year, such legislation would be signed into law by a President Trump and many Congressional members may be reluctant to remove significant health coverage provisions affecting their constituents without something meaningful to replace it.

- There is still strong disagreement among Republicans over what the ACA should be replaced with, encompassing different views on the relative value of employer-sponsored coverage and individual commercial coverage.

- Further, neither Trump nor Congressional Republicans have specified how much of the ACA they wish to repeal. It is not clear that they have contemplated whether repeal would encompass the non-exchange or coverage provisions of the ACA:
  
  - Centers for Medicare and Medicaid Innovation (CMMI), encompassing BPCI, CJR and ACOs;
  - Medicaid expansion;
  - closing the gaps in the Medicare Prescription Drug Benefit;
  - reformed payments for Medicare Advantage plans;
  - hospital value-based performance and readmission reduction programs;
  - disclosure of medical product manufacturers payments to physicians or hospitals;
  - others.

**CMMI and Value-Based Care**

- The new Republican Administration could be sympathetic to elements of the CMMI program and wish to maintain support for developing care models that are proven to reduce Medicare program expenditures.

- If there are no major changes to CMMI, expect CMS to be considerably more reluctant to implement mandatory demonstrations and to consider more flexibility in the management of demonstrations.

- Eyes will be on CMMI career leadership to see if they remain within the Administration.
**Merit-based Incentive Payment System (MIPS) and Alternative Payment Models (APMs)**

- MACRA is the result of broad bipartisan agreement and therefore is unlikely to be altered. A Republican administration may be more sympathetic to further administratively easing the implementation of MIPS but otherwise will proceed with the law.

- Administrative complications may arise, however. MACRA states that physicians may be exempted from MIPS if they are participating in an APM, as designated by CMS. Most of the designated APMs are models that are authorized by the CMMI under ACA authority. It is not clear, how CMMI would still designate APMs if the CMMI is included among the repealed portions of the ACA.

**Next Steps**

- The first priority for health care stakeholders is expediently to communicate to their Congressional delegation and the Congressional health care committees which, if any, provisions of the ACA are important to maintain or reform and why.