



To: Interested Parties  
From: Heritage Action for America  
Date: September 21, 2017  
**Subject: Amending Graham-Cassidy To Ensure Choice**

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Conservatives are justifiably frustrated with the obstinance displayed by their moderate colleagues over the past nine months, a frustration that is likely exacerbated by the leading roles played by Senators Lindsey Graham (R-S.C.) and Bill Cassidy (R-La.) in a last minute effort to take action on Obamacare. Regardless of how Republicans and the conservative movement arrived at this moment, Graham-Cassidy should be evaluated on the policy, process and politics of this particular moment. While no one should be under the illusion that Graham-Cassidy delivers on the Republicans’ seven-year campaign promise to repeal and replace Obamacare, it could make important improvements over the status quo.

**Policy.** There is no sugar coating the shortcomings of Graham-Cassidy,<sup>1</sup> but its most significant change to Obamacare is a new waiver system that would allow states to begin reasserting some of their traditional, pre-Obamacare role of regulating health insurance markets. In this way, Graham-Cassidy tries to seriously tackle Obamacare’s regulatory architecture. As Heritage Action explained in March:

“Obamacare’s beating heart was its regulatory structure: the benefit mandates, the one-size-fits-all community-rating rules, the limits on pricing structure and rules about where cost burdens must fall, and the federal review of decisions about insurance markets that can be handled perfectly well in the states. The goal, in the words of proponents like Sara Rosenbaum, was to restructure the insurance market by grafting onto it the ‘characteristics of a public utility.’ The law’s various other impositions on Americans — the coercive individual mandate, the taxpayer-financed subsidies necessary to help people purchase insurance far more expensive than they would otherwise desire, the massive tax increases — flow by necessity from this regulatory heart.”<sup>2</sup>

Graham-Cassidy repeals the individual and employer mandates, and creates the aforementioned waiver system tied to massive block grants that effectively force the federal government to share the driver’s seat with the states. Specifically, Graham-Cassidy contains a modified version of the 1332 waiver reforms included in the Senate’s Better Care Reconciliation Act (BCRA) and a new waiver available to states tied to the new block grant mechanism, which is funded by the Obamacare taxes and savings from ending the

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<sup>1</sup> See Appendix I

<sup>2</sup> Michael Needham and Jacob Reses. “Unpacking the Complexity of Repeal and Replace.” National Review. (March 15, 2017). <http://www.nationalreview.com/article/445767/obamacare-repeal-replace-unpacking-complexities>

Medicaid expansion. Taken together, these waivers are broad enough to allow states -- should they feel compelled to act in the best interests of their citizens -- to opt out of some of the most controversial and destructive Obamacare regulations.<sup>3</sup> While shifting some regulatory responsibility to the states is preferable to Obamacare's fully centralized structure, The Heritage Foundation cautions that "states are likely to spend the funding in ways that expand the number of people in government health care programs" that are "effectively government-controlled monopolies."<sup>4</sup> Heritage recommends the Senate amend Graham-Cassidy so states cannot use the new block grant funding to:

1. expand Medicaid (though no more than 20 percent of a state's grant can be used for that purpose),
2. pay medical providers directly for providing services, and
3. contract with managed-care plans to cover specified groups.<sup>5</sup>

**Process.** According to reports, the Senate parliamentarian suggested that the fast track procedure Republicans hoped to use to repeal (and replace) Obamacare will expire after September 30, which is the end of the fiscal year. If accurate -- and congressional Republicans are acting as such -- it would give Senate Republicans just 10 days to use the reconciliation vehicle. At this point, it appears unlikely that the budget reconciliation bill could be used for anything other than Graham-Cassidy.

To be clear, hurdles still remain in advancing Graham-Cassidy. The Senate must have a budget score -- typically provided by the Congressional Budget Office (CBO) -- to review and score the bill, and the new legislative language must undergo parliamentary review to ensure it is compliant with the Senate's onerous budgetary rules. The latter process is amusingly known as a 'Byrd Bath' because the main constraints surrounding the Senate's consideration of a budget reconciliation measure stem from the Byrd Rule.<sup>6</sup> As with the BCRA, it is likely the substance of Graham-Cassidy will change -- perhaps significantly -- during this process and it could substantially alter the policy analysis above.

Moreover, the House may not have an opportunity to amend Graham-Cassidy because any changes would require Senate approval. Those changes would require 60 Senate votes if, as has been reported, the privileged nature of the reconciliation bill expired after September 30. Finally, given that the FY18 reconciliation instructions are going to be designed for tax reform, it seems highly unlikely congressional Republicans will have another filibuster-proof vehicle to use until the FY19 budget cycle.

**Politics.** The politics of Obamacare are changing rapidly. From its inception in 2010 and through the 2016 election, the law remained unpopular with the American people. As Democrats and the media mounted an effort to save the law, Americans were left directionless by a Republican Party that promised

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<sup>3</sup> One of the major policy issues in the initial debate was over community rating. Under Graham-Cassidy, states could get out of prohibitions on different premium rates for most factors except gender. See Appendix I for more detail.

<sup>4</sup> Edmund Haislmaier and Robert Rector. "How to Ensure that the Graham-Cassidy Bill Expands Markets and Choice in Health Care—Not Government Programs." The Heritage Foundation. (September 20, 2017). <http://www.heritage.org/health-care-reform/report/how-ensure-the-graham-cassidy-bill-expands-markets-and-choice-health-care>

<sup>5</sup> *ibid*

<sup>6</sup> Since 2015, Heritage Action has argued the Byrd Rule allowed for the full repeal of Obamacare. See: "Memo: How to Repeal All of Obamacare with Reconciliation." Heritage Action for America. (July 28, 2015).

<http://heritageaction.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/Heritage-Action-Memo-Reconciliation-Full-Obamacare-Repeal-July-2015.pdf>

repeal with no coherent vision for the future. As a result, opposition to Obamacare is hovering around 41 percent -- the lowest disapproval rating at any point in the law's lifetime.<sup>7</sup>

Combined with multiple failed congressional efforts to unravel the law, many Republican lawmakers are actively seeking bipartisan repairs to the law. Although bipartisan efforts to improve and repair Obamacare are now on hold, it is likely they will reemerge if Republicans do not act to unravel Obamacare. The emergence of a bipartisan coalition committed to improving and repairing Obamacare will ensure the law ascends to the political equivalent of America's other welfare and entitlement programs. A properly executed repeal effort in January<sup>8</sup> would have eliminated this threat, but it is impossible to ignore that previous failures have shifted the political landscape in fundamental ways.

Allowing Obamacare's regulatory architecture to remain firmly intact poses a serious threat to the long-term effort of enacting conservative health care reforms. Earlier this year, Heritage Action explained:

“[A]s harmful as Obamacare has been, its architects never had the opportunity to fully deploy the nearly unlimited regulatory apparatus at their disposal. Near-term political considerations and the disastrous performance of the exchanges forced the administration to scale back its ambitions. Indeed, the Obamacare statute vests so much power in federal regulators that it actually could have been worse.”<sup>9</sup>

Tweaking Obamacare, as bipartisan working groups propose to do, is obviously insufficient. As Heritage Action cautioned earlier this year, Obamacare's “elements are intertwined and inextricably linked, and so long as that [regulatory] heart beats, tweaks to the design of our insurance markets will only be able to help on the margins. The demand on the left to revive Obamacare — or something worse — will persist.” It should come as no surprise that in recent weeks the far-left wing of the Democrat Party flexed its muscle with the rollout of a national, single-payer health care scheme. Heritage Action warned of the left's movement earlier this summer:

“Regardless of what happens [with the repeal effort], one thing is certain: Democrats will not stop in their quest for a nationalized, single-payer scheme. Conservatives cannot cede the playing field despite justified disappointment with the current process.”<sup>10</sup>

In one very tangible sense, Graham-Cassidy has the potential to blunt the momentum for the left's national march toward socialized medicine by restoring significant regulatory authority to the states themselves. When combined with significant sums of money, state governments may be reluctant to allow

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<sup>7</sup> “Public Approval of Health Care Law.” Real Clear Politics. (accessed September 18, 2017). [https://www.realclearpolitics.com/epolls/other/obama\\_and\\_democrats\\_health\\_care\\_plan-1130.html](https://www.realclearpolitics.com/epolls/other/obama_and_democrats_health_care_plan-1130.html)

<sup>8</sup> “Memo: How to Repeal All of Obamacare by Inauguration.” Heritage Action for America. (December 5, 2016). <http://heritageaction.wpengine.netdna-cdn.com/wp-content/uploads/2016/12/updatedmemorereconciliationfullrepealobamacare.pdf>

<sup>9</sup> Reses, Jacob. “Full Repeal Means Regulatory Repeal: Why Obamacare's Regulatory Mandates Must Be Undone Permanently.” Conservative Reform Network. (March 8, 2017).

<http://conservativereform.com/full-repeal-means-regulatory-repeal-obamacares-regulatory-mandates-must-undone-permanently/>

<sup>10</sup> Needham, Michael. “Americans Need Relief from Obamacare.” Real Clear Politics. (June 29, 2017). ([https://www.realclearpolitics.com/articles/2017/06/29/americans\\_need\\_relief\\_from\\_obamacare\\_134327.html](https://www.realclearpolitics.com/articles/2017/06/29/americans_need_relief_from_obamacare_134327.html))

a national single-payer system to take resources from the state. To be clear, there is nothing inherently conservative in using massive sums of taxpayer money in the form of a new block grant -- that amounts to a new entitlement to the state -- but rather it is a political trade off that some conservatives find appealing given the left's momentum.

### **Graham-Cassidy Should Expand Markets and Choice**

A threshold question for conservatives is whether future legislative efforts to enact conservative health care reforms are best done from the baseline of Obamacare as it undergoes bipartisan tweaks, or a baseline in which Washington's powers have been curtailed and states are allowed to innovate and experiment. Earlier this year, Heritage Action outlined the challenge with a federally concocted health insurance scheme:

“Conservative health policy is built on skepticism of these grand plans’ efficacy and with a different goal: to make markets freer and make insurance more consumer-driven. Achieving that goal is essential in the effort to rein in runaway health costs and limit Washington’s influence in Americans’ lives.”<sup>11</sup>

In summarizing Graham-Cassidy, The Heritage Foundation concludes:

“If the Senate makes the recommended changes in the block grant program, Graham–Cassidy would provide an improvement over the status quo. However, without these changes, nothing would prevent states from simply expanding government health programs, which could result in transferring up to 8 million people from private coverage into government-run programs with no consumer choice.”<sup>12</sup>

Repealing Obamacare’s regulatory architecture is essential for the future of pursuing conservative health care policy. And while clearly Graham-Cassidy does not repeal the regulatory structure, it does give states the ability to opt out of significant regulatory burdens and limit the influence Washington bureaucrats and technocrats have over the lives of the American people.

To ensure states do not use the new block grant funding to force individuals into restrictive, government-run health care programs, the Senate should remove three provisions of Graham-Cassidy that would permit states to use the funds to:

1. pay medical providers directly for providing services to individuals;
2. contract with managed care plans to provide coverage to specified groups of individuals; and
3. expand Medicaid (no more than 20 percent of a state’s grant can be used for that purpose).<sup>13</sup>

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<sup>11</sup> Reses, Jacob. “Full Repeal Means Regulatory Repeal: Why Obamacare’s Regulatory Mandates Must Be Undone Permanently.” Conservative Reform Network. (March 8, 2017).

<sup>12</sup> Edmund Haislmaier and Robert Rector. “How to Ensure that the Graham–Cassidy Bill Expands Markets and Choice in Health Care—Not Government Programs.” The Heritage Foundation. (September 20, 2017).

<http://www.heritage.org/health-care-reform/report/how-ensure-the-graham-cassidy-bill-expands-markets-and-choice-health-care>

<sup>13</sup> *ibid*

Make no mistake: If an amended version of Graham-Cassidy were to become law, there would still be an extraordinary amount of work ahead. States would have to innovate -- rapidly -- to begin restoring choice and competition in their health insurance markets. Conservatives would have battles to fight at the state level, as our Founders envisioned. Conservatives would continue to fight battles at the federal level as regulatory and statutory obstacles emerge from state innovation.

As Heritage concludes in its report, “Members of Congress should not be under any illusion that passing Graham–Cassidy relieves them of the burden of continuing to reform the health care system in a more patient-centered, market-based direction.”<sup>14</sup>

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<sup>14</sup> *ibid*

## Appendix I

### How Recent Bills Would Undo Obamacare

Action	2015 Repeal Bill	House Bill (AHCA)	Senate Bill (BCRA)	Graham-Cassidy Bill (GC)
<b>REGULATORY REFORM</b>				
Allows states to get a waiver to restructure federal insurance subsidies	N	N	Y <sup>a</sup>	Y <sup>b</sup>
States can waive "essential health benefits" package that individual and small group plans must offer so that they can create lower premium plans	N	Y	Y <sup>a</sup>	Y <sup>b</sup>
Repeals actuarial value mandate	N	Y	Y <sup>a</sup>	Y <sup>a</sup>
Repeals minimum medical loss ratio mandate	N	N	Y	Y <sup>b</sup>
Repeals prohibition on insurers varying premiums by age using a ratio of greater than 3:1	N	Y <sup>c</sup>	Y <sup>c</sup>	Y <sup>b</sup>
Incentivizes continuous coverage	N	Y <sup>d</sup>	Y <sup>e</sup>	N
Allows states to use health status rating	N	Y <sup>b</sup>	N	Y <sup>b</sup>
<b>FINANCING REFORM</b>				
Eliminates individual and employer tax penalties	Y	Y	Y	Y
Repeals taxes on health insurance, drugs, and medical devices	Y	Y	Y	N
Repeals all non-healthcare taxes	Y	Y	N <sup>f</sup>	N
Repeals Cadillac Tax on "high-cost" employer plans	Y	N	N	N
Caps employer plan tax exclusion (similar to other benefits like 401ks)	N	N	N	N
Improves Health Savings Accounts <sup>g</sup>	Y	Y	Y <sup>h</sup>	Y <sup>h</sup>
Repeals cost-sharing subsidies	Y	Y <sup>i</sup>	Y <sup>i</sup>	Y <sup>i</sup>
<b>MEDICAID REFORM</b>				
Reforms Medicaid financing through per-capita federal funding approach	N	Y	Y	Y
Phases out Medicaid expansion and returns focus of Medicaid to the elderly, disabled, children, and pregnant women in poverty by removing Obamacare's higher reimbursements for able-bodied adults	Y	Y	Y	Y

**NOTES:**

- a — Through less restrictive Sec. 1332 state waivers
- b — Through a new funding and waiver mechanism
- c — Sets new default limit of 5:1 and states can opt to set their own ratios
- d — Default 30 percent premium surcharge and option for state waiver to use health status related premiums for those without continuous coverage
- e — Six-month waiting period before coverage takes effect for those without continuous coverage

- f — Bill leaves net investment income tax, the additional Medicare Health Insurance (HI) Tax, and the remuneration tax on executive compensation for certain health insurance executives
- g — Allows higher contributions and purchasing over-the-counter drugs through account
- h — Also allows individuals to use account funds to pay premiums
- i — Provides new state stability funding
- j — Would eliminate the Obamacare medical device tax but other Obamacare taxes would remain in place.

SOURCE: Heritage Foundation research.

 heritage.org