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Jan. 6, 2017

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## New Congress Acts Quickly to Pave the Way to ACA Repeal

On the first day of the new Congress, repeal of the Affordable Care Act was put on the fast track by virtue of a budget resolution introduced in the Senate ([Sen. Con. Res. 3](#)). Without a clear replacement plan ready to go, it appears Congressional Republicans are nearing agreement on a strategy of “repeal and delay.”

**Lockton comment:** Waiting to repeal the ACA until a replacement plan is ready is not completely off the table. A number of senators have expressed a preference for simultaneous repeal and replace, and some budget hawks in the House may be willing to slow repeal as a bargaining chip for more conservative tax reform.

The Senate budget resolution includes language allowing Senate Republicans to use the filibuster-proof procedure called reconciliation to repeal aspects of the ACA without getting help from any Democrats.

**Lockton comment:** [Figure 1](#) provides a high level overview of the reconciliation process. [Figure 2](#) outlines current views of how repeal and delay might look.

The budget resolution provides that a repeal bill should be introduced by or shortly after Jan. 27. Both the Senate and House will need to consider and pass that bill, and Vice President-Elect Pence has indicated that President-Elect Trump expects to sign the bill by Feb. 20.

### What Might an ACA Repeal Bill Look Like?

We think the last repeal bill ([H.R. 3762](#)), vetoed by President Obama in 2016 and also passed through reconciliation, will serve as the basis for 2017 repeal legislation.

Under that bill, the penalties for not complying with the employer and individual mandates would both be reduced to \$0, effective *retroactively* to 2015 – i.e., as if the employer mandate was never enacted and the individual mandate applied for only one year. Tax credits available on the health insurance exchanges, however, would be killed beginning in 2018. The delayed effective date allows Republicans time to install some form of replacement. Most other taxes and fees under the ACA would also be phased out retroactively to 2016, but Republicans may need to keep some taxes and fees to pay for other repeals.

***Lockton comment:*** It is not clear whether these exact repeal dates will be included in the forthcoming legislation. Equally unclear is whether an employer could file for a refund for taxes or fees that are retroactively repealed, such as a refund for the 2016 transitional reinsurance fee, should that fee be repealed effective in 2016.

Any repeal legislation is likely to spare popular ACA provisions such as the ban on preexisting condition exclusions and mandated coverage to age 26 for adult children. It's not clear how other ACA insurance mandates fare, including rules for summaries of benefits and coverage (SBCs), the bans on rescissions and the stricter claim appeal rules for non-grandfathered plans.

***Lockton comment:*** Legislation passed through reconciliation can only make changes to revenue (i.e., taxes) or spending laws and the debt limit. It cannot make changes to current law that has a mere incidental impact on the budget. Senate rules do not clearly define what counts as incidental, but it is widely believed that reconciliation legislation cannot be used to modify these and other ACA market reforms.

Noticeably missing from H.R. 3762 is a provision eliminating the ACA's employer reporting requirements. This makes some sense to us. If tax credits remain available through 2017, and perhaps even later, for people who do not have an offer of minimum value and affordable coverage through their employers and are not enrolled in employer-sponsored coverage, then the IRS will need to know about coverage offered or provided to these individuals, to avoid providing tax credits to those who do not qualify for them.

***Lockton comment:*** Mr. Pence recently explained that the incoming administration plans to issue executive orders during any transition between repeal and full replacement. It is possible that such executive action could be used to simplify the ACA employer reporting requirements or establish a nonenforcement policy. Until official guidance is issued, we continue to recommend employers maintain their efforts to comply with the ACA reporting rules. Employers may wish to delay undertaking costly efforts until sometime after Mr. Trump's Jan. 20 inauguration (e.g., mailing paper forms that are not due until March 2).

## **What Might an ACA Replacement Bill Look Like?**

Speaker of the House Paul Ryan (R-WI) and others are saying that Congressional Republicans intend to finalize a replacement plan by year's end, and this week the Republican Study Committee, a group of traditionally conservative Republicans, unveiled a vehicle that might be the first step in accomplishing that goal. The proposed legislation, called the "American Health Care Reform Act of 2017" (AHCRA), is substantially similar to a bill by the same name introduced in 2015 by Rep. Phil Roe (R-TN). Roe, a physician, is the chairman of the subcommittee on Health, Employment, Labor and Pensions for the House's powerful Education and the Workforce Committee.

Highlights of the proposal, including the full text, are available [here](#). We summarize a few of its key provisions below, but please recognize that the replacement bill that ultimately clears both the House and Senate months from now will almost certainly bear limited resemblance to the bill as introduced. All we can say today is that the legislative sausage making has begun, but it is a lengthy and messy process, and the pieces that begin the process rarely look anything like the finished product.

***Lockton comment:*** For example, before the ACA became a 900-plus-page law, it started out as a six page bill dealing with home ownership for military veterans.

Most notably, the bill eliminates the treatment of employer-provided health insurance as a nontaxable fringe benefit and substitutes it with a hefty tax *deduction* (\$7,500 for individuals, \$20,500 for families) for those who purchase certain “qualifying health plans.”

For example, today an employee who receives employer-sponsored health insurance worth \$10,000 a year doesn’t include a penny of that value in taxable income. Under the AHCRA, the employee would treat the *entire* \$10,000 value as taxable income. However, in light of the deduction, the employee would avoid taxation on the first \$7,500 of that \$10,000 (we’re assuming we’re dealing with just self-only coverage here). The deduction is available whether or not the employee itemizes his or her other deductions.

***Lockton comment:*** The AHCRA also shields the value of the health plan from *payroll* taxes, up to the \$7,500/\$20,500 limits, although the employee may choose to subject that value to payroll taxes to, for example, maximize later Social Security benefits.

The tax deduction is available in full even if the taxpayer’s cost of coverage is less than the deduction. In the example above, if the employee’s coverage under his or her qualifying health plan had a value of \$5,000, the employee would be able to shield an additional \$2,500 in income from federal taxes (the difference between the \$7,500 deduction and the \$5,000 value of the plan) regardless of the source of that additional \$2,500 in income, or for what that \$2,500 was used.

Among other modifications, the AHCRA also includes a series of changes designed to make health savings accounts more attractive and expands permissible wellness program incentives.

### **Did You Miss Our Jan. 6 Webcast?**

Reach out to your Lockton Producer or Account team for a recording of our Jan. 6 webcast, which goes into more detail on repeal, delay, reconciliation and replacement. The recording should be available early next week.

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