

MEMORANDUM

To: ASTS

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

Date: May 15, 2017

Re: Amendments to the American Health Care Act, and Health Reform's Likely Trajectory in the Senate

I. Summary

On May 4, 2017, the House of Representatives passed the American Health Care Act (AHCA), legislation to repeal and replace key portions of the Affordable Care Act (ACA), by a vote of 217 to 213. The House bill included a number of amendments and changes from the bill that was introduced in early March by the House Committee on Ways and Means and the House Committee on Energy and Commerce. Ultimately, the amended legislation proved more palatable to members of the House, enough of whom had not supported the first draft to prevent that iteration from receiving a vote. The passed version now goes to the Senate, where the legislation faces an uncertain future. In this memorandum, we summarize the major amendments in the AHCA as passed, issues that are likely to be raised in the Senate surrounding this bill and the key members raising them, the legislative process that could play out, and the likely next steps for health reform from here into the future.

For a detailed analysis of the March 6 initial version of the AHCA, please see our previous memorandum, attached under separate cover. The final version of the AHCA as passed by the House combined the March 6 version with the amendments described below. This memorandum assumes an underlying knowledge of the AHCA's various provisions; unfamiliar readers are encouraged to review the previous memorandum.

II. New Amendments to the AHCA

March 20: Manager's Amendments

On March 20, Reps. Greg Walden (R-OR) and Kevin Brady (R-TX) modified the AHCA as introduced on March 6 by adding two Manager's Amendments, one predominantly making [technical](#) changes, and one making more substantive [policy](#) changes. These amendments:

- Alter the AHCA's Medicaid provisions by giving states the option to choose to receive a block grant for the federal share of funding for Medicaid rather than participate in a per-capita cap financing system;
- Revise Medicaid expansion provisions by implementing the following changes:

- Ends the ACA’s mandatory requirement for States to expand Medicaid for certain childless non-disabled, non-elderly, non-pregnant adults up to 133% FPL;
- Sunsets the State option to cover adults above 133% FPL, effective December 31, 2017;
- Preserves the ability of States to cover Medicaid expansion enrollees (childless non-disabled, non-elderly, non-pregnant adults), but only at a State’s regular Federal Medical Assistance Percentage (FMAP); and
- “Grandfathers” Medicaid expansion enrollees who are enrolled in Medicaid expansion prior to December 31, 2019. States will receive the enhanced matching rate under current law (90 % in CY2020), for grandfathered enrollees as long as such individuals remain eligible and enrolled in the program.
- **Work requirement.** The bill gives States the option of instituting a work requirement in Medicaid for nondisabled, nonelderly, non-pregnant adults as a condition of receiving coverage under Medicaid;
- Delays implementation of the so-called “Cadillac Tax” on insurers and employers that offer generous health insurance coverage by one year, to 2026; and
- Accelerates AHCA’s tax repeals, moving most from 2018 to 2017. These include a long list of tax provisions such as repeal of the medical device tax and the increase in taxes on health savings accounts.

March 23: Manager’s Amendment

On March 23, Reps. Greg Walden (R-OR) and Kevin Brady (R-TX) added another Manager’s [Amendment](#) to the AHCA. This amendment proposed:

- Delaying the repeal of the additional 0.9 percent Medicare tax on high-income earners for one year, to taxable years beginning after December 31, 2022;
- Adding \$15 billion to the Patient and State Stability Fund for 2020 to cover maternity, mental health, and substance use disorder care; and
- Requiring states to define essential health benefits, beginning in 2018, for purposes of determining coverage of benefits under the premium tax credit. [The final AHCA as passed by the House *permits* states to define EHB].

April 6: The Palmer/Schweikert Amendment

On April 6, Reps. Gary Palmer (R-AL) and David Schweikert (R-AZ) introduced an [amendment](#) that created a \$15 billion risk sharing program to help states lower premiums for health coverage offered in the individual market, from January 1, 2018 until 2026.

April 23: The MacArthur Amendments

On April 23, Rep. Tom MacArthur (R-NJ), a moderate Republican, worked with Rep. Mark Meadows (R-NC), Chair of the conservative Freedom Caucus, to introduce the “[MacArthur Amendments](#),” which were intended to attract additional support from both of these factions of the House Republican Party. These amendments included the following:

- **EHB waivers.** States may apply to receive waivers that allow them to waive federal essential health benefits (EHB) requirements. States may also begin to specify their own EHBs starting in 2020.

- **Age-rating waiver.** Waivers can be used to increase a state’s age-based premium rating ratio above the AHCA’s 1:5 age rating ratio requirement. (The Affordable Care Act permits an age-based premium rating ratio of 1:3.)
- **Continuous coverage waiver.** Waivers may be used to allow states to avoid imposing premium penalties (30 percent of the premium amount in the original version of the AHCA) on consumers who did not maintain continuous coverage by having those consumers’ health status included as a factor in determining their insurance premium instead. However, a state may only use health status in premium rating if they establish a risk mitigation program (e.g., a high risk pool) or participate in the Federal Invisible Risk Sharing Program (FIRSP). Health status-based premium rating may not be used for individuals who maintain continuous coverage. Further, the amendments explicitly state that issuers may not discriminate on the base of gender, or limit access based on preexisting conditions.

The Upton Amendment

On May 3, Rep. Fred Upton (R-MI) introduced the “[Upton Amendment](#),” which many see as creating state high-risk pools. Specifically, the amendment establishes a federal grant of \$8 billion from 2018 to 2023 to states to subsidize premiums, cost-sharing or other out-of-pocket costs of high-cost individuals. The amendment also directs that these funds are applicable to those who:

- Reside in a State with an approved waiver;
- Have a pre-existing condition;
- Are also uninsured because they have not maintained continuous coverage; and
- Purchase health care in the individual market.

This amendment appeared to be the final piece needed to garner enough votes in the House for passage of the amended AHCA. Prior to this amendment, many analysts had predicted that the House did not have enough votes to pass the legislation; however, upon introduction of this amendment, the House moved forward with a vote and passed the AHCA, as amended, on the House floor by a slim margin.

III. Current Political Dynamics

The Senate’s health reform bill will likely depart from the AHCA in several important ways, with Senators across the Republican caucus offering different perspectives on the path forward on health reform legislation. Republicans have little margin for error among the 52-member strong Republican Senate majority to pass legislation, needing at least 50 votes plus the Vice President to achieve a 51 vote majority. A number of key Republican Senators are seen as lynchpins who may significantly impact the likelihood of passing health reform legislation.

In particular, working groups of Senators have formed to draft the Senate version of health reform legislation. Those working groups include a 13-member leadership-based group that includes Senate Majority Leader Mitch McConnell (R-KY), Senators John Cornyn (R-TX), John

Thune (R-SD), John Barrasso (R-WY), Orrin Hatch (R-UT), Lamar Alexander (R-TN), Michael Enzi (R-WY), Tom Cotton (R-AR), Cory Gardner (R-CO), Rob Portman (R-OH), Ted Cruz (R-TX), and Patrick Toomey (R-PA). Senators Susan Collins (R-ME) and Bill Cassidy (R-LA) have separately been working on legislation to repeal and replace the ACA, and have [reportedly](#) been seeking Democratic support for their bill. Senator Cassidy has been an outspoken critic of the AHCA, saying that he believes it is “written to set up tax reform.” He and Collins have been working to try and achieve a more bipartisan result.

Other Senators worth noting are Senators Mike Lee (R-UT) and Rand Paul (R-KY), who have in the past expressed concerns about repealing the ACA and replacing it with what is, in their view, a similar entitlement program. Senator Cruz has also expressed a similar conservative view on the legislation, but notably is being included in the ongoing discussions on the bill in the larger leadership group.

Meanwhile, all 48 Senate Democrats and Independents remain opposed to the AHCA, and to efforts to repeal and replace the ACA. Democrats have written to Republican leadership to say they stand ready “to develop legislation with Republicans that will improve quality, lower costs, and expand coverage for all Americans,” but only if the GOP sets aside efforts to repeal the ACA. However, Republicans are unlikely to table their current efforts, having a majority in both chambers and having already invoked Congressional procedures to allow them to proceed without any Democratic support in either chamber.

The White House, for its part, has indicated that it is leaving the crafting of Senate legislation up to Senate GOP leadership. Politico reports that administration officials have indicated recognition that the Senate needs space and time to work through their version of a bill. To that end, the White House has not called for legislation to be tied to any particular time deadline.

A Congressional Budget Office (CBO) score has not been issued for the amended AHCA. The CBO analysis of the bill is expected the week of May 22nd. A score is necessary for the Senate Parliamentarian to review the AHCA and for leadership to set the terms of debate on the bill.

IV. Issues Likely to Be Raised in the Senate

The issues in the Senate bill most likely to differ from the House bill include:

- **Transforming Medicaid into a Per-Capita Cap/Block Grant Structure.** The AHCA requires states to reform their Medicaid programs into either per-capita caps or block grants.
 - Senators Shelley Moore Capito (R-WV), Cory Gardner (R-CO), and Lisa Murkowski (R-AK) have made statements of concern regarding the future of Medicaid, although not specifically on block grants or per-capita caps. Democrats are expected to strongly defend the current structure of the Medicaid program.
- **Cutting Medicaid Expansion.** The AHCA will phase out the ACA’s enhanced funding for Medicaid expansion
 - [Twenty Republican senators](#) are in states that have expanded Medicaid.

- Two of these Senators are in close re-election bids in 2018: Senators Jeff Flake (R-AZ) and Dean Heller (R-NV).
- Senators Rob Portman (R-OH), Shelley Moore Capito (R-WV), Cory Gardner (R-CO), and Lisa Murkowski (R-AK) expressed concerns in [March](#) that the AHCA did not provide enough protections for the Medicaid expansion population.
- Senator Portman, one of the Senators formulating a Senate companion bill to the AHCA, stated that Senators are currently debating a “softer landing” for states to exit Medicaid expansion.
 - Senator Portman stated that he prefers a longer phase-out period for the high federal matching rate for the Medicaid expansion population. Senator Portman also stated that it is unlikely that the current funding levels for the Medicaid expansion population will continue indefinitely.
- Senator Susan Collins (R-ME) has expressed concern about how the AHCA would treat Medicaid expansion states vs. non-expansion states.
- Senator Tom Cotton (R-AR), in response to a question about the AHCA’s plans for Medicaid expansion, [stated](#) that “I didn’t think [the AHCA] got it right, that it was better to slow down, and get it right rather than get it fast.”
- Senator John McCain (R-AZ) has [said](#) he has “a problem with the bill,” making clear the AHCA is a non-starter for his state, Arizona, where more than 400,000 residents have benefited from the Medicaid expansion program of the ACA.
- **ACA Taxes.** The AHCA repeals the ACA’s taxes, including the individual and employer mandate penalties.
 - The Senate is [considering](#) not repealing all of these taxes in its health reform bill.
- **“Invisible” High-Risk Pools**
 - The AHCA includes \$15 billion over nine years for reimbursing the claims of some high-cost beneficiaries.
 - Senator Collins stated that an “invisible” high-risk pool would need at least \$15 billion during its first year alone. Senators Gardner and Mike Rounds (R-SD) have maintained that negotiations continue to increase funding for these invisible risk pools.
- **Tax Credits for individuals aged 50-64.** In 2020 and beyond, the AHCA replaces the ACA’s income-based tax credits with an age-adjusted annual credit.
 - Senator Collins (R-ME) expressed concern about the insufficiency of AHCA’s tax credits for individuals aged 50-64.
 - Senator John Thune (R-SD) is reportedly working to increase these tax credits, and has floated some preliminary proposals.
 - Senator John Hoeven (R-ND) has also stated that the House bill’s tax credits are “just not robust enough to make sure that low-income individuals can actually afford a [health] plan.”
 - Others, such as Senator Bob Corker (R-TN), support ideas such as increasing payments to more targeted, smaller groups of individuals, to allow individuals at the lowest incomes to purchase health insurance.

- **Subsidies to Low-Income Individuals**
 - Senators Bob Corker (R-TN) and John Thune (R-SD) have expressed concern that the AHCA’s subsidies should be more generous to low-income individuals.
- **Planned Parenthood.** The AHCA imposes a one-year freeze on mandatory funding to a class of providers designated as “prohibited entities,” which in this case includes family planning and reproductive health facilities such as Planned Parenthood. This funding includes Medicaid, the Children’s Health Insurance Program, Maternal and Child Health Services Block Grants, and Social Services Block Grants.
 - Senator Lisa Murkowski (R-AK) has stated that if this provision (known as the “Planned Parenthood Provision) is in the final legislation for repeal and replace, she would not vote for it. Sen. Susan Collins (R-ME) has also publically stated that it would be a “mistake” to defund Planned Parenthood in health reform.
- **Pre-Existing Conditions.** Backers of the AHCA faced a slew of criticism for several amendments to the final bill that would effectively allow insurers to charge patients with pre-existing conditions more for their insurance coverage, effectively eroding key ACA protections for vulnerable patients.
 - Senator Cassidy and other more moderate Republicans have been outspoken about not wanting to support legislation that could leave people with pre-existing conditions unable to afford their health insurance premiums.
 - Some analysts note that the coverage protections provided for in the ACA have contributed to the rise in premiums, as insurance companies are required to cover more high-cost individuals without being able to offset those higher-cost patients with correspondingly high premiums. However, politically, the removal of pre-existing coverage protections is challenging, as many patient groups and constituents have rallied around this tenet of the ACA.

V. Process/Procedure

The process for health reform in this Congress began in January with the passage of a “budget reconciliation” bill that enables Congress to consider repealing and replacing the Affordable Care Act through expedited procedures. A reconciliation bill allows the Senate to pass legislative provisions with only 51 votes, rather than the 60 required for other controversial legislation. With only 52 Republicans in the Senate, Senate Republicans would not be able to pass a Republican-only ACA repeal without using this budgetary procedure.

A reconciliation bill is limited in terms of its contents. The only provisions that can be included are those provisions that impact the federal budget in a positive or negative direction. This means that any budget neutral provision in the ACA cannot be addressed through this mechanism. This means that while Congress can include in the reconciliation bill a repeal of federal subsidies to help purchase insurance, for instance, they may not be able to include a repeal of many of the consumer protections, which may be determined not to have a direct impact on the federal budget. For those non-budgetary items, 60 votes would be required in order to pass them, while only 51 votes would be needed for budgetary items. The Senate

parliamentarian will have a large role in these decisions, serving as the decision maker on what components of any legislative proposal are germane to the rules of the process.

In its current state, some provisions of the AHCA are not expected to be germane to the budget reconciliation process. In other words, it contains provisions that go outside the scope of purely budgetary items. The AHCA includes a number of provisions that impact insurance coverage provisions, such as essential health benefits and pre-existing conditions, which are expected to not be germane to the rules of budget reconciliation. How the Senate chooses to address those provisions will be something to watch over in the coming days and weeks. It appears that GOP leaders continue efforts to work to find an ACA repeal, or portions of repeal, that they can accomplish within the rules of budget reconciliation, seeking to use only the votes from their 52-member majority to pass legislation by a simple majority of 51 votes.

VI. Conclusion

Health care reform legislation has advanced through its initial step, having passed the House. It now faces an uncertain future in the Senate, where political dynamics, competing proposals, and questions about process and procedure cloud the path forward. Republicans face significant pressure to pass legislation addressing the ACA. Since 2010, Congress has held over 50 votes to repeal the ACA, in some cases passing legislation to only have it be vetoed by President Barack Obama. Additionally, Republicans have long campaigned on the promise of repealing the ACA, a promise very familiar to their constituents. Now, with control of both chambers of Congress and the White House, Republicans have a much greater likelihood of accomplishing their long-sought goal of repealing the ACA. Democrats have succeeded in mobilizing their rank and file members to actively engage in opposition to ACA repeal efforts.

While Republicans are presented with the best possible political environment to repeal the ACA in years, the competing proposals, political dynamics, and procedural hurdles present significant challenges to enactment of a final bill. We will be closely following the developments over the coming weeks, and will be sure to provide timely updates on any significant developments as they occur.