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This is the second article in a series in which Ropes & Gray health-care partner Tom Bulleit will compare and contrast various aspects of the latest Affordable Care Act "repeal and replace" proposals.

## Failure to Launch the American Health Care Act: Portents for the Future of Health Care Reform?



BY TOM BULLEIT

### Introduction

In a busy week, House leadership and President Donald Trump went from celebrating the unity that would bring about passage of the American Health Care Act (AHCA), to the Speaker Paul Ryan's (R-Wis.) resigned statement that "Obamacare is the law of the land," to the President's finger-pointing at Democrats and then at the House Freedom Caucus for scuttling the bill, to a new "unity conference" that several House members predicted would bring about a vote on the bill

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(or some replacement) later this spring. The President stated that he is ready to move on to other legislative priorities, like tax reform, but members of Congress have hinted that they may not be finished yet with efforts to "repeal and replace" the Affordable Care Act (ACA).

This column attempts to read signs and portents from this initial failure of the AHCA that might provide insight into what Repeal and Replace 2.0 might look like.

### Portent #1: House Conservatives Must Accept That the Perfect Is the Enemy of the Good

The prevailing interpretation of the AHCA's failure is that it might have been possible to capture a sufficient number of moderate Republican votes to advance the bill to the Senate, but too many members of the House Freedom Caucus were unwilling to adopt a solution that preserved the continuation of the ACA's taxpayer support for insurance represented by the AHCA's advanceable, refundable tax credits and Medicaid expansion. Conservatives described the AHCA as "Obamacare 2.0" and "Obamacarelite." The result was that instead of a bill that contained many but not all things they wanted, they have the ACA continuing. One Freedom Caucus member has quite publicly resigned from the group over this result.

It remains to be seen whether a sufficient number of Republicans will be willing to eat some spinach in order to get to dessert, but the first portent of the initial failure of the AHCA is that there will be no "repeal and replace" unless they do.

### Portent #2: Without Sticks (Mandates), the AHCA Must Offer Carrots (Subsidies)

The AHCA would have eliminated the individual and employer mandates to buy or offer health insurance,

and would have reduced and redistributed the subsidies (renamed “advanceable, refundable tax credits”) that support the purchase of private insurance in ways that favor wealthier Americans. The ACA tax credits were structured so that individuals under 200 percent of the poverty line (approximately \$24,120 for an individual or \$49,200 for a family of four), received the most generous tax credits, which were phased out completely for families earning more than 400 percent of the poverty line. The AHCA was structured so individuals would receive credits based on age (with younger individuals receiving less), and where those earning under \$75,000 (or \$150,000 for couples filing jointly) would be eligible for the full amount. The credit would have phased out by \$100 for every \$1,000 in income higher than those thresholds.

The AHCA also would have repealed altogether the ACA’s cost-sharing subsidies, which reduced the amount of deductibles, copays, and out of pocket limits charged by insurers to low-income individuals with certain exchange plans (and providing that HHS would reimburse insurers for these subsidies).

The combination of these features proved toxic to moderates once the Congressional Budget Office (CBO) estimated that the AHCA would cause 14 million fewer people to be uninsured by 2018. CBO’s calculation was that most of that number would come from people who would choose not to buy insurance if it were no longer mandated to avoid the tax penalty, and the remainder because the reduction of subsidies would make insurance unaffordable. In response to objections from House moderates, leadership was in the process of modifying these provisions to take more account of income. While the whole idea of subsidy is anathema to some House conservatives, there does not appear to be a path to passage in the House (let alone the Senate) that does not include them. If some conservatives are willing to accept a decrease in the *amount* of spending as a victory, that might bring in enough votes on this issue. Another possible solution would be to restructure the tax credits to favor lower income individuals by further means-testing or creating a hard income ceiling but to add a sunset provision for a future date should some premium reduction target or percentage of enrollment be reached.

Portent number two, then, is that some level of federal subsidy in the individual insurance market likely will have to remain.

### **Portent #3: With or Without Restructuring of Medicaid, Some Expansion Must Remain**

Although the ACA expanded the number of Americans eligible for Medicaid by supplying enhanced federal matching funds for the expansion population, it did not alter the fundamental nature of the Medicaid program. Since 1965, in order to receive federal matching funds, states have been required to cover a minimum benefits package for eligible individuals. Significantly, the amount of funding depends on the costs of care. Republicans have long argued that restructuring Medicaid into a block grant or similar kind of fixed fund program is necessary to restrain the growth in spending. The AHCA would have taken the occasion of repeal and replace not only to scale back the ACA expansion, but to effect this other long-time Republican objective. As

originally drafted, the AHCA did not take the block-grant approach, opting instead for per capita funding based on the state’s 2016 Medicaid costs, trended forward annually for inflation. According to the CBO, this would decrease federal spending on Medicaid by \$880 billion by 2026, and would be the main driver behind CBO’s reported increase in the uninsured population from 14 million who withdraw from the individual market by 2018, to 24 million by 2026.

In an effort to attract more conservative votes, the Budget Committee added a Manager’s Amendment that would have given states even more freedom by granting the option to receive a certain portion of federal Medicaid funding in the form of a block grant. Under this option, states would be able to receive a block grant for adults (other than seniors, persons with disabilities, and the Medicaid expansion population), or those adults and children. Block grant funding would be frozen at a state’s 2019 enrollee figure (updated each year by the consumer price index for urban consumers). In addition, the Manager’s Amendment would have given states the option of instituting a work requirement in Medicaid for certain adults as a condition of receiving Medicaid, and would have ended federal enhanced funding on the ACA’s expansion population for new enrollees effective at the end of this year, although those already enrolled could stay enrolled at the enhanced rate.

Many moderate House Republicans, particularly those from states that had taken the ACA’s Medicaid expansion, insisted on retaining the existing Medicaid expansion.

A compromise that cuts off new expansion enrollees sooner, but makes permanent (or allows a long sunset on) the expansion for current enrollees (that is, no loss of current funds) might satisfy enough moderates. The AHCA attempted to deal with this by allowing the enhanced federal match to continue for existing expansion enrollees beyond the closing of new enrollments. But as written, the expansion funding would be subject to the per capita caps. A possible compromise here would be to guarantee enhanced funding above the per capita cap for a set period of time for those beneficiaries currently enrolled. The AHCA’s attempt to fundamentally reform Medicaid—removing the federal entitlement by changing Medicaid to a block grant or per capita payment—is a long-sought Republican objective, but really has nothing to do with the ACA. Republicans would not violate their “repeal and replace” pledges if they abandoned this effort, which would also appeal to moderates. The Senate’s Collins-Cassidy bill offers an interesting compromise that would allow states to choose to retain their Medicaid expansion or move to a block grant formula, an approach that could appeal to Republicans bent on lessening the federal role in health care.

Portent number three: forge some kind of compromise that maintains part of the Medicaid expansion at least in states that have already adopted it, and leave fundamental Medicaid reform to another day.

### **Portent #4: Essential Health Benefits Must Be Left to Secretary Price**

A late-breaking requirement of the Freedom Caucus was repeal of the ACA’s ten essential health benefits,

the baseline requirements that all individual and small group insurance plans must offer. These include maternity and mental health and substance use disorder services, and conservatives argue that one of the reasons premiums have continued to rise is that insurers are not allowed to offer smaller policies that do not contain coverage that consumers think they don't need. The AHCA originally would have left the essential benefits requirement for the private market untouched, but eliminate it for Medicaid plans after 2019. Conservatives argued that repeal is essential to lowering premiums, and Senator Ted Cruz (R-Texas), for example, pledged to oppose any bill that does not bring down premiums "immediately." This argument appears to be mostly political theater, because it is likely that the essential health benefits requirements cannot be repealed in the budget reconciliation process (because it is not related to federal spending or revenue). But the definitions of the essential health benefits are creatures of HHS regulation, not the ACA itself. Accordingly, HHS can write new rules that would more narrowly define (and thus make less generous) those benefits. Another idea that has surfaced is to allow HHS to grant waivers to states for the EHBs, though it is unclear how this would work—through regulation or legislation—and if through legislation, whether it could be part of a budget reconciliation bill.

Portent number four is that awaiting these regulatory actions could get conservatives a good deal of what they want.

### **Portent #5: Any Bill Must Still Get Through the Senate**

On the Senate side, Republicans can only afford to lose three votes; four would prevent the bill's passage unless supported by a Democrat. Republicans intend to use the budget reconciliation process to pass the health bill to avoid filibuster. However, provisions that do not directly affect the federal budget cannot be passed us-

ing the budget reconciliation process and would thus require a 60-vote majority. Provisions likely to require a 60-vote majority include certain insurance market reforms such as the essential health benefits provisions, and permitting insurers to charge the oldest enrollees five times as much as the youngest (instead of the ACA's 3:1 ratio). In addition, even 51 votes are not assured for parts of the AHCA. Four moderate Republican senators from states that expanded Medicaid—Rob Portman (Ohio), Shelley Moore Capito (W. Va.), Cory Gardner (Colo.) and Lisa Murkowski (Alaska)—penned a letter to Senate Majority Leader Mitch McConnell (R-Ky.) expressing concern that the bill "does not provide stability and certainty for individuals and families in Medicaid expansion programs." On the conservative side, Senator Rand Paul (R-Ky.) has been outspoken in calling for a full repeal of the ACA. Although he calls the bill "dead on arrival," the other conservatives who initially opposed the bill—Cruz and Mike Lee (R-Utah)—have both indicated that they are engaged in negotiations to produce a bill they can vote for.

Portent number five is that getting House Republican moderates and conservatives to compromise is a necessary, but because of the Senate, likely insufficient, path to enactment.

### **Conclusion**

Given the perceived political importance to Trump and congressional Republicans of their campaign promises to repeal and replace the Affordable Care Act, it is hard to believe that we have seen the last of legislative efforts to accomplish this goal. Statements and negotiations that preceded and followed cancellation of the March 24<sup>th</sup> vote suggest that there is a legislative path forward if conservatives are willing to accept half (or three-fourths of) a loaf. That path runs through a field where certain crops—advanceable, refundable tax credits, Medicaid expansion, and essential health benefits—are grown but are tended to keep them from getting too large.