

What Comes Next for Health Care Reform?

April 3, 2017

Health Care

On March 24, 2017, Speaker Ryan pulled the American Health Care Act (“AHCA”) from the House floor and announced that the Affordable Care Act (“ACA”) would remain in place “for the foreseeable future.” Since that time, there has been considerable speculation about what comes next for the ACA, both in Congress and with respect to administrative action by the Trump Administration. In the advisory below, we analyze the prospects for legislative and administration action on health care in the coming months.

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Following the election, Speaker Paul Ryan announced, with the support of President Trump, a three-phase plan to repeal and replace the ACA: (1) repeal spending components of the ACA through the budget reconciliation process, and replace those provisions with a Republican alternative; (2) modify Obama administration regulations and other executive branch policies implementing the ACA; and (3) repeal and replace the remaining provisions of the ACA that could not be addressed through [reconciliation](#). The first phase of this plan failed last week when Speaker Ryan withdrew the American Health Care Act (“AHCA”). While a new version of AHCA is unlikely to emerge, there may still be a path forward for parts of the second and third phases of Speaker Ryan’s plan that call for executive action and additional legislation. As these issues are continuously evolving, interested parties should expect plenty of government action regarding the ACA and health care in the upcoming weeks and months.

Phase One: Statutory Repeal of the Spending Components

Speaker Ryan has expressed a lack of appetite to move forward on “repeal and replace” of the ACA, stating that “we’re going to be living with Obamacare for the foreseeable future.” This indicates that Congressional leadership is unlikely to resurrect the AHCA. While the conservative and moderate caucuses in the House have met to discuss the possibility of a deal, these attempts have been unsuccessful so far. And given the posture of the Senate, where a consensus approach has not emerged to get the necessary 50 votes under reconciliation, it is unlikely that Congress will try again to repeal the spending components of the ACA through reconciliation.

Phase Two: Executive Action

The second phase involves making changes to regulations and other executive branch policies implemented by the Obama administration, and not pursuing enforcement of others. The Secretary of Health and Human Services (“HHS”) and the Administrator of the Centers for Medicare & Medicaid Services (“CMS”) have the authority to make many of these changes even

absent legislative action. In fact, the White House has [indicated](#) that there will be executive action affecting the ACA.

There are several approaches that the Trump administration could take on this front. First, it could actively undermine the ACA through executive action. President Trump alluded to this option in his March 24, 2017 press conference saying “the best thing we can do politically speaking is let Obamacare explode.” In that regard, the Administration could decide not to continue to fund the ACA’s cost-sharing subsidies, which could result in an exodus of insurers from state and federal exchanges. A federal district court decision holding that these cost-sharing subsidy payments cannot be made without an appropriation from Congress gives the Administration a convenient legal rationale for discontinuing payments. See *United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016). If the individual health insurance markets were to begin to collapse as a result, the theory is that Congressional Democrats would be forced to the negotiating table. Given public [letters](#) by members of Congress, this seems like reasonable theory.

Alternatively, the Administration could concede the improbability of complete repeal and continue to implement and support the ACA, while also relaxing or repealing certain ACA regulations that HHS and CMS believe drive up the cost of insurance or hamper competition. For example, we expect that CMS will at least loosen the Essential Health Benefits regulations, which are extraordinarily complicated and have long been the target of Republican criticism.

Even if the Administration takes a more restrained approach to executive action, however, it is unlikely to devote the same attention and resources to improving the program as the Obama administration did. For example, after the problems with the exchange launch in 2013, the Obama administration recruited insurance experts and technology developers from across the country to help implement the ACA. We would not expect the same type of response now. Indeed, the Trump administration already has reduced the open enrollment periods and took action to reduce formal outreach to potential enrollees, which has prompted a [review](#) by the HHS Inspector General.

Phase Three: Additional Legislation

Under the third phase of the plan, Speaker Ryan had planned to enact separate legislation to make changes to the ACA that could not be addressed in reconciliation. Examples of statutory changes that might have been included in this package, but were not in the AHCA, include authorization of the sale of health insurance across state lines, as well as changes to or repeal of network adequacy requirements; the preventive services coverage mandate; and the medical loss ratio requirements. Without the procedural protections of reconciliation, any legislative changes to ACA now will require Democratic support to meet the 60-vote filibuster threshold in the Senate (and given the Freedom Caucus’s position on full repeal, in the House as well.)

A bipartisan approach may be difficult to achieve, but perhaps not impossible. Some moderate Democrats have expressed a willingness to work with Republicans on changes to the ACA provided that the changes do not undermine the law. Even Minority Leader Pelosi, a staunch and vocal defender of the current program, has [asked](#) her conference to share suggestions to improve the ACA. And Senate Democrats have also signaled a willingness to work with President Trump on health care reform, but only if he commits to ending his efforts to completely repeal the ACA. Possible changes to the ACA that might garner enough votes from

moderate Democrats include making the employer reporting requirements less burdensome; repeal of the Cadillac tax; repeal of medical device tax; and adding a new actuarial category of low-cost health plans for young adults.

Next Steps

If the ACA exchanges falter this fall, the reauthorization of CHIP in September 2017 is a potential vehicle for a bargain between Republicans and Democrats on health care reform. Democrats looking to ensure funding for CHIP may feel compelled to agree to some market reforms. This outcome is a realistic possibility if Republicans decide to seek narrow changes to the ACA such that the legislation does not represent a fundamental change to the law.

CHIP reauthorization may also be a vehicle for changes to Medicaid, including providing the States with increased flexibility to manage their programs. Changes to the Medicaid program that are likely to be under consideration include: expanding opportunities for reimbursement for individuals in Institutions for Mental Disease; clarifying state flexibility to deliver home- and community-based services (“HCBS”) in a diverse array of community settings; eliminating the requirement that States must provide the Medicaid expansion population with essential health benefits; and providing States more flexibility regarding cost sharing requirements.

While it is clear that Republicans will not achieve the repeal and replace of the ACA that Speaker Ryan proposed, there are evolving opportunities for legislative bargains and executive actions for health care reform. Covington will continue to monitor these developments and provide updates.

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