

# Compliance Alert



## American Health Care Act Passes the House

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Today the House passed the American Health Care Act (“AHCA”), the Republican’s bill to “repeal and replace” the ACA, on a narrow partisan vote of 217-213. All but 20 Republicans voted for the bill, and the Democrats were unanimous in opposition.

The successful vote comes after a roller-coaster series of weeks that at times appeared to be destined for certain passage, followed by certain defeat, then an extended period of uncertainty.

All attention will now turn to the Senate to determine the fate of the ACA.

### **History: Freedom Caucus Frustrates**

Following the election of President Trump and Republican majorities in the House and Senate last November, it appeared certain that Republicans would swiftly repeal the ACA upon taking office. The only question was which Republican’s vision would form the framework for the replacement approach. See [our webinar on the replacement proposals](#) for a more detailed summary of the various Republican “replace” visions.

On March 6, House Republicans [unveiled their official legislative draft](#) of the AHCA. The AHCA incorporates a number of provisions that have been championed for years by Speaker Ryan and current HHS Secretary Price.

The problem was it did not incorporate most of the provisions desired by the conservative/libertarian Freedom Caucus bloc of the Republican party. With only a 22-vote margin among House Republicans for the requisite majority, the Freedom Caucus’s 30+ members could prevent the bill’s passage by themselves. And when it came time to vote on the AHCA, they did just that. Speaker Ryan [pulled the bill from the floor](#) immediately before the scheduled vote on March 24 when it became clear that there were not 216 votes in the House.

### **The MacArthur Amendment: State Waiver Compromise**

Although it initially appeared House Republicans would turn their sights almost exclusively to tax reform, negotiations quietly persisted through the congressional spring recess. Representative

MacArthur (R-NJ), co-chair of the “Tuesday Group” of approximately 50 moderate House Republicans, worked in earnest to develop a compromise with the Freedom Caucus.

Representative Mark Meadows, chair of the Freedom Caucus, came to an agreement with Rep. MacArthur last week. The result is what’s now known as the “[MacArthur Amendment](#).”

The goal of the MacArthur Amendment is to permit states to waive certain ACA requirements that are likely to cause increased premium costs. The state waiver compromise approach preserves the ACA core market reform provisions for those states that choose not to seek the waiver.

There are three types of state waivers available under the MacArthur Amendment:

- 1) **Age Rating Ratio:** The AHCA modifies the ACA’s 3-to-1 age band ratio to 5-to-1 (based on an estimated true cost of care ratio at 4.8 to 1). This waiver would permit states to increase the permitted age rating to a ratio greater than 5-to-1.
- 2) **Essential Health Benefits:** The ACA requires that individual policies and certain small group employer plans provide coverage for a package of 10 “Essential Health Benefits.” This waiver would permit states to define their own list of essential health benefits without regard to the ACA list. It is not clear how this would affect the prohibition of lifetime and annual dollar limits on essential health benefits, or the out-of-pocket maximum limitations, for employer-sponsored group health plans.
- 3) **Health Status Underwriting:** The ACA prohibits insurers from using health status as a factor when underwriting policies in the individual market. This waiver would permit states to allow insurers to include health status as a legal factor when engaging in underwriting for individuals who did not maintain continuous coverage, subject to a number of limitations and safeguards.

State waiver request will be granted by default unless the Secretary of HHS (Secretary Price) notifies the state within 60 days after the date of the submission of the application that the request failed to meet any applicable requirements. Waivers are effective for a period of 10 years.

The original MacArthur Amendment was itself amended via [a separate stand-alone bill](#) to clarify that members of Congress may also be subject to such a waiver.

### **The Upton Amendment: Additional Protections for Preexisting Conditions**

One of the core concerns with repeal of the ACA has always been avoiding a return to the preexisting condition exclusion (PCE) issue that plagued the individual market prior to the ACA. The ACA addressed the issue with a blanket prohibition on PCEs, paired with the individual mandate in an attempt to drive participation among those with no current medical expenses.

The AHCA generally takes a different approach by instead imposing a premium surcharge of 30% for 12 months for an individual enrolling after a break in coverage of 63 or more days in the prior year. States that elect a MacArthur Amendment break from that scheme, however, by permitting additional premium costs and health status underwriting.

The fear from many moderates was that the waiver states would not have sufficient protections in place to ensure access to coverage for individuals who a) had a break in coverage, and b) returned to the individual market with a preexisting condition. Although the AHCA still prohibits

insurers from imposing PCEs, the cost of coverage in those circumstances could exceed any reasonable standard of affordability.

Representative Fred Upton (R-MI), an influential member of the moderate Tuesday Group, led the charge in pushing back. He even went so far as to say that the MacArthur Amendment “[torpedoes](#)” safeguards for individuals with preexisting conditions.

To address these concerns, Rep. Upton (R-MI) negotiated yet another compromise to bridge the last small gap in reaching the magic 216 votes needed for passage. The result is what’s now known as the “[Upton Amendment](#).”

In short, the Upton Amendment provides an additional \$8 billion in high-risk pool funding over five years (2018-2023) for waiver states for individuals with preexisting conditions who fail to maintain continuous coverage (and therefore may be subject to health status underwriting). The \$8 billion supplements the AHCA’s existing \$130 billion in high funding over ten years.

The Upton Amendment’s funding enhancement targeting those who may be subject to health status underwriting in the individual market proved to be the final missing link, enabling Speaker Ryan to schedule the long-awaited AHCA vote for today.

### **Summary of the American Health Care Act Provisions**

Click here for the [official section-by-section summary](#) from the House Energy and Commerce and Ways and Means Committees, updated to include the MacArthur and Upton Amendments.

- **Employer Mandate Pay or Play:** Reduces the §4980H pay or play penalties to zero. This effectively repeals the mandate to offer minimum essential coverage to full-time employees that is affordable and provides minimum value. This is made effective retroactive to the beginning of 2016.
- **Individual Mandate:** Reduces the individual mandate penalties to zero. This effectively repeals the requirement for individuals to maintain minimum essential coverage to avoid a tax penalty. This is made effective retroactive to the beginning of 2016.
- **Cadillac Tax Delayed:** Fortunately, the AHCA does not include a direct cap on the employer exclusion from income for health coverage. This is a huge win for employers. However, it preserves the Cadillac tax by delaying its effective date to 2026. There is no expectation that the Cadillac tax will ever take effect—this delay (rather than repeal) is merely to accommodate the budgetary process.
- **ACA Reporting:** There are procedural hurdles with removing the ACA reporting requirements through reconciliation. However, the [House summary document](#) (page 13) states that the Secretary of Treasury can stop enforcing the ACA reporting rules as they become irrelevant with the elimination of the ACA components subject to reporting. It is not clear whether 2017 ACA reporting would be required. Eventually, ACA reporting for employers would primarily be limited to a new box on the Form W-2 used simply to report the number of months in which the employee was eligible for coverage (additional reporting may be required for self-insured plans).
- **Refundable Tax Credit:** The AHCA provides a new refundable tax credit to replace the §36B premium tax credit under the ACA. The AHCA’s approach varies the credit from

\$2,000/year to \$4,000/year depending on age, with a family overall cap at \$14,000. The credits adjust for inflation plus 1%. There is also an income tested phase-out starting at \$75,000 for individuals, \$150,000 for families. The credit does not apply for employer-sponsored group health plans (but does apply for unsubsidized COBRA coverage). The new credit would be effective in 2020 (the ACA premium tax credit is transitioned through 2019).

- **Pre-Existing Conditions:** The AHCA replaces the ACA's blanket prohibition of pre-existing condition exclusions (and individual mandate) with an incentive for individuals to maintain continuous coverage similar to the HIPAA rules that previously applied to group health plans. Individuals who maintain continuous coverage (without a break of 63 days or longer) will not be subject to any pre-existing condition exclusions. Insurers can impose a 30% premium surcharge for up to 12 months for individuals who had a break in coverage in the previous 12 months. These provisions would generally take effect beginning with an open enrollment period for individual market coverage in 2019. *(Note: MacArthur waivers available to states.)*
- **Actuarial Value and Price Variation:** The AHCA eventually eliminates the metal tiers (Bronze, Silver, Gold, Platinum) determined by plans' actuarial value, allowing more plan options (presumably at below-Bronze levels). It also modifies the ACA's 3-to-1 age band ratio to 5-to-1 (based on an estimated true cost of care ratio at 4.8 to 1), with state flexibility to apply different ratios. *(Note: MacArthur waivers available to states.)*
- **Over-the-Counter Medicines and Drugs (FSA/HRA/HSA):** The AHCA eliminates the ACA requirement that over-the-counter medicines and drugs (other than insulin) be provided pursuant to a physician prescription to be reimbursed by a health FSA, HRA, or HSA. This would be effective retroactive to the beginning 2017.
- **Health FSA Limit:** The AHCA eliminates the ACA's \$2,500 cap on health FSA salary reduction contributions (currently \$2,600 after inflation adjustments). It was common for employers to offer a \$5,000 health FSA contribution limit prior to the ACA. This would be effective retroactive to the beginning of 2017 (although it would likely not be possible to have any significant effect prior to 2018).
- **HSA Contribution Limits:** The AHCA would significantly increase the annual HSA contribution limit to match the current HDHP out-of-pocket maximum limits. The individual contribution limit would increase from \$3,400 to \$6,550, and the family contribution limit would increase from \$6,750 to \$13,100. This would be effective retroactive to the beginning of 2017.
- **HSA Additional Tax:** The AHCA restores the pre-ACA 10% additional tax for non-qualified medical distribution from an HSA. The ACA increased the additional tax to 20%. This would be effective retroactive to the beginning of 2017.
- **HSA Catch-Up Contributions:** The AHCA allows both spouses to make catch-up contributions to the same HSA. Currently, each spouse must make a catch-up contribution to his or her separate HSA. [See slide 18](#) for a summary of the current limitation. This would be effective 2018.
- **HSA Expenses Incurred Prior to Establishment:** The AHCA allows individuals to take tax-free medical distributions from an HSA for expenses incurred prior to the date the HSA

is established (generally the date the HSA receives its first contribution). Individuals who establish an HSA within 60 days of becoming covered by a HDHP will be able to take tax-free HSA reimbursements for expenses incurred dating back to the HDHP enrollment. [See slides 23-24](#) for a summary of the current limitation. This would be effective 2018.

### **Here Comes the Senate Battle**

The Senate can pass this bill by a simple majority (50 votes with Vice President Pence as the tiebreaker) without the threat of filibuster through the reconciliation process. Any changes by the Senate will need to be approved by the House before presenting the bill for President Trump's signature.

In light of the extreme difficulty in negotiating the MacArthur and Upton Amendments in the House, it could prove a near-impossibility to acquire the sufficient majority in the House a second time to approve any Senate changes. The Senate therefore faces the stark choice of passing the House bill in its current form, or risking the bill's failure by tweaking any of its tightly-wound provisions.

### **Where Can I Learn More?**

[Register](#) now for our next Office Hours Webinar on Thursday, May 25:

### **The American Health Care Act: Details on the ACA Repeal and Replace Bill**

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