What Next, for Health Reform?
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April 2017
Agenda

- What the health reform just happened?
  - The obstacles to the American Health Care Act, and can they be overcome?

- What would the AHCA do...
  - ...and what might come back as part of tax reform?

- What's next: state and federal action

- ACA reset

- Lessons learned

- Conclusion and questions
What the Health Reform Just Happened?
What the health reform just happened?

- The ACA promised too much...
- ...and has some fundamental design flaws, particularly relating to the individual market...
What the health reform just happened?

- As a result, the ACA made for any *easy* target for political opposition
- House Republicans voted more than 50 times to repeal the ACA...
- “Repeal and replace” became a constant drumbeat on the campaign trail...
- ...But the GOP was “not shooting with live ammunition”
  - 8 pages to take down 2200 pages?
What the health reform just happened?

- Then came election night...

- ...and on Jan. 20 the GOP moved from the loyal opposition to the party in power...
What the health reform just happened?

- ...and had to tackle the business of governing...

"We were a 10-year opposition party, where being against things was easy to do... You just had to be against it. Now, in three months’ time, we tried to go to a governing party where we actually had to get 216 people to agree with each other on how we do things."

-- Paul Ryan (R-WI), March 24, 2017
What the health reform just happened?

- “Nobody knew healthcare could be so complicated.”
What the health reform just happened?

- John Boehner knew...

"[Republicans won’t] repeal and replace...that’s not what’s going to happen...In the 25 years that I served in the United States Congress, Republicans never, ever, not one time, agreed on what a health care proposal should look like. Not once."

-- John Boehner, Feb. 2017
What the health reform just happened?

- The real problem in the end...and even the beginning...was that the GOP couldn’t agree on how deeply to repeal the ACA, how fast to do it, whether to replace it now or later, and what (if anything) to replace it with...
What the health reform just happened?
What the health reform just happened?

- The target date for repeal and replace slipped...and then again...
  - “We’ll have a repeal bill by Jan. 20”
  - “We’ll have a repeal bill by early February”
  - “We’ll have a repeal bill by late February”
  - “We’ll have a repeal bill by early March”
  - Paul Ryan on Feb. 1: “We’ll have a repeal bill in 64 days”
  - “We’ll have it through the House and Senate by Easter.”
  - “We’re close...maybe by the Memorial Day recess.”
What the health reform just happened?

STRANGER THINGS....
What the health reform just happened?

STRANGER THINGS....

Mind if I take a quick look at that bill there?
What the health reform just happened?

- Finally, on Monday, March 6...

- American Health Care Act
- World’s Greatest Health Plan Act
- State Age Rating Flexibility Act of 2017
- Existing Conditions and Continuous Coverage Incentive Act of 2017
- ObamaCare Replacement Act
- Plan Verification and Fairness Act of 2017
- Patient Choice
- Empowering Patients First Act
What the health reform just happened?

- GOP moderates demanded concessions...including more tax credit money for lower income and older individuals...but with every move Ryan made toward the *middle*, he alienated the Freedom Caucus...

- ...the Freedom Caucus demanded concessions...including work requirements for some Medicaid coverage...but with every move Ryan made to the *right*, he alienated the moderates...

- ...with the party’s Libertarians making their views heard as well....
What the health reform just happened?

- In the end, the far right and the center wings of the GOP in the House simply could not come together, and on March 24, Ryan pulled the bill from the House floor to avoid a losing vote...
What the health reform just happened?

- ...and somewhere, John Boehner was saying “I told you so!”
What the health reform just happened?

- But three days later, the American Health Care Act was back from the dead!

Or was it?
What the health reform just happened?

- Day after day, there were reports that a deal was imminent, then that talks had fallen through...then that talks were back on the burner...then that negotiations had broken off...

- Some Freedom Caucus members quit or threatened to...others pledged continuing allegiance to the “Just repeal it, repeal it all!” drumbeat...

- Several times House leadership, White House reps and Freedom Caucus members met deep into the night...
What the health reform just happened?

- The roots of the problem: Congressional Budget Office (CBO) estimates
  - 24M fewer people would have coverage by 2026, 14M fewer in 2018
  - Most of the coverage losses attributable to the elimination of the individual mandate, but CBO expects fewer employers to provide coverage too
  - Premiums expected to begin to decline by 2026
  - $337B estimated savings over 10 years

- GOP moderates are leery about the coverage numbers, and aren’t sold on the time it will take to see premium reductions

- GOP leadership has accepted amendments to give states more authority to control their insurance markets
  - More flexibility in determining essential health benefits and possibly other market reforms
  - Additional funds to offset costs associated with certain high cost individuals
  - Have they done enough?
What the health reform just happened?

- By April 6, just a day before the 2-week Easter recess begins, House Republicans were still offering amendments to the AHCA (e.g., to establish high risk pools to shore up the individual health insurance market)
What the health reform just happened?

- Where is the AHCA going? What hope does the AHCA still have? Depends on to whom you talk...
- ...but it’s clear that nobody is pronouncing the bill dead and buried just yet...
“The majority if not almost all of the Freedom Caucus will vote for this bill [if certain offers that the Trump administration made to the Freedom Caucus appear in the final bill].”

-- Mark Meadows (R-NC) speaking on April 6

“We’re very close. The biggest thing for all of us is we want to make sure we don’t just have repeal, but we have replacement that drives down insurance costs.”

-- Mark Meadows (R-NC) speaking on April 11
What the health reform just happened?

- But when?
  - Congress reconvenes on April 25, and has just four work weeks before the Memorial Day recess, then seven work weeks before the summer recess...

- Other pressing priorities:
  - Fund the government to avoid an end-of-April shutdown
  - Tax Reform
  - Immigration Reform
  - Infrastructure Package...

- This week the focus is on the government funding bill...then what?
What the health reform just happened?

 Ed’s best guess: A tale of two secrets, and one **very** obvious fact...

 Secret #1: A lot of GOP moderates breathed a sigh of relief on March 24

 Very obvious fact: The individual health insurance market is struggling

 Week of April 3: Wellmark and Aetna bailed from Iowa’s individual market...great many areas where there is only a single carrier, if that...so what’s the play? Who takes the blame?

 UHC is pulling out of the marketplace in Va.

 S&P reports the market is stabilizing, that most insurers won’t lose as much this year as last...

 Secret #2: Both center- and far-right Republicans want to get this done...serious talks will continue

 Bonus Not-so-Secret Fact: *Nothing* is guaranteed in the Senate!
What the health reform just happened?

- So who knows...

He was wearing a ‘Drunk Lives Matter’ shirt when he was charged with another DUI.
What Would the AHCA Do…and What Might Come Back, as Part of Tax Reform?
What would the AHCA do?

- Employer Mandate:
  - Effectively killed
  - Reduced to $0 any penalties that would apply to employers for not offering coverage to ACA FTEs
  - Applied retroactively to 2016
  - Mooted the ACA regulatory regime for counting hours to determine FTE status, immediately
  - Why not repeal the employer mandate outright? What happens if the penalties are at $0, and the Democrats regain control?
What would the AHCA do?

- **Individual Mandate:**
  - *Effectively* killed
  - Reduced to $0 any penalties that would apply for not maintaining “minimum essential coverage”
  - Applied retroactively to 2016 (individual mandate applied beginning in 2014, wasn’t any required verification until 2015)
  - Why not repeal the individual mandate outright? What happens if the penalties are at $0, and the Democrats regain control?
What would the AHCA do?

- **Tax Credits: The Basics**
  - *Advance* credits
  - *Refundable* credits; excess to the taxpayer’s HSA, or no?
  - Age weighted ($2,000 - $4,000, $14,000 max per family)
  - *Begin* to phase out at $75,000/$150,000
    - Credits decline by 10% of excess of AGI over the phase-out threshold
    - **Example:** Family of 4 claims $10,000 credit; husband and wife are joint filers; credit won’t completely erode until AGI hits $250,000, or about 900% of the federal poverty level
  - Credits were a huge sore point
    - Freedom Caucus disfavored credits at all
    - Moderates wanted larger credits at lower income levels, and at higher ages, to mitigate difference in credits available under the ACA, and under the GOP bill
    - Ryan was inclined to agree, but the House puntedd the details to the Senate...
What would the AHCA do?

- **Tax Credits: The Employer Angle**
  - NOT available if employment-based *offer*
  - *Any* offer would do, other than an “excepted benefit”
  - No minimum value requirement, no affordability requirement
  - COMPARE:
    - ACA does not deny credits for a mere *offer* of bare-bones MEC coverage, but would if *enrolled*; ACA denies credits for a mere *offer* only if the offer is minimum value and affordable
    - GOP bill would deny credits for a mere *offer* of bare-bones MEC coverage
    - So what would be the play, for employers that put in MEC plans for rank-and-file FTEs, to avoid employer mandate penalties, who didn’t receive an offer prior to the ACA?
What would the AHCA do?

- If Credits Were Not Available for Mere Offers of MEC/Bare Bones Coverage, How Would the IRS Know?
  - Employers would report offers on W-2, beginning in 2021
  - Employers would have to VERIFY offers or lack of offers upon employee’s request...GOP wanted front-end verification of credit eligibility
What would the AHCA do?

- **Individual market issues**
  - These are difficult nuts to crack, under Senate rules (but in the wake of the Gorsuch confirmation, what Senate rules are safe?)

- **3:1 or 5:1 community rating...or no community rating at all?**

- **Guarantee issue and no pre-x: How the AHCA would solve the "playing the insurance lottery with house money" problem**
  - A principal defect with the ACA, and the cause of the incendiary nature of today’s individual health insurance market: Guarantee issue, a ban on pre-x, and an ineffectual individual mandate
  - Replaced with a “continuous coverage” requirement...you can leap to the individual market whenever you want, but if you have 63-day or longer break in coverage, you pay a 30% premium surcharge for the first year of coverage
  - **No more playing the insurance lottery with house money!**
  - But could “continuous coverage” survive the Senate Parliamentarian?
  - If the continuous coverage rule had survived, what would it have implied?
What would the AHCA do?

- Other Stuff
  - FSA $2500 annual max rescinded effective immediately
  - Prohibition on reimbursement of OTC is rescinded
  - HSAs turbocharged: Contribution maximum increased to OOP max, both spouses can make catch-up to same HSA
  - HSA penalty for non-qualifying distributions reduced to 10%
  - Talk of allowing tax-free withdrawals to pay premium
What would the AHCA do?

- Taxes and Fees
  - Health insurer tax *rescinded*
  - Pharmacy and medical device manufacturer taxes *rescinded*
  - Additional Medicare and capital gains taxes *rescinded*?
  - Tanning tax *rescinded*
  - PCORI *not* rescinded
  - Cadillac tax *deferred to 2026*
    - Why not repeal it outright?
The elephant in the corner of the room: Medicaid

- Medicaid is a shared federal and state (but mostly federal) healthcare indemnity program
  - Started out as coverage for single moms, the disabled, and children
  - States expanded coverage over the years, and the ACA added single, able-bodied individuals with incomes below 138% of FPL

- The federal government pays 60-80% of Medicaid expenses (95-100% for enrollees via the ACA expansion)
  - Medicaid is the third most expensive federal expenditure; annual federal spending on Medicaid has increased from $110b to $550b since 2001
  - CMS underestimated by nearly 50% the cost of coverage of ACA expansion

- About one in five people are insured under Medicaid
  - In some states, it’s one in four
  - Medicaid spending consumes 25-40% of most states’ budgets

- The AHCA would roll back some of the ACA’s Medicaid expansion, and fund further spending via *block grants*, inviting states to innovate on Medicaid design
What *isn’t* in the AHCA (yet)?

- No change to market reforms
  - Age 26 rule
  - Preventive care rule
  - Dollar limit prohibition
  - Waiting period rule
  - Nondiscrimination rule
  - Etc.

- No change to ACA reporting, at least through 2019 (final ACA reports would be due in 2020 for the 2019 year)
What *Wasn’t* in the GOP Bill?

- **What wasn’t in the bill?**
  - No tax on employees and employers, based on health plan values...but it was *almost* in there...

- Why would Congress want to tax employees and employers on health insurance premiums?
  - Tax free treatment is big loss of revenue...about $260 billion in “lost” income and payroll taxes
  - Policy wonks think generous plans lead to over-utilization (Lockton data and independent studies show the vast majority of utilization is driven by small minority of enrollees...the sickest of the sick)
  - Policy wonks think employers that reduce benefits to avoid triggering the tax will make up the benefits reduction with additional taxable wages (Lockton survey overwhelmingly indicated the contrary is true)
  - “Tax equity”...W-2 employees buying individual coverage don’t get the same tax treatment (AHCA tweaks would improve this)
  - “The tax-free nature of employer-provided health insurance has a greater *value* to higher paid people”
  - “Employer-provided health insurance is a historical accident.”
What *Wasn’t* in the GOP Bill?

- Could taxing employees on health insurance come back, as part of tax reform?
  - In a word, yes
  - Failure to advance the AHCA puts a crimp in tax reform plans, because the GOP wouldn’t have the “savings” generated by repeal-and-replace, to use to offset tax cuts...where could it raise the cash?
  - How would Congress shield itself from the political fallout?
    - Lockton’s survey and other surveys show employers overwhelmingly opposed to taxing health plans
    - How does Congress repeal taxes on pharmaceutical companies and even tanning beds, but levy a new tax on employees and families?
    - Softening the blow by adjusting individual tax rates
What’s Next: State and Federal Action
What’s Next: State Action

- Single payer initiatives
- *Indirect* taxation of employer plans to fund Medicaid, shore up individual markets, train physicians, etc.
  - Taxing claim payers for self-funded plans
  - Taxing insurers and hospitals
    - E.g., NH just passed HB 1696 to continue Medicaid expansion...but the state needs cash...carriers will pay $1.67 per covered life *per month*

- State innovation waivers from the ACA
  - Beginning in 2017 states can request waivers from ACA rules (i.e., put in place their *own* version of the ACA), provided their state program covers as many people and doesn’t add to the federal deficit (a la’ the Cassidy-Collins bill)
  - Challenge is to avoid patchwork rules for multi-state employers; unclear just how much protection ERISA’s preemption of state law would provide
What’s Next: Federal Action

- Stand-alone “issue bills” introducing smaller pieces of legislation that target specific issues related to health reform
What’s Next: Federal Action

- **H.R. 1101 - Small Business Health Fairness Act**
  - Introduced in the House February 16, 2017; passed in the House March 22, 2017
  - The legislation would amend ERISA to exempt association health plans (AHP) from most state laws and regulations, allowing small employers to pool together across state lines to form AHPs to purchase group health benefits for employees
  - In essence, association plans can avoid community rating and federal mandates (e.g., the obligation to cover all “essential health benefits”) that otherwise apply in the small group market
  - Status: Received by the Senate and referred to the Committee on Health, Education, Labor, and Pensions
What’s Next: Federal Action

- H.R. 1304 - Self Insurance Protection Act
  - Introduced in the House March 2, 2017; passed in the House April 5, 2017
  - The legislation would amend the definition of “health insurance coverage” under ERISA and the Tax Code to **exclude** stop-loss coverage
  - **Why?**
    - Employers typically save money by self-insuring their medical plans (avoids state mandates, premium tax and other tax pass-throughs, insurer profit margin, etc.)
    - Employers that *self-insure* medical coverage typically buy stop-loss insurance to protect against large claims (e.g., claims above an “attachment point” of, say, $100,000)
    - Some states allow the attachment point to be very low, e.g., $25,000, meaning there is little transfer of risk to the employer
    - Some states begin to look at the stop-loss coverage, then, as “medical insurance” that should be regulated as such
    - The bill would prevent that, giving employers (smaller employers, particularly) greater freedom to self-insure
  - **Status:** Received in the Senate and referred to the Committee on Health, Education, Labor, and Pensions
What’s Next: Federal Action

- H.R. 1189 - Preserving Employee Wellness Program Act
  - Introduced in the House *March 2, 2015*
  - The legislation would address the current conflicting wellness program rules impacting employer sponsored welfare plans, exempting wellness programs from certain ADA and GINA requirements so long as they meet the ACA wellness program requirements
  - Bad publicity
  - Legislation the best option?
ACA Reset

- For now, the individual mandate continues...

- The employer mandate continues...
  - The parsing of FTEs and non-FTEs
  - Affordability issues, including safe harbor issues
  - Wellness credits, opt-out incentives, and effect on affordability
  - Employer reporting, all the coding and safe harbor rules
IRS and the Employer Mandate: Treasury Inspector General General Report

"As of October 28, 2016, the IRS had processed **439,201** Forms 1094-C, and nearly **110 million** Forms 1095-C...

"However, our review identified that some of the processes did not function as intended, which resulted in the IRS not having accurate and complete data for use in its compliance strategy to identify noncompliant employers potentially subject to the [employer mandate penalty]...

"In addition, due to system errors, the IRS was unable to process paper information returns timely and accurately....

"Further, the criteria used to identify validation errors in the submissions did not always work as intended...

"Finally, the development and implementation of key systems needed to identify noncompliant employers subject to an Employer Shared Responsibility Payment have been delayed, not initiated, or cancelled."
ACA Reset

- Pass-through taxes on health insurers
- Benefit mandates...waiting periods, ban on dollar limits and pre-x, age 26 rule, preventive care rule, nondiscrimination rule
- Limit on health FSAs, and reimbursement of OTC Rx
- Marketplace notices
- ...and everything else...
Lessons Learned
Lessons Learned
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