

Compliance Alert



Senate ACA Repeal and Replace Bill Fails

July 18, 2017

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The Senate Republican effort to pass an ACA “repeal and replace” bill appears to have reached an anti-climactic conclusion. Last night, two more GOP Senators voiced their opposition to the [“Better Care Reconciliation Act” \(“BCRA”\)](#), dooming the bill to failure.

How Did the BCRA Fail?

With a 52-member majority in the Senate, Republicans need at least 50 votes to pass the bill. If the vote were tied 50-50, Vice President Pence could break the tie. That left a two-member margin for defectors (no Democrats support the bill).

Last night’s [opposition announcements](#) from Senators Mike Lee (R-UT) and Jerry Moran (R-KS) brought the total opposition to four members—in addition to the original opposition from Senators Rand Paul (R-KN) and Susan Collins (R-ME), enough to ensure the bill would not pass. It was also unclear how soon Sen. McCain (R-AZ) would return from Arizona, where he is recovering from surgery (or if he even was a “yes” vote upon return).

Why Did the BCRA Fail?

There was no middle ground. To simplify a complex picture with many moving parts, moderates opposed the Medicaid reform approach, and conservatives opposed keeping the core of the ACA in place.

After weeks of horse trading to attempt to address each factions’ concerns, it ultimately became clear that there was no sweet spot that could avoid losing more than two votes. There was no last-minute compromise to be had as with the MacArthur/Upton Amendments to the House’s [American Health Care Act](#).

[House Speaker Ryan’s original three-phase plan](#) also seems to be at the root of the problem. The three-phase vision was:

- 1) **The American Health Care Act/Better Care Reconciliation Act:** Passed by tricky reconciliation process to avoid filibuster in the Senate.
- 2) **Administrative Action:** Regulatory relief spearheaded by HHS Secretary Price.
- 3) **Additional Legislation:** Subsequent bills to address sale of insurance across state lines, the ACA market reform provisions, and others.

Speaker Ryan and Senate Majority Leader McConnell were not able to convince the party of its ability to further repeal the ACA or improve upon the AHCA/BCRA in so-called Phase 3. Everyone’s discontent with the AHCA/BCRA, driven primarily by the “Byrd Rule” limitations on reconciliation in the Senate, was a tough pill to swallow. It created an impossible balancing act that ultimately collapsed.

Where Do We Stand Now?

The ACA repeal **and** replace simultaneous effort is likely over. Majority Leader McConnell [issued the following statement today](#), indicating the Senate's intent to move back to the original plan to repeal the ACA first, with a replacement bill to be developed sometime down the road:

“Regretfully, it is now apparent that the effort to repeal and immediately replace the failure of Obamacare will not be successful.

“So, in the coming days, the Senate will vote to take up the House bill with the first amendment in order being what a majority of the Senate has already supported in 2015 and that was vetoed by then-President Obama: a repeal of Obamacare with a two-year delay to provide for a stable transition period to a patient-centered health care system that gives Americans access to quality, affordable care.”

Can the Senate Pass a Repeal-Only Bill?

This will raise the specter of an uncomfortable question for Republicans: Did they actually intend to repeal the ACA when [they passed the repeal-only bill in 2015](#) (vetoed by President Obama in early 2016)? Or was that grandstanding with the understanding of an inevitable presidential veto?

This morning, Senators Collins (R-ME), Capito (R-WV), and Murkowski (R-AK) have [already announced their opposition](#) to that repeal-only approach. That means there already are enough Republican “no” votes to block the bill from passage. At this point, it looks more likely than not that a repeal-only bill is also doomed to failure—despite the Republican passage of such a bill less than two years ago when President Obama was still in office.

Are There Any Alternatives?

Last night, President Trump tweeted:

“Republicans should just REPEAL failing ObamaCare now & work on a new Healthcare Plan that will start from a clean slate. Dems will join in!”

Getting Democrats to “join in” will be extremely difficult. We have proposed an approach focusing first on employer-sponsored group health plans and child care reforms that could receive Democrats support. In short, the approach would:

- 1) Repeal the Cadillac tax;
- 2) Repeal the employer mandate pay or play rules;
- 3) Repeal §6056 ACA reporting; and
- 4) Enact Ivanka Trump's proposed child care reforms.

All of these items should receive broad bipartisan support. In particular, Democrats would likely be largely in favor of the child care reform proposals.

See our full ABD Commentary paper, [“Health Care Reform Round 3: Third Time's the Charm,”](#) for full details on our proposal for this bipartisan consensus approach.

What's Next?

Senate Republicans will likely make an effort to quickly pass a repeal-only bill modelled after the version that passed in 2015. If that approach fails, which appears nearly inevitable at this point, they will likely turn to a major tax reform overhaul bill and table the ACA repeal and replace efforts until next year.

Stay tuned for further updates.

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