Replacing The Affordable Care Act: A Reality Infusion

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During the course of his campaign, President-elect Donald Trump repeatedly promised to repeal and replace President Obama's signature legislation, the Affordable Care Act (ACA). Certainly the Republican Party's continuing majorities in both chambers of Congress, coupled with an incoming Republican president, have now put the law's future in serious question.

But whether Republicans can craft a legislative alternative that enough of their conference will support remains an open question.

Complete repeal on Day One? Not possible.

Simply put, the ACA cannot be repealed on day one because it cannot be undone by unilateral action on the part of the Trump administration. Any repeal of the ACA would require an act of Congress, which means at least 60 votes would have to be secured in the Senate to overcome an expected Democratic filibuster of such a repeal bill.

The only way for the Senate to change the 60-vote filibuster threshold required for legislation to pass through the Senate would be a vote to change the entire rules of the Senate. While some defenders of the ACA believe Senate Republicans might be willing to go to this great length to end the law, it is very questionable whether enough Republicans would be willing to establish a new precedent that would then impact all pending and future legislation. In November 2013, then-Senate Majority Leader Harry Reid (D-NV) took the unprecedented step of changing the rules of the Senate to lower the filibuster threshold for executive and some judicial branch nominations to a simple majority. At the time, Republican Senate Minority Leader Mitch McConnell (R-KY) called it "a sad day in the history of the Senate." Bottom line: Without the bipartisan support needed to muster 60 votes, any repeal of the ACA most likely would have to go through what is called the budget reconciliation process.

Can vs. will

How much of the ACA Congress *can* repeal might be vastly different from what Congress *will* repeal. There is a process congressional Republicans can use to take a giant bite out of the ACA early in 2017, but the question remains whether they will utilize it.

Within the congressional budgeting process is a procedure known as "budget reconciliation," which allows Congress to make changes that impact certain mandatory federal spending that is outside the annual appropriations process, like Medicare and Medicaid, but not Social Security. Reconciliation allows for expedited consideration and passage by a simple majority of certain tax, spending and debt limit legislation, as reconciliation bills aren't subject to filibuster in the Senate and the scope of amendments is limited. Since Congress has not passed a budget for the current fiscal year (FY17), when the next Congress convenes in January, Republicans could introduce and pass a budget with

reconciliation instructions to repeal parts of the ACA.

However, while there are many procedural advantages, especially in the Senate, to proceeding through reconciliation, the scope of the reconciliation process is limited to provisions that have budgetary, revenue or spending impact. More specifically, the Senate's Byrd Rule requires that (i) every reconciliation item affect revenue or spending; (ii) any included policy proposals be connected to changes in revenue or spending; and (iii) the reconciliation legislation cannot raise the federal deficit beyond the five- or 10-year budget window.

Any provision of a reconciliation measure that does not change the level of spending or revenues, or where the change in spending or revenues is merely incidental to the provision's non-budgetary impact is considered extraneous and is therefore potentially subject to being stricken upon the demand of a senator. This includes any provisions that might be believed to reduce costs but for which specific estimates of savings can't be provided. Many provisions within the ACA would not meet these requirements and therefore would not be able to be repealed through reconciliation.

Under President Obama, the Democrats passed the ACA through budget reconciliation with Republicans complaining that the process was partisan and non-transparent. Now, it seems that the only likely vehicle available to this GOP-controlled Congress wanting to quickly repeal parts of the ACA is the same budget reconciliation process to which it previously objected.

While Congress could offer a reconciliation package early in 2017 to repeal parts of the ACA, will they be able to advance one that 50 Republican senators will support? In theory, congressional Republicans could quickly bring forward the same reconciliation bill that the president vetoed earlier this year. That bill repealed the premium tax credits, individual and employer mandates, Medicaid expansion, medical device tax, the so-called "Cadillac tax" on high-cost plans, insurer tax, high-income tax and small-business tax credit. It also phased out the Medicaid expansion after a two-year transition period and removed the insurance risk-adjusted programs.

That Republican package passed Congress with the full knowledge that it would be vetoed by President Obama, so there was no need for its backers to contemplate the real-life implications for patients, the health system or the markets were it to become actual law. Yet even with that guarantee of failure available to provide political cover, two Republican senators did not vote for the bill. So the question now becomes: Are there 50 senators able to support a process that, while repealing parts of the law, does so without putting an alternative in place? President-elect Trump stated in a recent *60 Minutes* interview that there would not be even a "two-day or two-year period where there's nothing. It will be repealed and replaced."

Timing is everything

The million-dollar question reverberating through the health care community since election night remains: How much of the ACA will be repealed and how quickly? Or will a consensus build that the repeal and replace process should be slow and deliberate and therefore result in some of the ACA's structure remaining in place for an unspecified period? Alternatively, could President-elect Trump reach out to Democrats to work on ways to improve the ACA without a straight repeal? That is certainly possible.

If Republicans choose to use reconciliation to both repeal and replace the ACA, wholesale changes will take some time to be developed. If they instead wait to use the Fiscal Year 2018 budget process, that would give Republicans time to build a consensus around a proposal to replace the ACA.

Whether reconciliation should be used only to repeal parts of the ACA or to repeal and replace it has been the subject of much speculation on Capitol Hill in the days since the election. Some Republican senators have said that they do not feel that reconciliation is the appropriate vehicle for replacing the ACA and that they would prefer going through

the standard process, requiring bipartisan consensus. The big unknown is whether the Republican Leadership will be able to convince enough of their congressional colleagues to start 2017 with a quick reconciliation process that repeals as much of the ACA as possible in an effort to force Democrats and other stakeholders to the table to negotiate a replacement.

Republican replacement proposals

Since the ACA's passage in 2010, there have been a number of Republican proposals related to repealing and replacing it. However, there has never been a single proposal that a majority of both House and Senate Republicans have rallied around. The process of building consensus around a particular replacement proposal has been attempted by congressional leaders several times since 2010, but because there was never an actual path to victory for those proposals as long as President Obama was in office, bicameral consensus was never achieved. The impending Trump administration changes all of that and now achieving consensus is necessary and potentially achievable. With Republicans holding a narrow majority in the Senate, they can only lose two votes and still be able to pass the reconciliation legislation with Vice President Mike Pence prepared to break a tie vote. Therefore, we expect to see the Senate setting the boundaries as to the ultimate scope of repeal-and-replace legislation.

Republican proposals that have been introduced since 2010 can serve as helpful guideposts to what provisions currently enjoy bicameral consensus. And this past summer, the House Republican Conference, led by Speaker Paul Ryan, set out the “Better Way,” a series of proposals on key issues, including health care. When comparing the Better Way roadmap with some of the proposals introduced in the Senate in recent years some consistent themes emerge:

1. Tax credits and portable coverage

The Better Way proposal, as well as bicameral proposals introduced by Senators Richard Burr (R-NC) and Orrin Hatch (R-UT) and Representative Fred Upton (R-MI), and another by Senator William Cassidy (R-LA) and Representative Pete Sessions (R-TX), all make available tax credits to individuals to purchase insurance.

The Better Way proposal envisions a universal advanceable and refundable tax credit to all individual and families who do not have an offer of health coverage. The credit would not vary based on income level, as is the case with the current subsidies offered under the ACA, but only based on age. This approach would close any current gap that exists between those eligible for Medicaid and those eligible for the ACA subsidies. It also would allow the credit to be used in a variety of settings, including private exchanges, and if the credit is more than the cost of coverage, any balance would be transferred into an account similar to a health savings account (HSA), to be used for future health expenses.

The Burr/Hatch/Upton proposal includes an age-rated and income-based tax credit. The advanceable and refundable tax credit would be available for those making up to 300 percent of the federal poverty level (FPL) and who don't have another offer of health coverage. The current ACA subsidies are available to individuals and families up to 400 percent of the FPL.

The Cassidy/Sessions legislation, the only one that does not start with the repeal of the ACA but rather allows states to opt out, would replace the individual mandate and ACA tax subsidies with a flat US$2,500 tax credit for individuals and a US$1,500 credit for children to purchase their own insurance.

2. Insurance reforms: Many from ACA remain

The Republican proposals maintain many of the ACA’s popular insurance reform provisions: no lifetime coverage limits, no denials based on pre-existing conditions, no loss of coverage if you get sick, guaranteed renewability and the ability of children to remain on their parents’ health plan. The proposals would return regulation of the insurance

industry back to the states, including ending the ACA's 3-to-1 age rating and replacing it with a federal default of 5-to-1 with state flexibility to change.

Continuous coverage. Proposals ensure that individuals who have maintained continuous health coverage in either the individual or employer market would be offered standard rates regardless of pre-existing conditions when switching coverage, whether within or between the employer and individual markets.

Expand purchasing options. Proposals include provisions that would allow individual consumers to shop and buy insurance plans currently marketed outside of their state, as well as enabling states to set up compacts with other states in their region or across the country. In addition, proposals include additional pooling provisions that would allow small businesses and voluntary organizations (such as alumni groups or trade associations) to come together for the purpose of offering coverage, called association health plans (AHPs).

State-based high-risk pools. Proposals include provisions that would increase funding to state-based high-risk pools and mandate that premiums would be capped and wait lists be prohibited.

3. Strengthen consumer-directed health

These bicameral proposals also strengthen consumer-directed health by making changes to current rules governing consumer-directed health plans, like health savings accounts (HSAs) and flexible spending accounts (FSAs). Proposed changes include allowing spouses to make catch-up contributions, increasing HSA contribution limits equal to a plan's annual deductible and out-of-pocket expenses limit, allowing HSAs to pay for plan premiums and expanding HSA-eligibility to TRICARE beneficiaries and those in the Indian Health Service.

4. Capping the employer exclusion

Bicameral proposals envision using a provision that would cap the tax deductibility of employer-based health coverage in order to cover the cost of the tax credits they offer. Capping the employer exclusion would set a federal threshold where any amount of a health plan above this threshold would be taxed. The provision is meant to end the limitless tax break employers receive on their employer-based health coverage and therefore discourage employers from offering health plans to their employees valued above the federal threshold. The Congressional Budget Office has estimated that this current limitless tax break increases average premiums in the employer-based market by as much as 10 to 15 percent. The Better Way proposal does not list a specific federal threshold, but the Burr/Hatch /Upton proposal does: US$12,000 for individuals and US$30,000 for families.

5. Medical malpractice reform

The proposals include several provisions focused on federal medical malpractice reform based on successful state laws in California and Texas. They include caps on non-economic damages, limitations on attorney’s fees and incentives for states to adopt additional solutions to settle disputes—from expert panels to health courts to medical review panels. The Better Way proposal also mentions loser-pays, proportional liability, medical safe harbor provisions and patient compensation reforms.

6. Reform Medicaid

The proposals all include wholesale Medicaid reform through either capped allotments or state block grants. The Better Way proposal allows states to choose either a state block grant or be defaulted into a capped, per capita allotment, while the Burr/Hatch/Upton proposal focuses only on a state-based capped allotment.

The per capita allotment outlined in the Better Way proposal would establish a federal allotment equal to a state's per capita allotment for four major beneficiary categories and the number of enrollees in each: aged, blind and disable, children and adults. The proposal would allow states to require able-bodied adults to be either employed, looking for

work or currently participating in an education or vocational training program. Additionally, states would be able to charge reasonable premiums for non-disabled adults and other optional Medicaid populations. For those states choosing the block grant option, funding would be based on current federal Medicaid spending and states would be required to cover Medicaid's mandatory populations. Any costs to the program above the federal grant would be paid by the state, however any savings achieved through state innovation would be kept by the state.

The Better Way also proposes reforms to the Medicaid waiver process by requiring that waivers be budget neutral when submitted to the federal government, allowing waivers to be grandfathered if they have been renewed twice already, establishing parameters that would provide states with a "fast track" process for renewing waivers and would eliminate the need for waivers when enrolling select populations into Medicaid managed care.

The capped allotment reform included in the Burr/Hatch/Upton proposal would have the federal dollars "follow the patient" based on the patient's health status, age and life circumstances. States would receive pass-through grants —"health grants"—for pregnant women, low-income children and low-income families as well as a defined amount t cover long-term care services for low-income elderly or disabled individuals. The funds sent to the states would be calculated based on the number of low-income individuals at or below 100 percent of the FPL and would give governors and state legislatures the flexibility to design the benefit, administer the program and negotiate with providers. In addition, it would reauthorize health opportunity accounts that states or the federal government could fund with up to US$2,500 a year for eligible adults and US$1,000 for kids to help Medicaid beneficiaries pay for out-of-pocket medical expenses when coupled with a high deductible health plan.

In short, Republicans have a sizable task ahead.

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