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CLIENT ALERT

Overview of the Senate Republican ACA Repeal and Replace Bill

Jun.23.2017

Yesterday, Senate Republicans released a discussion draft of their much-anticipated legislation to repeal and replace the Affordable Care Act. The bill, dubbed the Better Care Reconciliation Act of 2017 (the Senate Bill), comes nearly two months after the House passed its version of ACA repeal and replace and follows weeks of work by members of the so-called "Gang of 13" Republican Senators who were tasked with crafting a bill that could pass muster with both conservatives and moderates within the Senate Republican Conference.

Like its House counterpart, the Senate Bill relies on the Budget Reconciliation process that would allow it to pass without threat of a Democratic filibuster. Under reconciliation rules, however, provisions that do not impact the federal budget may not be altered, meaning that this bill cannot fully repeal the ACA, as Republicans have promised since the law's 2010 enactment.

The discussion draft is not intended to be the final version of the legislation that is expected to make its way to the Senate floor late next week. Instead, it represents a broad framework of the legislation that will be reviewed by the Congressional Budget Office and the Senate Parliamentarian to ensure that it conforms to the strict reconciliation rules. It is also expected to be further negotiated among Senate Republicans throughout the weekend and into next week. In fact, many members' concerns will not be addressed until they are able to offer floor amendments when the full Senate begins consideration of the bill next week.

Unlike most legislation that comes before the United States Senate, reconciliation bills require only a simple majority to pass, meaning that at least 50 Senators must vote in favor of the bill, with Vice President Pence available to cast the decisive 51st vote. Since Republicans currently hold 52 Senate seats and Democrats are not expected to support the legislation, only two Republicans can break ranks without dooming their long-promised repeal. Within 24 hours of the discussion draft's release, at least five Republican Senators announced that they are not yet supportive of the Senate Bill, indicating that the majority party has more work to do during the next eight days to win over the last few holdouts.

The following is a summary of the major provisions included in the Senate Bill:

- **Repeal of Insurance Purchase Mandates.** One of the three central elements of the ACA's reforms of the insurance markets was the individual and employer mandates. The goal was to drive down the average cost of insurance by requiring younger and healthier persons who received less net benefits to obtain coverage. These mandates were often challenged as curtailing personal economic freedom and as damaging the labor market by raising the cost of employment. The Senate Bill, like the House Bill, effectively eliminates both of these mandates by removing the penalties for failure to purchase insurance by an individual or provide health insurance by an employer – effective after December 31, 2015.
- **Elimination of ACA and Other Taxes.** The Senate Bill also follows the House Bill by eliminating several taxes the ACA imposed on the health industry. These include:

- Tax on branded prescription drugs: The ACA imposed a fee on manufacturers and importers of prescription drugs in the aggregate amount of $4 billion in 2017 and $4.1 billion for the industry as a whole in 2018. The Senate Bill eliminates this tax beginning January 1, 2018.
- Medical device excise tax: The ACA imposed a 2.3 percent tax on manufacturers, producers and importers of medical devices. The Senate Bill repeals this tax for sales occurring after December 31, 2017.
- Health insurance tax: The ACA imposed a fee on health insurers in the aggregate amount for the industry of $13.9 billion in 2017 and $14.3 billion in 2018. The tax was suspended for 2017. The Senate Bill, like the House Bill, repeals the tax for years after 2017.
- Excise tax on high cost employer-provided health insurance: The excise tax was to become effective in 2018, but was delayed until 2020. The Senate Bill, like the House Bill, further delays it until taxes years beginning after December 31, 2025.
- Income tax on over-the-counter medications: The Senate Bill strikes out language previously mandating drugs to be prescribed in order to qualify as a valid medical expense in a health savings account or a medical savings account. Similarly, the Bill expands the employer contribution deduction to reimbursements beyond prescription drugs and insulin. These alterations will apply to amounts paid or expenses incurred in the taxable years beginning after December 31, 2016.
- Individual tax deductions for medical and dental expenses: The Senate Bill increases the deductibility of medical expenses on individual tax returns by decreasing the deductibility threshold from 10 percent to 7.5 percent of a taxpayer's adjusted gross income.
- Medicare tax increase: Effective for tax years beginning after December 31, 2022, the Senate Bill eliminates the additional 0.9 percent Medicare tax on wages above $250,000 for joint filers and $200,000 for all other filers.
- Investment income tax: The ACA imposed a 3.8 percent tax investment income of high-income taxpayer's interests, dividends, annuities, royalties, and rents, subject to certain thresholds. The Senate Bill repeals this provision for taxable years beginning after December 31, 2016.

- **Improvements to Health Savings Accounts (HSAs)**. The maximum contribution amount for HSA would be increased to $5,000 for self and $10,000 for family coverage. Both spouses would be permitted to make catch-up contributions to the same HSA.
- **Market Stabilization Provisions.** The Senate Bill significantly limits financial assistance to individuals that obtain coverage through the individual and small group markets. In particular, the proposal tightens income eligibility for tax credits to help individuals purchase insurance (reduced to 350 percent of FPL). The Senate Bill eliminates the generous cost sharing subsidies that were a hallmark of the ACA. At the same time, Senate Bill infuses billions of dollars of federal funds in an attempt to stabilize the individual and small group insurance markets and encourage state-level innovations.
  - Short-term Funds to Insurers to Address Coverage and Access Gaps: The Bill grants $15 billion annually for 2018 and 2019, and $10 billion annually for 2020 and 2021 for short-term stabilization fund. The funds would be appropriated to the Centers for Medicare and Medicaid Services (CMS) to fund arrangements with health insurance issuers to address coverage and access disruption and respond to "urgent health care needs." The agency will develop procedures for distribution of the appropriated funds.
  - Long-term Funds to Support Small Group and Individual Markets: The Bill allots $8 billion for 2019, $14 billion for 2020 and 2021, $6 billion for 2022 and 2023, $5 billion for 2024 and 2026 for the long-term state stabilization and innovation program. States (and the District of Columbia) may apply for long-term stabilization fund allotment if the state certifies that the funds will be used for one or more of the following: (a) financial

assistance to individuals, (b) incentives to issuers, (c) reducing costs of insurance, (d) promoting participation in the individual and small group markets, (e) promoting access to certain health care services, (f) providing payments to providers and (f) reducing out-of-pocket costs for individuals. $5 billion of the allotments for 2019, 2020 and 2021 must be aimed at premium stabilization activities pursuant to guidelines from CMS. A state match would be phased-in beginning 2020.

  - Small Business Health Plans: The Senate Bill also includes provisions aimed at increasing risk pooling, including the establishment of Small Business Health Plans (SBHPs). Sponsors of SBHPs are required to be certified by the Secretary of the Department of Labor, organized and maintained in good faith as a permanent entity, and be organized for purposes other than providing health benefits (*i.e.* bona fide trade associations). Sponsors may not condition membership on minimum group size. SBHPs would be regulated under the same standards as group health plans under ERISA.

- **Insurance Market Reforms.** The bill allows states to request certain insurance market reforms by submitting a waiver under Section 1332 of the ACA that the Secretary is required to approve so long as the plan does not increase the federal deficit. Through this process states could waive or make changes to the essential health benefits package, actuarial value requirements, and out-of-pocket maximums. Furthermore, it changes the permissible age variation in premium rates for health insurance from 3-to-1 to 5-to-1 for adults. States could also choose to further adjust the ratio through the 1332 waiver process. Notably, the bill does not include a continuous coverage provision, like that outlined in the House American Health Care Act.
- **Medicaid Expansion.** The Senate Bill proposes a three-year phase out of Medicaid eligibility expansion provided by the Affordable Care Act beginning in 2021 and the expansion would be fully eliminated by 2024. The enhanced match would equal 90 percent in 2020 and be phased down to 75 percent by 2023. States that expanded Medicaid eligibility would receive the enhanced match for individuals already enrolled in the program and who continue to meet eligibility requirements. The discussion draft eliminates essential health benefits for Medicaid by Dec. 31, 2019.
- **Medicaid Program Financing and Growth.** The Republican proposal drastically modifies financing and growth of the Medicaid system. The bill provides for a default option of adopting per capita cap financing as opposed to the current federal match system in 2020. Under this option, states that have excess aggregate medical assistance expenditures for a given year will see reduced payments the following year by ¼ of the excess aggregate medical assistance payments from the previous year. States are given the flexibility to choose the base period for determining the per capita cap. The base period must include eight consecutive fiscal quarters for which there is sufficient data and fall between the first quarter of 2014 and the third quarter of 2017. The proposal outlines five beneficiary categories (elderly, blind, and disabled adults, children, non-expansion adults, and expansion adults) for the purpose of establishing the cap. Growth of per capita caps would first be tied to medical inflation and then be transitioned to general inflation starting in 2025. Under the Senate Bill, states that spend less than their allotment will be granted quality performance payments bonus payments. States will also have the option to waive the per capita cap financing and instead pursue a block grant system subject to the approval of the Secretary of HHS.
- **Medicaid State Flexibility / Work Requirements**. Beginning October 1, 2017, states can choose to condition the Medicaid benefit for nondisabled, nonelderly, nonpregnant beneficiaries on satisfaction of a work requirement. Work requirements are determined, directed, and administered by individual states. Those successful in their implementation would be eligible for an additional five percent in federal funding. States that complete Medicaid eligibility redeterminations for expansion enrollees every six months would be provided an additional five percent in federal funding as well.

- **Disproportionate Share Hospital (DSH) Allotments.** In order to make Medicaid "more fair" for non-expansion states, the Senate Bill repeals DSH cuts starting in 2020 for Medicaid expansion states and provides additional funding to states that chose not to expand their Medicaid program based on the number of individuals uninsured.
- **Medicaid Provider Tax**. The Senate Bill reduces the tax on providers each year from 2021 to 2025.
- **Other Provisions.** The Senate Bill also contains other provisions to address issues that are of particular importance to certain legislators, including:
    - Abortion coverage: Prohibits the use of tax credits to buy insurance that includes coverage for abortions, except in cases of rape, incest, or to save the life of the mother.
    - Planned Parenthood: Eliminates federal funding for Planned Parenthood for one year, beginning on the date of the law's enactment. Two Republican Senators have previously hinted that they would not support a bill defunding Planned Parenthood, so this provision will be closely scrutinized during next week's vote-counting.
    - Substance abuse treatment: In further response to the nation's persistent opioid addiction crisis, the legislation would authorize and appropriate $2 billion in FY 2018 to provide HHS grants to states for substance abuse addiction recovery programs. Senators from states hit particularly hard by the opioid crisis had hoped for significantly more funding for addiction treatment programs and are expected to push for an increase during the forthcoming floor debate.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

James G. Flood
Partner – Washington, D.C.
Phone: +1 202.624.2716
Email: jflood@crowell.com

W. Scott Douglas
Senior Policy Director – Washington, D.C.
Phone: +1 202.508.8944
Email: sdouglas@crowell.com

Tim Shadyac
Director, Government Affairs – Washington, D.C.
Phone: +1 202.624.2958
Email: tshadyac@crowell.com