

# Health Care Reform Management Alert Series



## Senate Health Care Reform Activity

Issue 112

## Three Senators Derail Latest Effort at ACA Repeal

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*This is the one hundred and twelfth issue in our series of alerts for employers on selected topics on health care reform. (Click [here](#) to access our general Summary of Health Care Reform and other issues in this series.) This series of Health Care Reform Management Alerts is designed to provide an in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.*

**Seyfarth Synopsis:** *In a dramatic late night, as the clock ticked down on the GOP's legislative window to repeal the ACA, self-proclaimed "maverick" John McCain joined moderate Republicans Lisa Murkoswki and Susan Collins to narrowly defeat the latest ACA repeal effort, a so-called "skinny repeal" bill that was released just hours earlier. While we have written this several times before (each time more certain than the last), it now appears the GOP will move on from its failed ACA repeal efforts to focus on other legislative initiatives.*

To understand last night's vote, it's important to take a few steps back and examine the series of events that were set in motion by the Senate's vote to proceed on consideration of the Better Care Reconciliation Act (BCRA) on Tuesday.

### Tuesday, July 25th

- With no margin for error, 50 Senate Republicans (plus Vice President Mike Pence, as the tie-breaker) voted to bring an ACA repeal bill to the Senate floor for debate. Majority Leader Mitch McConnell had been intentionally vague in the days leading up to the procedural vote on which bill would be under consideration, sensitive to the fact that every bill proposed thus far lacked the required votes.
- To garner the support necessary to move the legislation, McConnell had to rely on Senator John McCain's dramatic last minute return to Washington; (he had been convalescing in Arizona following surgery to remove a blood clot and a brain cancer diagnosis).
- Curiously, moments after casting the decisive vote to proceed, McCain took the floor to give a fiery speech blasting the process, expressing his lack of support for the BCRA, and pleading with Senators to return to "regular order" (passing legislation through a 60 vote majority rather than a simple majority).
- Later that same night, the Senate proceeded to vote down a version of the BCRA. This version of the BCRA largely tracked the version we described in [Alert 110](#), but with the addition of a \$100 billion fund to help people transition from Medicaid. It appeared the bill needed 60 votes to pass, as it included provisions the Senate parliamentarian had ruled ineligible for passage with only 51 votes. Regardless, the bill fell short, garnering only 43 votes. Notably, given his earlier speech, McCain voted in favor of the bill.

## Wednesday, July 26th

To fulfill a commitment necessary to obtain Senator Rand Paul's vote to proceed, the Senate voted on the so-called "Obamacare Repeal Reconciliation Act." This bill was cast as "repeal no replace", although it wasn't a full repeal as it only repealed those revenue/budget items eligible for passage with a simple majority. While it was clear from statements earlier in the week that this ORRA bill would not have the votes to pass, it was seen by some as an effort by Senator McConnell to force Senate Republicans to go on record voting against a straight repeal. Most of those same Senators had voted for a very similar bill in 2015, which was subsequently vetoed by President Obama ([see Alert 111](#)).

The ORRA garnered only 45 votes in support, with McCain voting against the bill.

## Thursday, July 27th

Early in the week, when it became evident that neither the BCRA nor the ORRA would have the votes to pass, there were whispers that the Senate was considering voting on a so-called "skinny repeal" bill. The idea was that the Senate would strip out all objectionable provisions of the earlier bills, focusing only on the lowest common denominators (those provisions most uniformly reviled by all Senate Republicans). The items rumored to be included were the individual mandate, the employer mandate, and the medical device tax.

By Thursday, even though the bill had not yet been released, this path became the only remaining viable option. Senate leadership started expressing optimism about the bill's chances as several of the usual holdouts suggested they might be willing to vote for this bill.

Shortly after close of business, Senators Lindsay Graham, Ron Johnson and John McCain held a surprise press conference, announcing they could not support skinny repeal unless they received assurances from Speaker of the House Paul Ryan that the House would not simply pass skinny repeal "as-is." Instead, the three wanted Ryan to guarantee the House would conference with the Senate and come up with a more robust repeal and replace plan that could garner the necessary votes in both chambers of Congress. In other words, the Senators wanted a guarantee that the bill they were about to vote in favor of would never become law. It remained unclear what this solution would be given the months of effort put into trying to make this work, but most viewed this as an effort to simply keep the ball rolling rather than throw in the towel.

After 8 pm Eastern Time, Speaker Ryan released a statement indicating the House was "willing" to go to conference on the bill. Graham, Johnson and McCain said this statement was insufficient and wanted further reassurances. A few hours later, following a call with Speaker Ryan, Graham and Johnson said they received the necessary assurances. However, McCain indicated he was still unsure and needed to consult with the Arizona governor.

Just before 11 pm Eastern Time (and only a few hours before the expected vote), the Senate finally released the text of the skinny repeal bill, labeled the "Health Care Freedom Act." At a high level, the bill included the following:

- Repeal the individual mandate
- Repeal the employer mandate (only through 2024 presumably because the Senate needed additional revenue within a ten year window for the bill to be eligible for passage with 51 rather than 60 votes)
- Postpone the ACA's medical device tax
- Cut off federal funds for Planned Parenthood
- Expand an ACA waiver program, giving states the option to roll back certain ACA benefit mandates
- Expand HSA funding

## Friday, July 28th

The CBO released a budget score for the HCFA, indicating it would result in 16 million fewer insured by 2026 and a 20% spike in premiums, but that it would save \$135 billion over ten years. This last point was key because the bill had to save at least \$133 billion (the savings in the House-passed AHCA) to pass with only 51 votes.

In the early hours of the morning, Vice President Mike Pence arrived on the Senate floor, indicating that leadership believed they would have the bare minimum - 50 votes - and that Pence would be the tie-breaker.

- What played out next was quite dramatic. As expected, Senate leadership entered the vote without the support of Collins and Murkowski, and they were viewed as firm “no’s”, meaning the Republicans could lose no more votes.
- It quickly became apparent that something was amiss as Mike Pence was seen standing by McCain feverishly lobbying him to shift his vote, to no avail. The roll call began, and the remaining Republican Senators fell in line, voting “yes”. When they reached John McCain, he voted “no” with a thumbs down, followed by an audible gasp in the room. This was, perhaps, the most riveting moment involving the Maverick since Tom Cruise battled the Russians in Top Gun™ (perhaps a fitting analogy on many fronts).
- When it became clear the vote would fail, McConnell gave a few remarks expressing his extreme disappointment and blaming the Democrats.
- Shortly thereafter, President Trump also tweeted “As I said from the beginning, let ObamaCare implode, then deal. Watch!”

## What’s Next?

Presumably, Congress will finally move on from ACA repeal and focus on tax reform and the remaining legislative backlog that had been building as both Chambers attempted to negotiate a workable health care approach. Things to watch for include:

- Several moderate Republicans had expressed support for working in a bipartisan manner to shore up the individual market. Presumably, there would be sufficient bipartisan support to move forward legislation in this space. In fact, the Problem Solvers caucus, a bipartisan group of about 40 House members led by Tom Reed (R-N.Y.) and Josh Gottheimer (D-N.J.), has already been meeting about ways to fix the ACA. It’s unclear whether President Trump would veto any such efforts.
- The Trump Administration is now in the awkward position of implementing and enforcing a law that it abhors. This leaves many unanswered questions, including:
  - Will the IRS enforce the individual and employer mandates?
  - Will the Trump Administration continue to allocate funding for Marketplace subsidies (and will it continue to do so only on a monthly basis or will it allocate long-term funding providing insurance carriers with the reassurances necessary to commit to future participation)?
  - Will the regulatory agencies attempt to roll back or soften earlier guidance implementing the ACA?
- Some Republicans have indicated they will continue their efforts to repeal the ACA. We would also expect that tax reform could include some targeted repeal of certain ACA taxes (such as the ACA’s tax on high earners).

Seyfarth Shaw will continue to monitor Congressional and regulatory efforts and will alert clients as new developments occur.

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