

Dismantling the ACA without help from Congress

If Congress doesn't repeal the ACA, President Trump's changes could go a long way to fulfil Republicans' pledge to scrap it. Susan Jaffe, *The Lancet* Washington correspondent, reports.

Members of Congress usually escape the humid summer heat and head home for the August recess. But this year, Senate Majority Leader Mitch McConnell is keeping them in Washington, DC, for 2 more weeks in what is expected to be an unsuccessful attempt to pass the Better Care Reconciliation Act, repealing and replacing the Patient Protection and Affordable Care Act (ACA), former President Barack Obama's signature health-care law.

As this went to press, the Senate's 48 Democrats remain solidly against a repeal, and Republicans are struggling to craft repeal legislation that would satisfy both the conservative and moderate branches of their slim majority. If the Senate does approve some form of repeal legislation, it would have to be reconciled with the House of Representatives' bill after working out any differences.

But President Donald Trump is not patiently waiting for the Republican-controlled Congress to keep their party's 7-year promise to scrap the law. "I've been saying for a very long time", he said, "let Obamacare fail and then everybody is going to have to come together and fix it".

And he is confident of the outcome: "Eventually, we're going to get something done and it's gonna be very good", the President said.

Meanwhile, support for the ACA, also known as Obamacare, hit an all-time high last month, 51%, the Kaiser Family Foundation reported in its latest poll. The percentage of Americans without health insurance has dropped to a record low of 10.9% in the fourth quarter of 2016, compared with 18% in 2013, just before the ACA took effect, according to the Gallup-Healthways Well-Being Index.

Waive, defer, and delay

While the congressional saga continues, the ACA remains in effect and the Trump administration is at the helm, in charge of a programme the President promised during his campaign to eliminate. Trump officials have an essential role in implementing the law and improving it, as well as unique opportunities to fulfil their prophecy that it will fail.

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On Jan 20, 2017, the same day he was sworn in as President, Trump issued an executive order that left little doubt about his intentions: "To the maximum extent permitted by law, the Secretary of Health and Human Services...and the heads of all other executive departments and agencies... shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the [ACA]..."

The order targets the ACA's online insurance marketplaces or exchanges, where individuals and small businesses can purchase policies that cover required health benefits and guarantee consumer rights the law specifies, such as protection from discrimination due to pre-existing health conditions.

The ACA also gives the President and his appointees the responsibility for ensuring that all Americans have insurance, and that those eligible receive subsidies to help them pay for it. As an incentive, it provides that individuals who can afford health insurance but choose not to buy it must pay a penalty.

The law also expanded Medicaid, the federal and state-funded health insurance programme for low-income people. Nearly the entire cost of the expansion was to be paid by the federal government. Some 32 states and the District of Columbia accepted the offer.

Success or sabotage?

"There is a really open question about whether the Trump administration is going to continue to operate the marketplace and try to make it a success, or sabotage it", said Eliot Fishman, Senior Director of health policy at Families USA, a consumer health advocacy group.

Trump officials have taken some steps to stabilise the insurance marketplaces, including tougher validation requirements for people who want to sign up outside the usual open enrolment season and requiring them to pay unpaid premiums before they can re-enroll, said Timothy Jost, emeritus professor at the Washington and Lee University School of Law, a member of the Institute of Medicine, and a National Association of Insurance Commissioners' consumer representative.



Mitch McConnell speaks to members of the media on July 19, 2017, in Washington, DC

But the administration should commit to “vigorously encouraging people to enroll”, he said. Instead, officials cancelled marketplace advertising during the final days of the 2017 enrolment period in late January. Enrolment had been running ahead of the previous year but when they “pulled the ads, we saw enrolment drop”, he said.

Room for improvement

There is room for improvement. Democrats and Republicans agree that premiums, deductibles, and copayments are too high, often making it difficult for some patients to afford medical care even though they have insurance.

Americans pay among the highest prices in the world for prescription drugs, a problem both Donald Trump and Vermont Senator Bernie Sanders lamented during their presidential campaigns. Insurance companies are leaving the marketplaces, driven out by rising costs and risks. There has been a 38% drop in the number of insurers intending to offer plans next year in the federally run marketplaces in 39 states, compared with this time last year, according to the Centers for Medicare and Medicaid Services (CMS), part of the Department of Health and Human Services, which runs the marketplaces or exchanges.

“This is further proof that the [ACA] is failing”, said Seema Verma, CMS Administrator. “Insurers continue to flee the exchanges, causing Americans to lose their choice for health insurance or lose their coverage all together”, she continued. “These numbers are clear: the status quo is not working.”

Usually after Congress passes a major law such as the ACA, technical correction legislation follows to address unclear language and other problems. Instead, Republicans in the House of Representatives voted more than 60 times to repeal the law while Obama was President.

They also filed a lawsuit against Obama, claiming that his

administration cannot spend money to reduce out-of-pocket expenses for low-income marketplace enrollees. Even though Congress created these cost-sharing reductions, Republicans claim Congress did not explicitly approve money to pay for them.

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“This is one of the many language problems in the original ACA that never got fixed”, said Joseph Antos, health-care policy resident scholar at the American Enterprise Institute. Republicans and Democrats alike never intended to withhold that money, he said.

Billions of dollars at risk

Although it has so far continued the Obama policy of paying the insurance companies for cost-sharing reductions, “the Trump administration has been threatening to stop making those payments”, said Fishman, worrying patients and insurers.

The Center on Budget and Policy Priorities’ analysis of spending in the federally operated exchanges in 39 states found that last year, the federal government paid US\$6.4 billion to reduce copayments for doctor visits, deductibles, and other medical expenses that insurance didn’t cover, for more than 5.6 million people in these states—or 59% of the total cost.

Without this money, companies selling policies in Pennsylvania’s insurance marketplace next year would seek a 23.3% increase in premiums, the state’s insurance commissioner Teresa Miller warned in June.

“The uncertainty over the program’s future has already had consequences on costs and choices in local markets”, Marilyn Tavenner, CEO and President of America’s Health Insurance Plans, a trade association, told Verma

in a letter 2 weeks ago. “Without a strong commitment to [cost-sharing reductions], consumers will have fewer, if any, plan choices for 2018, and options that remain in the market will have significantly higher premiums, which will make coverage unaffordable for millions of Americans.”

There is also uncertainty about whether Trump officials will strictly enforce the ACA’s requirement that most adults have health insurance or pay a penalty. Taxpayers are supposed to check a box on their tax returns whether they had coverage for the full year. If the mandate is not enforced, only people who need insurance because of pre-existing health conditions will buy it and their costs will not be sufficiently offset by premiums from healthier enrollees. At the same time, the ACA also forbids insurers from denying coverage to people with a history of health problems.

The Internal Revenue Service (IRS), which processes tax returns, explains on its website that due to Trump’s Jan 20 executive order, tax returns that do not indicate an individual’s insurance status will still be processed to minimise “the burden on taxpayers, including those expecting a refund”. In these cases, the IRS may contact taxpayers “at a future date” for more information, a spokesman said.

“We’re quite far along into the summer and there’s been no effort by Congress or the administration to assure insurance companies that the mandate will be enforced and they’ll be paid what they’re owed in 2018 [for cost-sharing reductions], or even the rest of this year”, said Sam Berger, a senior policy adviser at the Center for American Progress, who also worked on the ACA in the Obama administration.

And while the ACA is still the law of the land, enrolment for next year’s coverage begins in almost 3 months.

Susan Jaffe