

**MEMORANDUM**

**To:** Powers Clients and Friends

**From:** Peter Thomas, Peggy Tighe, Steve Postal and Leif Brierley

**Date:** March 29, 2017

**Re:** What to Expect Next in Health Care Policy

**Summary**

House Republicans withdrew a planned vote on the House floor of the American Health Care Act (AHCA), legislation to repeal and replace the Affordable Care Act (ACA) on March 24 because they lacked the votes for its passage. The decision to pull the vote occurred after several weeks of discussions and negotiations with Congressional Republicans and President Trump. After the decision to remove the bill from consideration on the House floor, Speaker of the House Paul Ryan (R-WI) stated that the ACA “is the law of the land” and will remain so “for the foreseeable future.” On Tuesday, March 28, Speaker Ryan said that Republicans are united around a common set of principles and their agenda. They will continue to pursue repeal and replacement of the ACA, stating that they would take the time to “get this right.”

The House GOP stated that it would continue to work to build consensus on a replacement package among its own members and, in the short term, would pivot to tax relief and regulatory reform, in particular. Also this week, Minority Leader Nancy Pelosi urged fellow Democrats to advance ideas to repair the ACA, asking her caucus for a set of proposals to improve current law. Democrats are not expected to advance comprehensive reform, but rather a set of modifications to attempt to strengthen the ACA.

This memorandum provides a brief overview of the AHCA debate, and what to expect next in federal health care policy.

**Abbreviated Timeline of Events: The American Health Care Act**

The AHCA process lasted about three weeks. During those three weeks, several significant developments occurred, including markups, the issuance of two Congressional Budget Office (CBO) scores of the legislation, the defection of several conservative and moderate members of the House Republican caucus, the postponement of the bill, and the retraction of the bill from floor consideration. See these developments in the following brief timeline:

- *March 6:* House GOP [releases](#) legislative text of AHCA
- *March 8:* House Congressional Committees [begin markup](#) hearings of AHCA
- *March 13:* CBO [estimates](#) 24 million would lose insurance coverage over 10 years under AHCA; finds bill will produce \$337 billion in federal savings over 10 years
- *March 16:* House Budget Committee [holds](#) markup of AHCA

- *March 22:* [More than 25 members](#) of the House Freedom Caucus publically oppose AHCA but continue to negotiate changes with President Trump and House leadership
- *March 23:* CBO [updates](#) cost estimate of AHCA to reflect manager's amendment, shows fewer savings achieved with no changes to coverage losses from original bill
- *March 23:* 7<sup>th</sup> Anniversary of signing of ACA; Freedom Caucus continues to press for changes to the bill but resists agreement to vote in the affirmative; anticipated vote on AHCA [postponed](#)
- *March 24:* Several Republican moderates announce opposition to the bill; Freedom Caucus members remain opposed; Speaker Ryan, with support from President Trump, [pulls](#) the AHCA bill from House floor consideration.

## Key Sticking Points: AHCA

The AHCA contained a number of provisions, such as repeal of the individual mandate and the expansion of health savings accounts, which Congressional Republicans broadly supported; however, the more conservative and more moderate wings of the Party disagreed strongly on a number of other provisions in the bill and in the subsequent manager's amendment. Those key sticking points included language on:

- **Date of Repeal.** Freedom Caucus members argued strongly for an immediate repeal of the ACA, opposing the AHCA's one-year delay for full repeal.
- **Essential Health Benefits (EHBs).** Originally, the AHCA was designed to only repeal the EHB requirement from the Medicaid expansion program; later versions included concessions to the conservative members of the House GOP, who sought to remove EHB requirements under private coverage. In a concession to the House Freedom Caucus, an amendment proposed that states would be required to define EHB for the purpose of determining premium tax credits, with the intent of eliminating requirements to cover a federal EHB package. Moderate House Republicans were less supportive of repeal of EHBs, and many grassroots patient groups were strongly opposed to their repeal.
- **Medicaid Per Capita Caps/Block Grants.** The original AHCA converted the existing Medicaid entitlement program into a per capita cap system, saving hundreds of billions of dollars over ten years. In a concession to conservative Republicans, the Rules committee adopted a proposal to allow states to accept fixed block grants—rather than funding through per capita caps—along with added flexibility to administer the Medicaid program. While the per capita caps system gave some House Republican moderates some pause, the more restrictive block grant language prompted significant pushback from those same Republicans.
- **Medicaid Work Requirements.** On March 14, 2017, the Centers for Medicare and Medicaid Services, in a letter to state governors, stated that it will use Section 1115 waiver authority to approve Medicaid reforms related to “training, employment, and independence.” On March 20, 2017, the House released a proposed manager's amendment to the AHCA, including a state option to condition Medicaid eligibility for

non-disabled, non-elderly, non-pregnant adults upon satisfaction of a work requirement. This amendment was generally supported by conservative House Republicans and opposed by moderate House Republicans.

## **What to Expect Next**

Below is a brief overview of possible routes that Congress and the Administration could pursue regarding repeal and replacement of the ACA.

### ***Possible Congressional Actions***

- **No Action in 2017, Deferment to Other Priorities.** Having used significant political capital and time to try and advance the AHCA, Congress may opt to defer further action on the ACA to 2018 as they pursue other priorities. Currently, Congress faces several must-pass items, including federal government appropriations that will expire on April 28 without additional congressional action. President Trump, Speaker Ryan, and Ways and Means Chairman Kevin Brady (R-TX) each stated that they will move forward with comprehensive tax reform. 2018 is also a Congressional election year, and presents an opportunity for the Republican Party to capitalize on messaging regarding any perceived or real failures of the ACA in their re-election campaigns. However, as Republicans now control both the legislative and executive branches of government, they may be held responsible for any depletion in healthcare coverage and access that voters believe are caused by their inability to reach party consensus.
- **AHCA Redux.** Speaker Ryan announced on March 28<sup>th</sup> that negotiations continue on the health care reform bill within the Republican conference in an attempt to “get it right,” and another potential vote is anticipated later this spring. Congressman Mark Meadows (R-NC), who heads the Freedom Caucus, stated that he was also interested in continuing discussions.
- **Piecemeal Legislation to Address Aspects of ACA.** Congress may pursue individual pieces of legislation that address different parts of health care reform. Recently, and quietly, the House passed [legislation](#) to allow for the formation of association health plans, which are group health plans sponsored by business associations that are not subject to strict insurance regulations like other types of plans. These plans are seen as one way to allow for new types of insurance plans to form with more flexibility, but also offering fewer benefits in some cases. It remains unclear at this time whether other pieces of legislation may emerge, but this type of strategy may allow Republicans to capitalize on their majority without having to write a comprehensive, all-encompassing bill that challenges the ability of the party to align.
- **Senate-led Health Care Reform Legislation Seeking a Compromise Solution.** The Senate, having put forth several health care reform proposals of its own already, may take up the mantle of ACA repeal and replace. As recently as Friday, pundits were calling for the Senate to pursue a more bipartisan health care reform strategy, and leading Senators were weighing in. Senator Lamar Alexander (R-TN), Chairman of the Health, Education,

Labor, and Pensions (HELP) Committee, issued a statement saying Congress “has a responsibility to continue its work to solve this problem and to give more Americans more choices of lower-cost health insurance.” Senator Alexander has also suggested for some time that lawmakers should focus on repairing the ACA rather than immediately repealing it, and that stabilizing the individual health insurance market is one potential area for bipartisan work.

Other pundits have pointed to a legislative [proposal](#) from Senators Susan Collins (R-ME) and Bill Cassidy (R-LA) that includes an option for states to continue or discontinue ACA mandates and insurance benefit rules, does not repeal Medicaid expansion, retains some private market insurance rules such as limits on annual caps and eligibility for dependents to stay on parents’ insurance thru age 26, and gives states flexibility to pursue multiple options. Simultaneously, Senator Bernie Sanders (I-VT) this past weekend indicated that he plans to introduce single-payer health care legislation to spur conversation on how to deliver on President Trump’s health care promises of covering all Americans. Neither President Trump, nor Congressional Republicans are expected to support his legislation. It remains to be seen if Republicans and Democrats will begin to work with one another on compromise ACA/AHCA legislation in the Senate. Democrats in the Senate and House have remained stalwart along party lines in opposing repeal and replacement. Minority Leader Pelosi’s move to ask for ACA tweaks could be an effort to thwart some Democrats’ interest in seeking to work with Republicans on compromise legislation, or it could be an attempt to identify areas where bipartisan agreement may be reached.

### ***Possible Administrative Actions***

Given the House’ current inability to advance repeal legislation, the Administration is expected to use its authority to advance administrative and regulatory actions to advance the GOP’s overall healthcare reform agenda. The Trump Administration could pursue one or more of the following:

- **No Action.** On March 24, President Trump stated that the best thing to do politically would be to let the ACA “explode.” The Administration could determine that it is in their best interest politically to let the ACA collapse on its own, blame the Democrats for this, and then begin to work in a bipartisan way to improve the system.
- **Administrative Actions to Stabilize Insurance Markets.** The Trump Administration may take further administrative actions, following the proposed market stabilization regulation published on February 15. This regulation includes: a shorter open enrollment period timeframe, greater emphasis on state reviews and state accreditation for network adequacy, and relaxed actuarial value requirements, among other things. The proposed regulation, expected to be finalized in April, is widely regarded as an emergency measure to preserve the federal exchanges and prevent a “death spiral” in the individual insurance market. Further administrative actions to stabilize the exchanges remain possible, including further flexibility to the EHB’s actuarial value requirements, and re-evaluating the ACA’s risk adjustment and risk corridor programs.

- **Administrative Actions to Establish Reinsurance/High Risk Pools.** Department of Health and Human Services Secretary Tom Price may use the ACA’s 1332 waivers to set up reinsurance programs or high-risk pools, suggesting that HHS could fund this policy with “pass-through” funding. However, establishing high-risk pools or reinsurance programs will likely be more difficult to establish administratively, as additional funding proposed by the AHCA will not be available. The AHCA contained a “patient and state stability fund” of \$15 billion for 2018 and 2019 that the Congressional Budget Office predicted would be used mostly for reinsurance pools.
- **Administrative Actions to Soften Regulations Imposed by the ACA.** Secretary Price could use administrative actions to weaken the ACA regulations. On February 24, President Trump issued an executive order calling for all agency heads to examine existing regulations in their agencies and recommend which ones to repeal. This followed another executive order, issued on January 30, where President Trump called for greater regulatory reform, calling for the repeal of two regulations for every one proposed. Secretary Price could use both of these executive orders to de-regulate the Affordable Care Act. Specific policies ripe for administrative action may include: relaxing enforcement of the individual mandate, relaxing essential health benefits standards, relaxing non-discrimination standards, and reducing preventative coverage requirements, including contraception.
- **The Federal Lawsuit Regarding Insurance Subsidies.** In a federal lawsuit brought against the Obama Administration by the House of Representatives, *House v. Price*, the House claimed the Obama Administration overstepped into legislative powers by allocating cost-sharing reduction payments without an appropriation. While the House won this case in the lower court last year, the case, appealed by the Obama Administration, was put in abeyance in January through a motion filed by the Trump Administration. Both parties will submit briefs in the case by May 22. It remains to be seen what the next step will be for the Trump Administration in this case. These cost-sharing reduction payments are a critical funding source to assist low income individuals pay for deductibles and payments, and preserving them may be key to ensuring the private exchanges do not collapse.
- **Executive Orders.** President Trump could issue additional health reform policies through executive orders. To that effect, the Trump Administration issued an executive order on January 20, which required agencies to ease the administrative burdens that the ACA imposes on consumers, industry and other stakeholders. In response to this action, the Internal Revenue Service (IRS) reversed a plan under the Obama Administration to reject tax filings that lacked health coverage information, which essentially relaxes enforcement of compliance with the individual mandate.

## **Additional Health Policy Priorities Facing the 115<sup>th</sup> Congress**

Several significant health care legislative issues will need to be addressed by the 115<sup>th</sup> Congress in 2017. First and foremost is continued federal funding for a raft of health care programs for the

remainder of fiscal year 2017, funding for which lapses on April 28<sup>th</sup>. Other key issues include the reauthorization of the Children’s Health Insurance Program (CHIP), reauthorization of Medicare “extenders,” including the exceptions process to the outpatient therapy caps, the negotiation of the Prescription Drug User Fee Agreement (PDUFA), the reauthorization of the National Health Service Corps (NHSC), and the need to address funding for Medicaid in Puerto Rico and other U.S. territories. Senate leaders have also placed a high priority on passage of the Finance committee’s chronic care working group’s legislative package and the House Ways and Means Committee continues to signal support for movement on value based purchasing for Medicare post-acute care providers. These additional priorities complicate Congress’s ability to further address the ACA, and shorten the available time for Congress to continue exploring comprehensive options to repeal and replace the ACA. We will be monitoring and reporting the latest developments surrounding these issues as they break in this Congress.

## **Summary**

Within days of the GOP’s withdrawal of the legislation from the House floor, the White House and GOP Congressional leaders have stated that ACA repeal/replacement must be reassessed and Republican efforts are again underway to find a means to get to House and Senate passage. Congress and the Administration may pursue one of many different routes, ranging from legislative solutions to administrative fixes, or—less likely—no action at all. No matter the fate of the ACA, health care policy issues outside of repeal will continue to be major topics this Congress, with a full agenda anticipated to address the various must-pass pieces of legislation in 2017.