WS&Co. Briefing

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Senate Republicans Reveal Their "Better Care Reconciliation Act"

On June 22, 2017, Senate Republicans revealed their much-anticipated draft bill aimed at repealing/reforming major provisions of the Affordable Care Act (ACA). Senate GOP leadership and the 13-person panel Senate working group have been meeting and working on the draft bill behind closed doors since the House passed its version of the American Health Care Act (AHCA) on May 4, 2017. The Senate has opted to drop the AHCA name and call its version, the Better Care Reconciliation Act of 2017 (BCRA or Better Care Act).

The Senate's draft bill will largely overhaul several major provisions of the ACA as summarized below. The Senate Majority Leader, Mitch McConnell, hopes to put the bill to a floor vote next week, before adjourning for the July holiday recess. However, the bill was released without having been seen by a significant majority of the Senate (it bypassed the usual committee review process) and has not yet been scored by the Congressional Budget Office (CBO).

Shared Responsibility Mandates

Similar to the House's AHCA, the Senate's BCRA will eliminate the penalties associated with both the Employer and Individual Mandates for tax years after December 31, 2015. As a budget reconciliation bill, BCRA cannot directly repeal these coverage mandates, but eliminating the penalties will essentially provide the same result.

ACA Reporting

The ACA reporting requirement to complete and file Forms 1094/1095 would continue to exist, however, without the associated penalties behind the Employer Mandate, the reports would not be used to calculate §4980H penalties against employers. The only purpose could be to substantiate whether an individual should have qualified for a federal premium subsidy in the Marketplace. There remains quite a bit of uncertainty about the reporting requirement, but the Treasury has been given marching orders to reform/alleviate this reporting requirement which is a pain point for applicable large employers (and small employer sponsors of self-insured plans).

ACA Taxes and Fees

Most of the ACA taxes and fees would be delayed, phased out or eliminated entirely. Here are some of the key provisions affecting employers:

- **Cadillac Tax:** The unpopular 40% excise tax, which is often referred to as the "Cadillac Tax" would be delayed through the end of 2025. The first effective date would be January 1, 2026.
- **PCORI Fee:** The PCORI fee (paid by insurers and sponsors of self-insured plans) would remain unchanged, but was already scheduled to sunset in October 2019.

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- **Medicare Additional Payroll Tax:** The ACA added a 0.9% additional tax on high-income earners. This additional tax would remain in effect until the end of 2022.
- **Tax on OTC Medications:** The ACA prohibits reimbursement of OTC medications from HSAs and FSAs. This OTC medication tax would be repealed after 2017 (and individuals will again be able to submit reimbursement claims through their HSAs/ FSAs in 2018).

Changes Affecting Health Plan Design

Several of the popular provisions of the ACA that affect health plan design will remain unchanged. For example, the Senate bill would keep the coverage eligibility for adult children (up to age 26) and the 90-day waiting period limit. However, similar to the House's AHCA, individuals must maintain continuous coverage (i.e., have no gaps in coverage) in order to have protection against pre-existing condition exclusions.

Consumer Driven Care (HSA and FSA Reforms)

As with the AHCA, the Better Care Act would reform consumer-driven health plans by increasing HSA contribution limits so that it would reflect the out-of-pocket costs under the integrated high deductible health plan. Furthermore, the ACA's reduced annual limit imposed on FSAs would be repealed and could return to the typical $5,000 (or higher) annual limit used prior to the ACA. Both of these changes would be effective after 2017.

Lower Marketplace Subsidies

The Senate rejected the House's proposed replacement of Marketplace subsidies with age-based tax credits and instead opted to retain the income-based subsidy structure. Under the BCRA, the ACA's premium subsidies for individual coverage obtained in the Marketplace would continue to exist but in a reduced fashion:

- Currently under the ACA, individuals who earn between 100% and 400% of the federal poverty limit (FPL) may qualify for some sort of premium subsidy. Under the BCRA, the upper earnings limit to qualify for a subsidy would be lowered to 350% of FPL.
- In addition, the amount of the subsidy itself, which is based on the cost of coverage for the second-lowest cost Silver Plan would also be reduced. The cost of the second-lowest cost Silver Plan varies depending on the location of the Marketplace, e.g., it's a higher subsidy in a higher cost area such as New York or California. Under the BCRA, the subsidy amount would be based on the "median cost benchmark plan."
- Lastly, the subsidy would not be available for any plans that cover abortions (subject to a couple of exceptions).

Medical Funding

Perhaps the most debated and sensitive issue when it comes to reforming the ACA revolves around the funding (or reduced funding) for Medicaid expansion. The BCRA would phase out the expanded Medicaid funding beginning in 2021 (which is one year later than the House's version). Then in 2025, there would be reform for the entire Medicaid system so that states may choose to take either a block grant amount or a "per capita cap" method (rather than the roughly 50% match the federal government currently provides to participating states).

State Waivers (EHB and Age-Banding Ratio)

The BCRA would expand the ACA's current waiver scheme rather than create new state waivers. States would be able to apply with HHS for a waiver so that they could use their own definition for what constitutes "essential health benefits" rather than using the ACA's definition.

The Senate bill would mirror the House's provision to increase the maximum age-banding ratio from 3:1 to 5:1. This means that an older individual seeking Marketplace coverage would pay 5 times more for coverage than a younger individual with the same level of coverage. However, the expansion of the state waivers would allow each state to set the age-banding ratio to something greater than 5:1.

What Happens Next

As mentioned above, Senator McConnell stated his intention to put the BCRA to a vote on the floor next week, before the July holiday recess. That creates a tight timeline for members of the Senate to review the draft legislation,

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most of whom have not seen the details of the bill prior to Thursday's official release. The timing is even more compressed because the Senate cannot vote on legislation without getting the report score from the CBO which will provide an estimate of the cost and impact of the draft legislation by early next week.

The Majority Leader called the BCRA a "discussion draft" which will likely need to undergo some negotiation and revision in order to rally enough support from the GOP to pass it through the Senate and back to the House. There have been a small handful of Senate Republicans who have voiced their objections to the closed-door process and content of the draft bill. With a slim, 52-seat majority, Senate Republicans will need at least 50 affirmative votes and a tie-breaking vote from Vice President Pence. There is little doubt that Senate Democrats will not cast a vote in favor of the draft bill.

If the Senate passes the BCRA, it will have to go back to the House for approval. Note that the House's version of the ACA reform bill only narrowly passed by a vote of 217-213 after making compromises to the satisfaction of House Republicans. The Senate's draft bill eroded some of the provisions that were the subject of those compromises in the House. Therefore, the Speaker of the House will have a lot of work to do to marshal the votes needed to pass the BCRA within their chamber of Congress.

As always, we will provide you with updates as they develop.
