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This is the fourth 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.

Searching for Goldilocks: Five Takeaways From the Senate's Health-Care Reform Porridge-Making



BY TOM BULLEIT

Where Are We in Repeal and Replace?

When the three bears went for their fabled walk in the woods, Goldilocks came to their house and began tasting the porridge to determine if it was too hot, too cold, or just right. Senate Republicans now find themselves rather in the position of needing a Goldilocks who can lead them to an American Health Care Act that is “Just Right” to satisfy both their moderate and conservative members. Senate Majority Leader Mitch McConnell (R-KY) is determined that the Senate will write its own version of the AHCA, and as of this writing has pledged to introduce it for a vote before the July 4 re-

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cess. However, depending on which senators you speak to, there will be a vote before the July recess, or maybe before the August recess, or maybe not until the Fall. Maybe the Senate will act to stabilize insurance markets now and put off major reform for later, or maybe the Senate will immediately repeal the Affordable Care Act (Obamacare). Maybe the ACA's Medicaid expansion will disappear in 2020, or maybe not until 2027.

In short, though Senator McConnell's determination makes it increasingly clear that there will be a Senate bill to vote on, it's pretty hard to predict right now exactly what the Senate will do and when it will do it. But, thanks to the willingness of senators and staffers to “leak,” there are some clues about what to expect.

How Did We Get Here?

As a reminder of what is the subject matter of “repeal and replace,” Obamacare increased the number of Americans with health insurance in two ways. First, the ACA expanded the Medicaid program to enroll healthy adults with incomes up to 133% of the Federal poverty level (FPL), resulting in about 14 million new enrollees. Second, the ACA created minimum federal standards for the individual insurance market (*e.g.*, policies must cover essential health benefits, premiums must be community-rated based on age and not on health status) and provided taxpayer support for health insurance premiums and consumer cost-sharing (copayments and deductibles), these latter called cost-sharing reductions or CSRs, resulting in about 10 million new enrollees. The AHCA would make significant changes to both of these areas, leading the nonpartisan Congressional Budget Office (CBO) to conclude that it would result in some 23 million Americans being without health care coverage by 2026. More than anything else, it is the desire to find a solution to this potential loss of insurance to so many people that has stalled the AHCA in the Senate.

House Republicans narrowly passed the AHCA on May 4. The bill had to go through multiple iterations, and what got it over the finish line was the MacArthur Amendment, which was designed to appease moderates by incorporating many of Obamacare's popular consumer protections (of essential health benefits, pre-existing conditions, and community rating of premiums), and to attract sufficient conservative votes by allowing the states to obtain waivers of those provisions. The bill that reached the Senate: (1) immediately repeals the individual mandate and other taxes used to fund the ACA; (2) ends the expansion of Medicaid by 2020; (3) continues (but reduces the amount and reallocates based more on age than income) taxpayer support for insurance premiums in the individual health insurance market, but eliminates the CSRs; and (4) nominally continues Obamacare consumer protections, but allows the MacArthur Amendment waivers mentioned above.

Based on widely-reported reactions from a number of senators, the Senate will not be able to pass the AHCA as written, even using the budget reconciliation process that requires only a simple majority of 51 votes. While conservatives such as Mike Lee (R-UT), Rand Paul (R-KY), and Ted Cruz (R-TX) have expressed some dissatisfaction with the bill as written, the larger obstacle appears to be that a greater number of moderate Republican senators will insist on changes that will be at least unpalatable, and possibly unacceptable, to the conservatives. Moderate objections focus on the AHCA's rollback of the ACA's Medicaid expansion, and the potential for many people who have acquired individual coverage through the Obamacare exchanges to lose coverage, or to find it unaffordable, as a result of the reduction and reallocation of the Obamacare subsidies and the MacArthur Amendment waivers.

Despite the uncertainty, the debate around these concerns allows us to take away a few predictions.

Takeaway 1: The Medicaid Expansion Will Roll Back Over a Longer Period

The AHCA would end the Medicaid expansion in three years, but moderate Republican senators have complained that states need more time for the transition. The Senate may win over those moderate Republicans by transitioning to a seven-year roll back instead of the original 2020 target. A further compromise under consideration is to slow the growth rate of the ACA's Medicaid caps, but not until 2025. Senators Shelly More Capito (R-WV), Dean Heller (R-NV), and Rob Portman (R-OH) have indicated support for a seven-year roll back. None of the moderate senators who have expressed concern about the Medicaid rollback seems to be on record in favor of a longer rollback or a permanent expansion, so any opposition would come from conservatives. Though speculation especially follows Senators Mike Lee (R-UT) and Rand Paul (R-KY), as of this writing, no one has pledged to vote "no" if the rollback is extended, and Senator Paul was recently quoted as saying that he might be inclined to vote for a partial repeal rather than no repeal at all.

Takeaway 2: CSRs Will Survive

CBO's score for the AHCA indicates that by 2026, approximately 23 million more consumers will become

uninsured if the AHCA replaces Obamacare. Although some have criticized this number and the Chief Actuary for the Centers for Medicare & Medicaid Services (CMS) recently came to a different conclusion (approximately 13 million) by using a different baseline, either estimate indicates a large number of Americans without health insurance, which will be troubling to the Senate. In addition, major insurers have withdrawn from some of the markets in several states, meaning that in those states, consumers may have few or no options for individual health insurance policies. While the Trump Administration has pointed the finger at Obamacare itself for the departures, the insurance industry has made clear that uncertainty about the continued availability of the CSRs is a key element in their decision to withdraw. Senators Collins, Cassidy, Ron Johnson (R-WI), and Lamar Alexander (R-TN) have indicated support for continuing the CSR payments, Recently, continued CSR funding even received a boost from House Majority Leader Kevin Brady (R-TX). Although Senator Paul is unsympathetic to the complaints of insurers, other conservative senators have not loudly objected to talk of stabilizing the individual insurance markets by funding the CSRs. Given the immediacy of the need to assure insurer participation in the 2018 marketplaces, it seems likely that the Senate will include continuation of the CSRs in its bill.

Takeaway 3: Premium Subsidies Will Migrate Back Towards Lower-Income Consumers

Under the AHCA, fixed advanceable, refundable tax credits based largely on age would replace the ACA's variable income-based premium subsidies. The shift towards fixed and age-adjusted support reflects the Republican philosophy that the amount of contribution should be a budgetable amount, and that the subsidies should be less like "welfare" and more helpful to the middle class. Age-adjustment also would help to offset the proposed change in community rating, which currently allows insurers to charge older consumers only three times the premium charged to younger consumers, and under the AHCA the Secretary of Health and Human Services is authorized to promulgate regulations raising it to 5:1.

Several Republican senators, including Senators John Thune (SD) and Collins, have expressed the view that the premium subsidies should move back in the other direction and provide better subsidies for lower-income consumers. Of the conservatives, no one has publicly declared specifically against the reallocation, although Senator Paul's position is less than crystal clear since he has at times said that the subsidies represent "new federal entitlements" and that he plans to vote against any new entitlements. It seems likely that the Senate bill will move this way.

Takeaway 4: More Money for State High-Risk Pools

Prior to Obamacare, and during its ramp-years, many states dealt with the problem of uninsured working poor by operating "high-risk pools," through which individuals with pre-existing conditions that made them uninsurable, or insurable at a cost they could not afford, could have state-supported health insurance. Most

health policy experts agree that high-risk pools are inefficient (because they take the most expensive patients and put them in a single risk pool) and that the experience of the states was not favorable. Obamacare essentially eliminated the need for high-risk pools by making insurance available and much more generally affordable, even for consumers with pre-existing conditions.

Because the AHCA would limit the amount of premium support, and would allow states to reduce essential health benefits and charge consumers with pre-existing conditions more under certain conditions, the AHCA also would provide funding to revive high-risk pools, and to support similar efforts at providing for persons who can't afford health insurance because of pre-existing conditions. Between 2018 and 2026, the AHCA would provide \$100 billion that could be used for high-risk pools or other state activities, an additional \$15 billion for a Federal Risk Sharing Program, an additional \$8 billion specifically for high-risk pools (the Upton Amendment), and an additional \$15 billion in 2020 specifically for maternity coverage, newborn coverage, and prevention or recovery treatment for mental or substance abuse disorder. A Kaiser Family Foundation study reviewed high-risk pool programs funded by the ACA prior to 2014 and found that about 100,000 people over two years resulted in \$2.5 billion in federal spending. Senators who think this study is just directionally correct may conclude that the \$138 billion may not be enough to cover what is likely to be a much larger number of uninsured persons.

Several senators have expressed support for increasing the amount available for high-risk pools and variations on that theme, such as the "invisible high-risk pools" (similar to reinsurance) that Alaska and Maine

have adopted, which provide state funds to defray the cost of consumers with qualifying pre-existing conditions, but do not segregate them into a separate pool. Conservatives seem to prefer this kind of mechanism to Obamacare's form of premium support (although again, Senator Paul may be a "no" on the view that this is a new entitlement). For these reasons, increasing high-risk pool funding could be another likely change.

Takeaway 5: 'Just Right' in the Senate May Still Be 'Too Cold' for the House

As it stands, it is too difficult to predict how a vote in the Senate will play out. But, if Senator McConnell does pass a health care bill, it would only be through wooing moderates without losing the support of conservatives. Senator McConnell may be able to win over enough moderates by slowing down the Medicaid rollback, increasing high-risk pool funding, and removing or limiting state waivers, and the Senate's most conservative members might join in because they might agree with Senator Cruz that the cost to Republicans of not passing a bill could be "catastrophic." However, incorporating these changes into a Senate bill may act as a poison pill to the generally more conservative House Freedom Caucus. While it is not impossible to imagine a Senate "revive and reaffirm" bill that could attract Democratic support, there is no indication that anything currently being considered in the Senate would go in that direction. If a moderating Senate is able to cook up a porridge that will be palatable to 215 House Republicans, it will be a considerable testament to Senator McConnell's culinary skills.