



# Issue Brief: Straight Repeal of ObamaCare Is Better Than the American Health Care Act

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*“We have shown now that there is a clear path to repealing ObamaCare without 60 votes in the Senate. So, next year, if we’re sending this bill to a Republican president, it will get signed into law.”* – Speaker Paul Ryan (R-Wis.), January 8, 2016

## Introduction

We’ve been down this road before. We passed a bill to repeal ObamaCare in January 2016. Unfortunately, President Barack Obama vetoed it.

During the 114th Congress, the House and Senate passed H.R. 3762, the Restoring Americans’ Healthcare Freedom Reconciliation Act (2015-2016 repeal bill), which repealed most of Patient Protection and Affordable Care Act, PPACA or ACA. Repeal of the 2010 law, also known as “ObamaCare,” has been a top priority of congressional Republicans since it was signed by President Obama.

At the time of the passage of 2015-2016 repeal bill, Speaker Paul Ryan (R-Wis.) said, “This is the closest that we have come to repealing ObamaCare. And now we are sending that repeal to the president’s desk. And we have now shown that with a Republican president, there is a clear path to repealing ObamaCare without 60 votes in the United States Senate.”<sup>1</sup> That path was straight repeal.

After President Obama’s veto of the 2015-2016 repeal bill, on January 8, 2016, Speaker Ryan said, “We have shown now that there is a clear path to repealing ObamaCare without 60 votes in the Senate. So, next year, if we’re sending this bill to a Republican president, it will get signed into law.”<sup>2</sup>

Conservatives and libertarians could not have agreed more with Speaker Ryan.

The 2015-2016 repeal bill, as adjusted by the Senate, reduced the deficit by \$516 billion over ten years,<sup>3</sup> from FY 2016 to FY 2025.<sup>4</sup>

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<sup>1</sup> Speaker Ryan Press Office, “Speaker Ryan Signs Bill to Repeal ObamaCare, Defund Planned Parenthood,” January 7, 2016 <http://www.speaker.gov/video/speaker-ryan-signs-bill-repeal-obamacare-defund-planned-parenthood>

<sup>2</sup> Speaker Ryan Press Office, “Speaker Ryan Responds to President’s Veto of Obamacare Repeal,” January 8, 2017 <http://www.speaker.gov/press-release/speaker-ryan-responds-president-s-veto-obamacare-repeal>

<sup>3</sup> Rep. Kevin Brady, “FAQ: Restoring Americans’ Healthcare Freedom Reconciliation Act of 2015,” January 6, 2016 <http://kevinbrady.house.gov/news/documentsingle.aspx?DocumentID=399462>

<sup>4</sup> House Budget Committee, *Senate Amendment to H.R. 3762*, Retrieved March 10, 2017 <http://budget.house.gov/uploadedfiles/hr3762sectionbysection.pdf>



It passed the House<sup>5</sup> and Senate<sup>6</sup> with overwhelming Republican support, and only five Republicans in Congress voted against it. As Rep. Kevin Brady's office noted at the time, the 2015-2016 repeal bill "[r]epeal[ed] of all of the ObamaCare taxes, as well as the individual and employer mandates which force Americans to purchase unaffordable healthcare plans."

This is the position with which virtually every conservative agrees. ObamaCare is collapsing, as we predicted it would in 2010. It is clear that this law has to be repealed.

Here are some of the reasons why:

- Health insurance premiums went up by an average of 25 percent for 2017<sup>7</sup>
- Aetna's CEO has said ObamaCare markets are in a death spiral<sup>8</sup>
- Humana has withdrawn from Tennessee's ObamaCare market<sup>9</sup>
  - Humana was the only insurer in 16 counties
  - If no other insurer enters the market in the counties, 40,000 people won't have access to private coverage on the individual market
- One-third of counties have only one health insurance provider<sup>10</sup>
- 18 of 23 ObamaCare CO-OPs have folded<sup>11</sup>

There is no disagreement that ObamaCare is a disaster. There is no disagreement that the law must be repealed. The disagreement is on what should replace ObamaCare. To be clear, conservatives are not looking for the perfect bill, but any replacement should move away from ObamaCare's structure, not leave it intact.

## American Health Care Act

After a long wait and leaked discussion drafts, on Monday, March 6, the House Ways and Means Committee and House Energy and Commerce Committee released their recommendations to repeal and replace ObamaCare through reconciliation. These committees were originally due to have their recommendations submitted to the House Budget Committee

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<sup>5</sup> H.R. 3762, Roll Call 6, January 6, 2016 <http://clerk.house.gov/evs/2016/roll006.xml>

<sup>6</sup> H.R. 3762, Roll Call 329, December 3, 2015

[https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=114&session=1&vote=00329](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=1&vote=00329)

<sup>7</sup> Robert Pear, "Some Health Plan Costs to Increase by an Average of 25 Percent, U.S. Says," The New York Times, October 24, 2016 <https://www.nytimes.com/2016/10/25/us/some-health-plan-costs-to-increase-by-an-average-of-25-percent-us-says.html>

<sup>8</sup> Zachary Tracer and Katherine Greifeld, "Aetna CEO: ObamaCare in 'Death Spiral,'" Bloomberg, February 15, 2017 <https://www.bloomberg.com/news/articles/2017-02-15/aetna-ceo-says-obamacare-in-a-death-spiral-with-sick-customers>

<sup>9</sup> Emily Siner, "As Humana Plans To End ObamaCare Coverage, Tennessee Insurance Commissioner Is 'Very Concerned,'" Nashville Public Radio, February 15, 2017 <http://nashvillepublicradio.org/post/humana-plans-end-obamacare-coverage-tennessee-insurance-commissioner-very-concerned>

<sup>10</sup> Alicia Adamczyk, "One-Third of Counties Will Have Just One ObamaCare Insurer by 2017," Time, August 29, 2016 <http://time.com/money/4470574/obamacare-providers-2017/>

<sup>11</sup> Sally Pipes, "ObamaCare's Co-Op Disaster: Only 7 Remain," Forbes, July 25, 2016 <https://www.forbes.com/sites/sallypipes/2016/07/25/obamacares-co-op-disaster-an-unfunny-comedy-of-errors/>



on January 27, as required by S.Con.Res.3. The recommendations are collectively referred to as the American Health Care Act, or the AHCA.

One hurdle in the Senate is the “Byrd rule.” This rule, named after Sen. Robert Byrd (D-W.V.), allows senators to object via a point of order to provisions in reconciliation legislation that aren’t relevant to the subject or are outside the committees of jurisdiction.<sup>12</sup>

The Senate parliamentarian determines whether the point of order is valid. A three-fifths majority, or 60 votes, can overturn the parliamentarian’s ruling. The Byrd rule is often cited as the reason Republicans could not repeal ObamaCare’s regulations, as the regulations do not directly affect revenues, outlays, or debt, the topics to which reconciliation is limited.

Republican leadership’s repeal process will come in three parts:

1. **Repeal Under Budget Reconciliation:** This is the American Health Care Act. A budget reconciliation measure, which the AHCA is, needs only a simple majority, or 51 votes, in the Senate for passage. It cannot be filibustered, though it is amendable if the bill does not come to the floor under a structured, which limits amendments, or closed rule.
2. **Regulatory Action:** Federal agencies can roll back regulations tied to ObamaCare, such as the “essential health benefits.” It is important to note, however, that these administrative changes, if Congress does not codify them, can be undone by the next administration, making them only temporary and possibly bringing only short-term stabilization to the individual market.
3. **Regular Order:** Congress and the Trump administration plan to pursue policies, such as the buying and selling of health insurance across state lines and the repeal of the McCarran-Ferguson antitrust exemption for health insurers, under regular order, which would include the potential for a filibuster in the Senate. What we have heard is that the administration may seek to include infrastructure spending in these bills to entice Democrats.

The *Wall Street Journal’s* editorial board recently chastised conservatives who want repeal ObamaCare through a mechanism like the 2015-2016 repeal bill. “Some on the right now say that doing nothing is better than the House bill, claiming they can let ObamaCare deteriorate further and blame Democrats for creating it. But voters aren’t stupid. They know they elected a unified Republican government that promised repeal and replace,” said the editorial. “Voters will conclude the GOP is either feckless or pulled a bait and switch.”

“Health-care reform is a test of whether Republicans, having been handed the gift of ObamaCare’s failure, can show voters that they can do better with conservative principles. The health-care market is at a crossroads. Either it heads in a more market-based direction step by

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<sup>12</sup> David Reich and Richard Kogan, *Introduction to Budget Reconciliation*, Center on Budget and Policy Priorities, November 9, 2016 <http://www.cbpp.org/research/federal-budget/introduction-to-budget-reconciliation>



step, or it moves toward single-payer step by step. If Republicans blow this chance and default to Democrats, they might as well endorse single-payer because that is where the politics will end up,” the editorial added.<sup>13</sup>

Separately, Kimberley Strassel sees the goal that those concerned about the AHCA are trying to accomplish, writing, “[C]onversations with conservative leaders suggest they are pursuing a very different strategy—one reminiscent of that long-lost galaxy. They appear to understand that the GOP has to fix health care, and this bill is the vehicle to do it. Rather than opposing it outright, they seem focused on a specific list of policy complaints.”

“Their message to GOP leaders: Work with us to make the legislation better,” she added.<sup>14</sup>

Conservatives and libertarians agree that we have to repeal and replace ObamaCare, but the disagreement centers on replace. The narrative that is forming from House Republican leadership and others like the *Wall Street Journal* is that the AHCA is better than nothing.

Some health care policy experts disagree. Michael F. Cannon,<sup>15</sup> Megan McArdle,<sup>16</sup> and Veronique de Rugy<sup>17</sup> have separately raised red flags about the AHCA. Cannon and McArdle both explained that the United States would wind up with complete federal financing of health insurance if the AHCA becomes law. Philip Klein has explained that the bill does not meet conservative standards.<sup>18</sup>

McArdle has also written, “If Republicans cannot get up the will to bear those costs, then they should do nothing, and start preparing their rebuilding strategy while they wait for the flaws in ObamaCare’s structure to bring down the individual market on its own. Neither strategy is painless, because the ossified mistakes of earlier policy making have taken all the cheap and attractive options off the table. But either is better -- for America, and for the Republican Party -- than setting new mistakes in stone.”<sup>19</sup>

Peter Suderman has noted that “Republicans would be replacing one set of insurance subsidies with another set of insurance subsidies, while killing the individual mandate but leaving many of

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<sup>13</sup> *Wall Street Journal*, “What Are the GOP’s Health-Care Alternatives?,” March 9, 2017 <https://www.wsj.com/articles/what-are-the-gop-alternatives-1489017100>

<sup>14</sup> Kimberley Strassel, “Let’s Make a (Conservative) Deal,” *Wall Street Journal*, March 9, 2017 <https://www.wsj.com/articles/lets-make-a-conservative-deal-1489099914>

<sup>15</sup> Michael F. Cannon, “The House GOP Leadership’s Health Care Bill Is ObamaCare-Lite — Or Worse,” Cato Institute, March 7, 2017 <https://www.cato.org/blog/house-gop-leaderships-health-care-bill-obamacare-lite-or-worse>

<sup>16</sup> Megan McArdle, “The Republican Plan Is Even Worse Than ObamaCare,” Bloomberg, March 7, 2017 <https://www.bloomberg.com/view/articles/2017-03-07/the-republican-plan-is-even-worse-than-obamacare>

<sup>17</sup> Veronique de Rugy, “House Republicans’ ObamaCare Replacement Plan Is a Disaster. Here’s Why.,” Reason, March 9, 2017 <http://reason.com/archives/2017/03/09/house-republicans-obamacare-replacement>

<sup>18</sup> Philip Klein, “Speaker Ryan, this is not what conservative reform looks like,” Washington Examiner, March 9, 2017 <http://www.washingtonexaminer.com/speaker-ryan-this-is-not-what-conservative-reform-looks-like/article/2616998>

<sup>19</sup> Megan McArdle, “Republicans Should Kill ObamaCare or Let It Die,” Bloomberg, March 9, 2017 <https://www.bloomberg.com/view/articles/2017-03-09/republicans-should-kill-obamacare-or-let-it-die>



the law's insurance regulations intact (with a penalty for insurance gaps).<sup>20</sup> Suderman later wrote that the AHCA “doesn't really accomplish any of the things that Republicans say they want to accomplish on health care, at least not well.”<sup>21</sup>

It is important to note that many of the very same health care policy experts who correctly anticipated that ObamaCare would be a disaster are making the same warnings about the AHCA. We should heed their concerns about the House Republican alternative.

In a report from the Center for American Progress, Jonathan Gruber, the architect of ObamaCare, described the “three-legged stool” of the 2010 law, writing, “At the health law's core is a ‘three-legged stool’ approach to reforming these markets: new rules that prevent insurers from denying coverage or raising premiums based on preexisting conditions, requirements that everyone buy insurance, and subsidies to make that insurance affordable.”<sup>22</sup>

Using Gruber's analysis, the three stools of ObamaCare remain under the House Republican leadership's proposed bill:

- **Coverage for Pre-existing Conditions:** The AHCA continues ObamaCare's requirement that insurance companies cover individuals with pre-existing conditions. However, the AHCA seeks to offset these costs through \$100 billion in cost-sharing subsidies, in the form of grants to states, which is substantially more than the \$25 billion proposed by House Republicans in the “A Better Way” blueprint.
- **Individual Mandate:** Some believe that though the AHCA zeroes out, though does not repeal the individual mandate, that it still exists in another form: tax subsidies. “Under either a tax credit or a mandate, the government requires you to buy health insurance or to pay more money to the IRS,” Michael Cannon wrote. “True, the credit may reduce the recipient's tax liability. But it does nothing to reduce the overall tax burden imposed by the federal government, which is determined by how much the government spends. And wouldn't you know, the refundable portion of the credit increases the overall tax burden because it increases government spending, which Congress ultimately must finance with additional taxes. So refundable tax credits do increase taxes, just like a mandate.”<sup>23</sup>

Additionally, the AHCA may gut the individual mandate, but it puts another coercive mandate in its place, an Orwellian-sounding “continuous coverage incentive,” which is described in more detail below. In short, however, this coercive provision is the individual mandate by another name.

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<sup>20</sup> Peter Suderman, “The GOP's ObamaCare Repeal Bill Is Here. Is This Just ObamaCare Lite?,” Reason March 6, 2017 <http://reason.com/blog/2017/03/06/the-gops-obamacare-repeal-bill-is-here-i>

<sup>21</sup> Peter Suderman, “The GOP's ObamaCare Repeal Bill Has Finally United the Right On Health Care—Against the Bill,” Reason, March 7, 2017 <http://reason.com/blog/2017/03/07/the-gops-obamacare-repeal-bill-has-final>

<sup>22</sup> Jonathan Gruber, *Health Care Reform Is a “Three-Legged Stool,”* Center for American Progress, August 5, 2010 <https://www.americanprogress.org/issues/healthcare/reports/2010/08/05/8226/health-care-reform-is-a-three-legged-stool/>

<sup>23</sup> Michael F. Cannon, “House Republicans' Health Plan Might Provide Even Worse Coverage For The Sick Than ObamaCare,” Forbes, June 23, 2016 <https://www.forbes.com/sites/michaelcannon/2016/06/23/house-republicans-health-plan-might-provide-even-worse-coverage-for-the-sick-than-obamacare/>



- **Tax Subsidies for Insurance:** The AHCA merely repeals one set of costly tax subsidies – an advanceable, refundable tax credit – for another set of advanceable, refundable tax subsidies.

Again, no one is looking for the perfect bill, but every conservative and libertarian expects a replacement plan to move away from the ObamaCare structure and toward patient-centered, free market reforms that lessen dependence on government.

## The Good

### Expansion of Health Savings Accounts

Section 16 of the Ways and Means recommendations does expand the maximum annual contributions for a health savings account to \$6,550 for an individual and \$13,100 for a family. Section 17 allows both spouses to make catch-up contributions to a single HSA at the beginning of 2018. This is a positive reform that we support.

Although the way Section 16 is written is great, it could go further to allow individuals to pay their health insurance premiums out of their HSA. Rep. Dave Brat (R-Va.) and Sen. Jeff Flake's (R-Ariz.) HSA Expansion Act, H.R. 247 and S. 28, and Sen. Rand Paul (R-Ky.) and Rep. Mark Sanford's (R-S.C.) ObamaCare Replacement Act, S. 222 and H.R. 1072, allow HSAs to be used to pay health insurance premiums.

Brat-Flake also went further on the maximum contribution amounts, increasing these amounts to \$9,000 for individuals and \$18,000 for families. Paul-Sanford allows unlimited contributions to an HSA.

### Repeal of Most of ObamaCare's Tax Increases

By the time the 2015-2016 repeal bill landed on President Barack Obama's desk it was early January 2016, and most of ObamaCare's taxes would have been repealed through the bill and would have taken effect immediately on January 1, 2016. Some, like the individual and employer mandates, would have applied retroactively to 2015. The Cadillac tax was repealed outright in 2018.

Under the AHCA, the repeal of ObamaCare's tax increases is delayed to the beginning of 2018. The Cadillac tax is delayed, not repealed despite what the section title suggests, to the beginning of 2025.

#### 2015-2016 Repeal Bill and AHCA on ObamaCare's Taxes

Tax	2015-2016 Repeal Bill	AHCA
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Individual Mandate	Zeroed Out Retroactive to CY 2015	Zeroed Out Retroactive to CY 2016
Employer Mandate	Zeroed Out Retroactive to CY 2015	Zeroed Out Retroactive to CY 2016
Cadillac Tax	Repealed Beginning CY 2018	Delayed to CY 2025
Tax on OTC Medications	Repealed Beginning FY 2016	Repealed Beginning FY 2018
Tax on HSAs	Repealed Beginning FY 2016	Repealed Beginning FY 2018
Tax on Prescription Medications	Repealed Beginning FY 2016	Repealed Beginning FY 2018
Medical Device Tax	Repealed Beginning FY 2016	Repealed Beginning FY 2018
Health Insurance Tax	Repealed Beginning FY 2016	Repealed Beginning FY 2018
Medicare D Expense Deduction	Repealed Beginning FY 2016	Repealed Beginning FY 2018
Chronic Care Tax	Repealed Beginning FY 2016	Repealed Beginning FY 2018
Medicare Tax Increase	Repealed Beginning FY 2016	Repealed Beginning FY 2018
Tanning Tax	Repealed Beginning FY 2016	Repealed Beginning FY 2018
Net Investment Tax	Repealed Beginning FY 2016	Repealed Beginning FY 2018

(Note: The Cadillac tax is delayed until 2020 under existing law. The AHCA only delays the effective date of the tax. The individual and employer mandates remain in statute but penalties are set to \$0.)

## Sunset of ObamaCare’s Actuarial Value Standards

Do not get too excited about this provision because it is likely to fall victim to the Byrd rule in the Senate because it does not relate to revenue, outlays, or debt. Section 134 of the Energy and Commerce recommendations repeal ObamaCare’s actuarial value (AV) standards. These standards are also known as metal tiers, which identified the minimum actuarial value of health plans sold on the ObamaCare exchanges.

- **Bronze:** Plans are required to pay 60 percent of all health care expenses. The remaining 40 percent are paid by the insured through deductibles, copayments, and coinsurance.
- **Silver:** Plans are required to pay 70 percent of all health care expenses. The remaining 30 percent are paid by the insured through deductibles, copayments, and coinsurance.
- **Gold:** Plans are required to pay 80 percent of all health care expenses. The remaining 20 percent are paid by the insured through deductibles, copayments, and coinsurance.
- **Platinum:** Plans are required to pay 90 percent of all health care expenses. The remaining 10 percent are paid by the insured through deductibles, copayments, and coinsurance.



The AV standards are one of the main cost-drivers of health insurance premiums under ObamaCare. Interestingly, while conservatives are told by House Republican leaders and staffers that the Byrd rule prevents any repeal of the so-called “essential health benefits.” The AV standards lives in the same section of ObamaCare, Section 1302.

## The Bad

### An Advanceable, Refundable Tax Credit Is an Entitlement

Section 3 of the Ways and Means recommendations repeals ObamaCare's advanceable, refundable tax credits, statutorily referred to as the “Premium Tax Credit,” are repealed effectively at the beginning of 2020. This echoes the 2015-2016 repeal bill.

But in its place is one of the main pieces of the replace provisions in the AHCA is found in Section 15 of the House Ways and Means Committee recommendations is an age-rated advanceable, refundable tax credit. The tax credit is capped based on income levels and not eligible to anyone who is eligible for employer-sponsored coverage and not on any government programs, which throws any notion of portability out of the window.

A February 10 discussion draft<sup>24</sup> showed that Republicans were planning to go with generous advanceable, refundable tax credits to help consumers on the individual market purchase health insurance coverage. This draft did not cap the tax credit based on income level.

Speaker Paul Ryan (R-Wis.) recently said, “If you think letting people keep more of their own money and letting them do what they want with it is an entitlement, then you must believe this is Washington’s money.”<sup>25</sup> This was a misleading statement.

A refundable tax credit is an expenditure in the tax code that can be refunded by the IRS to the taxpayer even if their tax liability is zero. If Speaker Ryan were making this argument about a nonrefundable tax credit, which can be used to bring a taxpayer’s liability to zero but cannot result in a refund, his assessment would have been correct.

Still, the advanceable, refundable tax credit in the AHCA has similarities to ObamaCare’s advanceable, refundable tax credit. Under ObamaCare Premium Tax Credit, those individuals and families who earn between 100 percent and 400 percent of the federal poverty level (FPL). The Premium Tax Credit was paid directly to insurance companies on behalf of consumers who purchased health plans available through the Health Insurance Marketplace.

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<sup>24</sup> Paul Demko, “Exclusive: Leaked GOP ObamaCare replacement shrinks subsidies, Medicaid expansion,” Politico, February 24, 2017 <http://www.politico.com/story/2017/02/house-republicans-obamacare-repeal-package-235343>

<sup>25</sup> Juliegrace Grufke, “Paul Ryan: Tax Credits In ObamaCare Repeal Are Not An Entitlement,” The Daily Caller, March 9, 2017 <http://dailycaller.com/2017/03/09/paul-ryan-tax-credits-in-obamacare-repeal-are-not-an-entitlement/>





Under the AHCA, tax credits will be paid directly to insurance companies on behalf of the consumer. Additionally, the tax credits are exceedingly generous to those who purchase coverage on the individual market.

### AHCA's Refundable Tax Credit for Health Insurance

Age	Under \$75,000 AGI	First Phase Out	Last Phase Out
Under 30	\$2,000	\$75,000 (621% FPL)	\$90,000 (746% FPL)
30-39	\$2,500	\$75,000 (621% FPL)	\$95,000 (787% FPL)
40-49	\$3,000	\$75,000 (621% FPL)	\$100,000 (829% FPL)
50-59	\$3,500	\$75,000 (621% FPL)	\$105,000 (870% FPL)
Over 60	\$4,000	\$75,000 (621% FPL)	\$110,000 (912% FPL)

(Note: Credits listed apply to only individuals. Annual increases in the available tax credits are tied to the Consumer Price Index CPI plus 1 percent. The tax credits are capped at \$14,000 for a family.)

Some, including Speaker Ryan, have criticized congressional conservatives for opposing the AHCA because of the advanceable, refundable tax credit. He has singled out Rep. Mark Meadows (R-N.C.), who chairs the House Freedom Caucus, because he cosponsored the Empowering Patients First Act, H.R. 2300, in the 114th Congress, which also provided for advanceable, refundable tax credits. Dr. Tom Price, who now serves as President Trump's secretary of the Department of Health and Human Services, introduced the bill.

While this may be a reasonable criticism, the advanceable, refundable tax credits in H.R. 2300 were considerably less than what the AHCA offers. Moreover, other aspects of the bill, specifically, Section 102, sought to drive down health care costs by making insurance coverage portable. Section 102 allowed individuals to choose a tax credit over government health plans or group coverage. The AHCA does not contain this language.

### Refundable Tax Credit for Health Insurance Under Rep. Tom Price's H.R. 2300

Age	Under \$75,000 AGI	First Phase Out	Last Phase Out
Under 18	\$900	N/A	N/A
18-34	\$1,200	N/A	N/A
35-49	\$2,100	N/A	N/A
Over 50	\$3,000	N/A	N/A

(Note: Tax credits would have been available to consumers on the individual market, as well as those in the group market, who could have opted to receive a tax credit over employer-sponsored coverage.)

Former Rep. John Shadegg (R-Ariz.) has written a memo in which he defends the advanceable, refundable tax credit, arguing that it's "not a 'new' entitlement." He writes, "Making Americans who lack employer-funded health insurance whole is no more of an 'entitlement' than current law making employer-provided coverage 'tax free.'"



With all due respect to the Congressman, an advanceable, refundable tax credit is much different than the tax deduction employers receive to provide their employees with health coverage. There is no disagreement that this particular tax deduction, which cost \$250 billion in FY 2016,<sup>26</sup> is not good policy, but we should not confuse this deduction, which can be used to bring a tax liability down to zero, with an advanceable, refundable tax credit that can be refunded by the IRS to the taxpayer even if their tax liability is zero.

Michael F. Cannon has noted, “Though they sound like tax cuts, ObamaCare’s tax credits are actually 94 percent government outlays and only 6 percent tax reduction. The House leadership’s tax credits are likely to be similarly lopsided.”<sup>27</sup>

Some have also maintained that advanceable, refundable tax credits are similar to school vouchers. While certainly subject to the specifics of the school voucher proposal, the value of the tax credit depends on the tax status of the individual, whereas vouchers are flat payments to all individuals independent of other factors such as wealth and tax liability.

## **Repeal of Medicaid Expansion Takes Longer, and May Never Happen**

Medicaid expansion under ObamaCare is repealed effective December 31, 2019 and the Supreme Court's ruling in *National Federation of Independent Business v. Kathleen Sebelius*, which made Medicaid expansion optional for states, is codified into law.

States will still be allowed to enroll people under expansion, those who make between 100 percent of the federal poverty level (FPL) and 138 percent of FPL. Beginning January 1, 2020, states could still enroll individuals who would have been eligible for Medicaid expansion, but states will receive only pre-ObamaCare funding. The 2015-2016 repeal bill repealed Medicaid expansion outright on January 1, 2017.

States that did not expand Medicaid would receive a share of \$10 billion over five years, which is described as a "safety net." The share would be determined based on the number of individuals with an annual income below 138 percent of FPL in 2015. States could still opt-in to Medicaid expansion, but states would not be eligible for the safety net funding.

Section 121 creates per capita Medicaid block grants to states beginning in FY 2020. The amounts states receive will increase annually based on CPI for medical care, which is higher than traditional CPI. This is generally a positive reform. The fact that the block grant is “per capita” does give us pause, but block grants give states flexibility to create their own safety nets for those who qualify for Medicaid.

The concern here is that the bill sets up an ObamaCare “cliff” in 2019, ahead of the 2020 presidential election. This is not unlike the so-called “fiscal cliff” in 2012<sup>28</sup> when tax cuts passed

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<sup>26</sup> Congressional Budget Office, *Private Health Insurance Premiums and Federal Policy*, February 2016  
[https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51130-Health\\_Insurance\\_Premiums.pdf](https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51130-Health_Insurance_Premiums.pdf)

<sup>27</sup> Cannon



under President George W. Bush were set to expire and the first round of the sequester under the Budget Control Act of 2011 was set to take effect. A deal was reached to keep tax cuts for low- and middle-income earners and raise taxes on high-income earners. The first round of sequester cuts were delayed for two months.<sup>29</sup>

The sequester has since been delayed two additional times, in the Bipartisan Budget Act of 2013,<sup>30</sup> which was orchestrated by then House Budget Committee Chairman Paul Ryan (R-Wis.) and Senate Budget Committee Chairwoman Patty Murray (D-Wash.), and the Bipartisan Budget Act of 2015.<sup>31</sup>

Additionally, Congress had routinely delayed the Medicare Sustainable Growth Rate (SGR), which became law under the Balanced Budget Act of 1997. The SGR was meant to control Medicare costs by preventing yearly increases in expenses, including payments to physicians, from surpassing the growth in gross domestic product (GDP).

Congress went through the exercise of delaying the SGR by including language in legislation to prevent the cuts. This frequent routine became known as the “doc fix.” The SGR was ended in April 2015 with the Medicare Access and CHIP Reauthorization Act.<sup>32</sup>

Because states will be allowed to continue to enroll people under expansion until January 1, 2020 and states will be given the opportunity to expand Medicaid through the same date, the circumstances in a presidential election year will make the repeal of Medicaid expansion a political football for President Trump and Republicans. Given the previous actions of Congress to avert difficult decisions, it is highly likely that the repeal of Medicaid expansion will never happen.

The effect of this, of course, makes any score from the Congressional Budget Office useless in determining the real budgetary impact of the AHCA.

## **Coercive Continuous Coverage Language**

Like the 2015-2016 repeal bill, the AHCA zeroes out the individual mandate, though does not repeal it outright. As part of the replacement language, the AHCA, in Section 133 of the Energy and Commerce recommendations, provides for a surcharge or penalty of 30 percent of an individual’s base premium payable to the insurer if the individual failed to maintain coverage for more than 63 consecutive days.

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<sup>28</sup> Jackie Calmes, “Demystifying the Fiscal Impasse That Is Vexing Washington,” *The New York Times*, November 15, 2012 <http://www.nytimes.com/2012/11/16/us/politics/the-fiscal-cliff-explained.html>

<sup>29</sup> Lori Montgomery and Paul Kane, “Obama, Senate Republicans reach agreement on ‘fiscal cliff,’” *Washington Post*, January 1, 2013 [https://www.washingtonpost.com/business/fiscal-cliff/biden-mcconnell-continue-cliff-talks-as-clock-winds-down/2012/12/31/66c044e2-534d-11e2-8b9e-dd8773594efc\\_story.html](https://www.washingtonpost.com/business/fiscal-cliff/biden-mcconnell-continue-cliff-talks-as-clock-winds-down/2012/12/31/66c044e2-534d-11e2-8b9e-dd8773594efc_story.html)

<sup>30</sup> Congressional Budget Office, “Bipartisan Budget Act of 2013,” December 11, 2013 <https://www.cbo.gov/publication/44964>

<sup>31</sup> Grant A. Driessen, “Bipartisan Budget Act of 2015: Adjustments to the Budget Control Act of 2011,” *Congressional Research Service*, November 6, 2015 <https://fas.org/sgp/crs/misc/IN10389.pdf>

<sup>32</sup> Jordan Fabian, “Obama signs \$200 billion ‘doc fix’ bill,” *The Hill*, April 16, 2015 <http://thehill.com/homenews/administration/239165-obama-signs-200b-doc-fix-bill>



The surcharge begins for the 2019 coverage year, though there is a look back period to the 2018 coverage year to determine whether an individual was uninsured for more than 63 days. Absent a hardship, these individuals would be assessed a 30 percent surcharge paid to the insurer on top of their base premium.

House Republican leaders and staffers insist the provision is necessary to prevent people from purchasing coverage only when they get sick. Philip Klein, however, has already panned the continuous coverage language, writing, “[I]t’s not clear why this would provide much more of an incentive for healthy adults to purchase coverage than the mandate.”<sup>33</sup>

This is the individual mandate by another name. The continuous coverage surcharge has ostensibly the same function, which is to coerce people to buy coverage to avoid a penalty.

## **ObamaCare’s Essential Health Benefits Remain**

Section 1302(b) of ObamaCare defines certain “essential health benefits” that health plans offered on the exchanges and in small group markets are mandated to cover, which, like other parts of the law, have caused premiums to increase.

Now, House Republican leaders have claimed that any attempt to repeal the essential health benefits through reconciliation would fall victim to the Byrd rule in the Senate because of the upper chamber’s arcane rules. The AV standards would presumably fall to the same fate. Yet, the Energy and Commerce recommendations target the AV standards as though they will survive a Byrd rule challenge when the AV standards, like the essential health benefits, have no direct impact on revenues, outlays, or debt.

Leadership insists that ObamaCare’s regulations will be targeted by the Department of Health and Human Services through the administrative or regulatory action. Unfortunately, for conservatives, this is only temporary relief. As previously mentioned, the concern here is that another administration, in four to eight years, can undo these administrative actions unless Congress codifies them into law.

## **ObamaCare’s Community-Rating Provision Stays**

This is yet another serious concern with the AHCA. Section 135 of the House Energy and Commerce Committee recommendations proposes changing the age variation in health insurance premium rates from a 3-to-1 ratio, as set by ObamaCare, to 5-to-1. Under ObamaCare, a health insurer can charge only three times more than younger enrollees. This is a price control.

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<sup>33</sup> Philip Klein, “Republican plan to attract healthy may be as ineffective as Obamacare’s mandate,” Washington Examiner, March 6, 2017 <http://www.washingtonexaminer.com/republican-plan-to-attract-healthy-may-be-as-ineffective-as-obamacares-mandate/article/2616633>



As Michael F. Cannon explains, “The House leadership bill retains the very ObamaCare regulations that are threatening to destroy health insurance markets and leave millions with no coverage at all. ObamaCare’s community-rating price controls literally penalize insurers who offer quality coverage to patients with expensive conditions, creating a race to the bottom in insurance quality.”

“In fact, the House leadership’s decision to leave ObamaCare’s community-rating price controls in place while relaxing its “essential health benefits” requirements would cause coverage for sick to deteriorate even faster than ObamaCare does,” Cannon adds. “It is because the House leadership would retain the community-rating price controls that they also end up retaining many other features of the law. Observers have started to notice that successive iterations of the bill look increasingly like ObamaCare.”<sup>34</sup>

Whether Section 135 will survive a point of order challenge under the Byrd Rule remains to be seen, but because it does not directly impact revenues, outlays, or debt, it could be struck from the AHCA once it reaches the Senate, leaving the ObamaCare the 3-to-1 ratio in place.

## Conclusion

Since the House Ways and Means Committee and the House Energy and Commerce Committee Significant rolled out the American Health Care Act, FreedomWorks has maintained that changes need to be made to improve the bill. As currently written, the AHCA leaves the architecture of ObamaCare in place.

Again, our concerns are:

- A new advanceable, refundable tax credit that replaces ObamaCare’s advanceable, refundable tax credit
- That states can continue to enroll individuals under Medicaid expansion until 2020
- States can continue to expand Medicaid until 2020
- ObamaCare’s essential health benefits remain in place
- ObamaCare’s community-rating provisions remain in place
- The coercive continuous coverage language, which is the individual mandate by another name

Positive improvements that could be made to the bill include:

- Lessening the fiscal impact of the tax credit by making it nonrefundable or partially refundable
- Immediately freezing Medicaid expansion enrollment and adding work requirements to the program

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<sup>34</sup> Cannon



- Repealing ObamaCare’s essential health benefits mandates
- Striking the continuous coverage language

If House Republican leaders cannot gain support for the AHCA, an alternative or ready-made path forward is the 2015-2016 repeal bill. Sen. Rand Paul (R-Ky.) and Rep. Jim Jordan (R-Ohio) have introduced legislation, S. 554<sup>35</sup> and H.R. 1436,<sup>36</sup> that is modeled after the 2015-2016 repeal bill.

As Speaker Ryan said after President Obama vetoed the 2015-2016 repeal bill: “We have shown now that there is a clear path to repealing ObamaCare without 60 votes in the Senate. So, next year, if we’re sending this bill to a Republican president, it will get signed into law.”

The 2015-2016 repeal bill offered a two-year delay. This gives Congress time to get patient-centered health care right.

We have one shot at reconciliation to gut ObamaCare once and for all, and we cannot miss this one moment to repeal ObamaCare so it cannot be resurrected.

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<sup>35</sup> S. 554, 115th Congress (2017) <https://www.congress.gov/bill/115th-congress/senate-bill/554>

<sup>36</sup> H.R. 1436, 115th Congress (2017) <https://www.congress.gov/bill/115th-congress/house-bill/1436>