GILFIX & LA POLL ASSOCIATES LLP
Legal and Consulting Services

2479 E. BayshoreRoad, Suite 220
Palo Alto, CA 94303

San Jose Office
950 Bascom Avenue, Suite 1113
San Jose, CA 95128

Telephone: (650) 493-8070
Gil-Fax: (650) 493-4668
website: www.gilfix.com

TRUSTS & ESTATES

The Journal of Wealth Management
for Estate Planning Professionals

July, 2017 Issue

Trump Initiatives Affecting Vulnerable Populations

Leading attorneys in elder law and special needs planning analyze current proposals

By Michael Gilfix, Esq.
Vincent J. Russo, Esq.
Harry S. Margolis, Esq.

COMMITTEE REPORT:
ELDER CARE

By **Michael Gilfix, Vincent J. Russo** & **Harry S. Margolis**

Trump Initiatives Affecting Vulnerable Populations

Leading attorneys in elder law and special needs planning analyze current proposals

The election of Donald J. Trump surprised most voters. Some were elated. Some were shocked. Many knew or believed that they knew how the new president would proceed and which issues he would address. Since his election, there's been more uncertainty about the administration's agenda and priorities. Most had some level of confusion. For a newly elected president, there was a remarkable level of ambiguity about how specific issues would be addressed.

Since the election, it's indisputable that civil discourse and reasoned debates have largely fallen victim to passions, vitriol and unbending partisanship.

As a result, we formed the Trump Policy Analysis Group three weeks after the election.[1] We were concerned about the level of speculation and, frankly, fear emanating from so many journalists, politicians and other opinion makers. We concluded that there's an extraordinary need for objectivity as new proposals emerge from the administration and from Congress, especially concerning older Americans and Americans with disabilities.

With that in mind, let's examine actual proposals and legislation that impact or could impact our populations of concern.

Trump's Plan for Taxes

Tax reform is one of the administration's priorities. If enacted, proposed changes will impact older Americans and individuals with disabilities as to income and estate taxation.

On April 26, 2017, the Treasury Secretary, Steven Mnuchin and Gary D. Cohn, the director of the President's National Economic Council, provided a skeletal outline of the Trump administration's guidelines for tax reform. This plan was unveiled in a single page statement filled with bullet points.

The goals are simply stated, as follows:

- Tax relief for middle class Americans: To achieve the American dream, let people keep more money in their pockets and increase after-tax wages.
- Simplify the Tax Code: To reduce the headaches Americans face in preparing their taxes and let everyone keep more of their money.
- Grow the American economy: By discouraging corporate inversions, adding a huge number of new jobs and making America globally competitive again.
- Don't add to our debt and deficit: Which are already too large.

Here's a brief summary of these proposed changes, as we understand them.

Income taxation. A number of income tax proposals have been proffered. For example, individual income tax rates would be compressed into three brackets—10 percent, 25 percent and 35 percent. Compare these rates with the seven rates that are currently in effect and that include 39.6 percent as the highest level of taxation. Details on the income brackets that would trigger these rates aren't yet available.

The standard deduction will double to $24,000 (for married taxpayers filing jointly), while certain

Left to right: **Michael Gilfix** is a partner in the Palo Alto, Calif. firm of Gilfix & La Poll Associates, LLP; **Vincent J. Russo** is managing shareholder of Russo Law Group, P.C. in Garden City, N.Y.; and **Harry S. Margolis** is an attorney at Margolis & Bloom, LLP in Boston. The authors are founding members of the Trump Policy Analysis Group, along with Tim Nay of Portland Ore. and A. Frank Johns of Greensboro, N.C.

itemized deductions (including state and local taxes) would no longer be allowed. This would simplify millions of taxpayers' returns. It would logically benefit low income taxpayers.

The proposed elimination of some itemized deductions, including the deduction of mortgage interest, could have a negative effect on current and potential homeowners. Currently, homeowners can take advantage of these deductions to reduce their taxable income. This change could decrease potential homeowners' incentives to purchase a residence or to sell and then purchase a more valuable residence.

The proposed plan would repeal the alternative minimum tax (AMT) and the net investment income (NII) tax and most individual credits. For high income seniors, repeal of the AMT could significantly reduce income taxes while also simplifying the preparation of individual tax returns. Many high income seniors would likely enjoy reduced tax on certain investment income if the 3.8 percent NII tax is eliminated. However, this tax was implemented to fund the Affordable Care Act (ACA), also known as "Obamacare." Accordingly, this tax may not be repealed until and if the ACA has been replaced.

For older Americans and individuals with disabilities, the impact of any tax reform will very much depend on the individual's tax situation.

The proposed plan would also provide tax relief for families with child and independent care expenses. This could give some tax relief to adult children who are caregivers for their parents or a disabled sibling. It could also be helpful for families with special needs children.

Estate taxation. The plan would repeal the federal estate tax. This issue isn't relevant to the vast majority of older Americans because the current level of estate and gift tax protection is $5.49 million or $10.98 million for a married couple (for decedents dying in 2017). Current law allows for annual adjustments in the level of estate tax protection.

For those older Americans who have taxable estates, the future of the estate tax is uncertain. Discussion among Congressional leaders and critics focuses more on income and corporate tax rates, border adjustment and the tax implications of the "repeal and replace" effort regarding the ACA.

Estate tax issues will still have special significance in states such as New York, Connecticut and Massachusetts, which continue to have a state estate tax. Hence, it doesn't necessarily follow that the elimination of the federal estate tax will result in the elimination of these state level estate taxes.

It's inevitable, however, that income and capital gains planning will be more important if the estate tax is repealed. Indeed, it's possible that all assets in an individual's estate won't enjoy a step-up in basis at the time of death. The president previously proposed a step-up in basis only for the first $10 million of estate assets. Assets above that level would have a carryover basis, which could result in additional taxes on the sale of appreciated assets.

Tax planning for high-net-worth older Americans isn't our focus. We nevertheless note that careful, proactive planning is necessary for those with larger estates. It will also be important for those practitioners who advise wealthy Americans to be aware of developments in the world of Social Security, Medicare, Medicaid and special needs because these issues affect everyone.

Business taxation. For seniors who own businesses, Trump's plan would reduce both the corporate and small business tax rate to 15 percent.

Small businesses (partnerships, S corporations and sole proprietorships) that pass their income through their owners will effectively also be taxed at 15 percent. Currently, this income can be taxed at a maximum rate of 39.6 percent on the owners' tax returns. While ordinary income such as wages and interest income would be taxed at a maximum rate of 35 percent, business income tax will be capped at 15 percent.

Process derailed. The president envisioned that the House and Senate would develop details to implement his goal of massive tax relief and to make "America more competitive." He envisioned that the administration would hold "listening sessions with stakeholders" throughout the month of May to help this process.

Myriad political distractions have emerged, derailing the envisioned process.

For older Americans and individuals with disabilities, the impact of any tax reform will very much depend on the individual's tax situation. Practitioners will need to be diligent in monitoring tax proposals and related legislative proposals that may impact older Americans and Americans with disabilities.

The Trump-Ryan Plan for Medicaid

The House of Representatives passed the revised American Health Care Act (AHCA) on May 4. While the Senate says it's crafting its own bill from scratch, we can begin moving from conjecture to reality, though much still remains uncertain. AHCA is projected to cut Medicaid expenditures by $839 billion over the next 10 years; Trump's recently released budget proposal would cut another $610 billion.

Per capita rather than block grants (maybe). Speaker of the House Paul Ryan has long been a proponent of block grants for Medicaid in place of the current system under which the federal government simply reimburses states for a percentage of their spending (with the percentage varying by state), no matter the cost. Under the current system, the federal government sets out the rules on who may be covered and what services Medicaid will pay for. Within those rules, each state runs its own Medicaid program.

One block grant proposal would simply give each state a set amount of money to spend on its Medicaid program as it sees fit. This, the theory goes, would permit the states freedom to create their own health care programs for the poor and provide better care at less cost. Fears include:

- Some states wouldn't cover everyone covered now.
- States would put in less of their own money, reducing the care provided to their lower income residents.
- The federal government would ratchet back the amount it gave to states over time, putting more stress on their already-strained state budgets.
- The federal government wouldn't kick in more at times of recession when a combination of lower tax revenue and more citizens in need could crash state budgets.

These fears were somewhat alleviated by the original form of the GOP plan, which instead of giving states a fixed amount for their entire Medicaid programs, would have given them a fixed amount per Medicaid beneficiary, with different amounts for beneficiaries according to the following five categories:

1. Elderly
2. Blind and disabled
3. Children
4. Expansion adults (under the ACA Medicaid expansion)
5. Other adults

However, the revised version of the bill gives the states the option of having a pure block grant for children and non-expansion adults as long as they meet certain minimum requirements in terms of covered care. States also have the option of imposing a work requirement for nondisabled, nonelderly and nonpregnant adults beginning this Oct. 1.

> While the GOP proposals include a long list of changes to the Medicaid program, most don't affect seniors and individuals with disabilities.

The actual funding under either plan would start in 2020, but would use 2016 as a base year adjusted each year by the medical component of Consumer Price Index (CPI-M) calculations and by this amount plus 1 percent for beneficiaries who are disabled or 65 and older. This still raises concerns that center largely on the extent of the funding and how limits will affect state budgets. In its analysis of the proposal, the Congressional Budget Office (CBO) projects that during the 2017-2026 period, CPI-M will grow at an average rate of 3.7 percent while the average per enrollee Medicaid expenses will grow at a rate of 4.4 percent, a 0.7 percent difference per year. With respect to the original AHCA bill that contained the same provisions, the CBO predicted:

> With less federal reimbursement for Medicaid, states would need to decide whether to commit more of their own resources to finance the program at current-law levels or whether to reduce spending by cutting payments to health care providers and health plans, eliminating optional services, restricting eligibility for enrollment, or (to the extent feasible) arriving at more efficient methods for delivering services. CBO anticipates that states would adopt a mix of those approaches.[2]

It's not clear from the CBO report why it projects Medicaid costs per enrollee to increase so much higher than medical inflation. One factor may be Baby Boomers, who are getting older and are likely to need more care per individual as the years progress. One possible result of squeezed state Medicaid budgets may be lower payments to nursing homes with adverse effects on quality of care.

The states will have to deal with increased costs on their own while they seek Congressional approval of federal cost sharing.

Impact on Medicaid eligibility, planning. While the block grant proposal appears to throw out the federal rules for Medicaid eligibility, the per capita cap probably doesn't do so because the House wouldn't want the states to seek more federal funding by admitting more people to the program. So, we probably won't see a wholesale reformation of the Medicaid eligibility rules and 50 different Medicaid programs in the 50 states, just in those that elect a pure block grant. And, the rules governing Medicaid coverage of nursing home care won't change because under AHCA, the states may only elect block grants for children and nonexpansion adults, Categories 3 and 5 above.

That said, there are indications that under the new administration, the Centers for Medicare & Medicaid Services will be more amenable to state requests for waivers from the standard rules. This could result in increasing variation among the states and changes that impinge on eligibility. Because these waivers don't have to wait for Congressional approval, they may begin happening well before the 2020 start date for the GOP House plan.

In terms of the new block grant option, it could be that few or no states choose it because it puts them at risk if a recession, natural disaster or other circumstance increases the number of enrollees for Medicaid. If that were to happen, the states would be left holding the increasingly costly Medicaid bag.

Other changes. While the GOP proposals include a long list of changes to the Medicaid program, most don't affect seniors and individuals with disabilities. Those that do, include:

- Repeal of enhanced federal matching funding for the Community First Choice (CFC) option that helps institutionalized individuals move to the community. Eight states have adopted this incentive that was part of the ACA: California, Connecticut, Maryland, Montana, New York, Oregon, Texas and Washington.
- Eliminating the ability to receive up to three months of retroactive coverage. This could hurt nursing homes: They wouldn't be paid for residents who complete their applications for Medicaid after they run out of funds to pay the facilities—not an unusual occurrence.
- Limiting the ability to exclude equity in homes over $560,000. Currently, states have the option of increasing the home equity limit to $840,000. Reducing the cap to the same amount nationwide disregards the great differences in housing costs around the country. This affects 10 states and the District of Columbia, which have elected the higher figure: California, Connecticut, District of Columbia, Hawaii, Idaho, Maine, Massachusetts, New Jersey, New Mexico, New York and Wisconsin.

Likely effects. Undoubtedly, the bill will go through many changes before enactment, so we can't know the ultimate effects. But, here are a few possibilities based on the initial proposal:

- No changes until 2020.
- More strain on state budgets after 2020 as they receive less federal funding.
- Lower enrollment in insurance and Medicaid by

Americans between ages 50 and 64 due to lower health insurance subsidies, repeal of limits on age-based insurance premiums and a rollback of Medicaid expansion.

- A loss of a portion of federal funding for the CFC program, which could lead states to eliminate it or reduce enrollment, perhaps grandfathering those already in the program.

Whatever happens, these changes will be quite disruptive to health care systems, providers and beneficiaries throughout the nation. Sara Rosenbaum, chair of the Department of Health Policy at the George Washington University School of Public Health in Washington, D.C., wrote the following on the Health Affairs Blog:

> States have built their programs and designed their complex health care delivery systems for the poor over a half century, entirely depending on this federal/state funding arrangement. Under the bill, they either would have to accept the terms of a seriously diminished financial deal or give up federal funds entirely. . . . Effectively this leaves states with the Hobbesian choice of either making up the funds that have been lost out of their own coffers or cutting where they can under existing law, notably funding for optional populations such as children and adults with severe disabilities who receive home and community-based care (many of whom are optional); prescription drug coverage; inpatient and outpatient rehabilitation services for adults; preventive services for adults; durable medical equipment; and so forth.[3]

Further, by restricting federal reimbursement to the number of beneficiaries rather than actual costs, they'll only adjust partially to unanticipated needs that inevitably will arise, such as the aftermath of Katrina or, more recently, responding to the Zika virus. The states will have to deal with increased costs on their own while they seek Congressional approval of federal cost sharing.

Individuals With Special Needs

No proposals have yet been made that would directly affect services for special needs children and adults. Medicaid block grants could adversely affect special needs residents of states that decide—at the state level—to reallocate or otherwise restrict funding for both governmental and non-governmental providers. It's possible that the emergence of Medicaid block grants could significantly reduce or even eliminate the benefit of special needs trusts that are currently relied on to supplement government programs for the protection of trust beneficiaries.

Medicaid block grant advocates, on the other hand, suggest that services could improve because states would be given more control and opportunity to experiment with alternative health care models.

Generally speaking, envisioned federal budget reductions suggest that increased services for disabled adults are unlikely in the short term. This situation is problematic because, unfortunately, anything short of dramatically increased funding for services, such as housing and residential care, will only exacerbate existing gaps in the special needs safety net.

Future of Programs

The CBO, economists and some members of both political parties express concern about the future solvency of Social Security, Medicare, Medicaid and programs that address the needs of veterans. One arguably responsive strategy emerged in the Trump 2018 budget proposal. It envisions a $72 billion reduction, over a 10-year span, in federal payments to individuals who are disabled and, therefore, unable to work. The largest such program is Social Security Disability Insurance. Another is Supplemental Security Income.

The stated strategies are designed to: (1) induce or compel those now receiving benefits to return to the workforce, (2) tighten or more strictly enforce eligibility criteria, and (3) more aggressively pursue and punish providers and others who abuse the system.

It's historically proven that efforts to address abuses of government systems typically cast too wide a net. Perennial initiatives to rein in "fraud and abuse" so often prove more harmful to vulnerable Americans than beneficial to the nation's annual budget.

Beyond this, we refrain from discussions of political statements, posturing and prognostications about entitlements. We nevertheless express our hope that the needs of our vulnerable populations are adequately addressed as we look to the future.

Resource for Everyone

Objectivity in times of political turmoil can be elusive. We don't pretend to be without agendas, but our agendas have nothing to do with political parties. Instead, we focus on the needs of older Americans and Americans with disabilities. With this in mind, we continue our work. We'll continue to monitor developments, publish papers and be a source of even-handed and reliable information. We'll be a resource for everyone, regardless of political inclination and motivation.

Endnotes

1. Together, members of Trump Policy Analysis Group have over 170 years of leadership experience in addressing the needs of older Americans and of Americans with disabilities. Accordingly, these populations and initiatives affecting them are exclusively our areas of focus.
2. American Health Care Act, Congressional Budget Office Cost Estimate (March 13, 2017), at p. 11.
3. *http://healthaffairs.org/blog/2017/03/10/the-american-health-care-act-and-medicaid-changing-a-half-century-fede al-state-partnership/.*

SPOT LIGHT

Red, White & Blue

Fourth of July, New England by John Charles Terelak sold for $12,500 at Bonhams' recent American Art auction in New York City on May 24, 2017. Terelak is an Impressionist artist known for his scenes of New England. His signature style consists of layered paint and glazing, along with incredible use of color and rich texture.