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Client Alert

Government Advocacy & Public Policy Practice Group

May 5, 2017

House Approves the American Health Care Act to Repeal and Replace the Affordable Care Act

Yesterday, by a vote of 217 to 213, the U.S. House of Representatives approved H.R. 1628, the American Health Care Act (AHCA), to repeal and replace the Patient Protection and Affordable Care Act (ACA). The House action follows committee markups by the House Ways and Means Committee, the Energy and Commerce Committee, and the Budget Committee, as well as a postponed House floor vote. After House Leadership pulled the bill from floor consideration on March 24, President Trump, Vice President Pence, and the House Republican Leadership spent weeks negotiating an agreement that would secure enough Republican votes for passage. The House adopted H.Res. 308, a rule enacting several policy amendments, and the AHCA was approved with only Republican support. All House Democrats and 20 House Republicans voted against the AHCA. Immediately prior to the AHCA vote, the House voted 429-0 to approve H.R. 2192, a bill to ensure that the AHCA state waiver provisions will apply to Members of Congress and congressional staff.

The Congressional Budget Office (CBO) estimate for the AHCA's impact on the federal deficit and on health insurance coverage was not available prior to the House vote. A March 23 CBO score for an earlier version of the AHCA estimated the bill would provide $150 billion in deficit reduction over 10 years and would result in 14 million individuals being uninsured in 2018, increasing to 24 million in 2026.

Pursuant to the provisions of the Fiscal Year 2017 budget resolution S.Con.Res. 3, adopted by the House and Senate in January 2017, H.R. 1628 now moves to the Senate, where it will be considered under the expedited procedures of budget reconciliation, with limited debate and requiring a simple majority vote for approval. The Senate is expected to make significant changes to the AHCA, and a working group comprising representatives from the Senate Budget, Finance, and Health, Education, Labor and Pensions Committees has already begun meeting on the legislation.

The following summarizes some of the key provisions contained in the House-approved AHCA:

Repeal of Individual and Employer Mandates for Insurance Coverage

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One of the immediate effects of H.R. 1628 is the repeal of the individual and employer responsibility provisions in the ACA, which required individuals to maintain - and employers to provide – health insurance meeting minimum essential coverage standards. The bill repeals these mandates and their respective penalties retroactive to January 1, 2016. Instead, this bill would allow insurers to collect a 30% surcharge on plan premiums for the initial plan year for individuals who have not maintained continuous coverage (lapse of 63 days or more during a 1-year look back period). This continuous coverage provision becomes effective for special enrollment periods in 2018, and for all applicable plan years beginning on or after January 1, 2019.

Financial Support for Consumers in the Individual Market

This bill repeals the current premium assistance program, which provides advanced premium tax credits for individuals purchasing insurance on the Exchanges, and phases in an alternative tax credit program that can be used for comprehensive health plans as well as for catastrophic or high-deductible health plans that are not on the Exchanges.

During the transition period (January 2018 – December 2019), the bill would:

- Increase tax credits for young adults with an annual income above 150% of the federal poverty level and decrease credits for adults age 50 or older with an annual income above that threshold;
- Allow tax credits to be used to purchase catastrophic coverage and other plans outside of the Exchange;
- Prohibit tax credits from being used on plans that cover abortion; and
- Require consumers to repay excess advance premium payments in full, regardless of income.

Beginning in 2020, the formula for tax credits would:

- Provide a flat tax credit adjusted by age, ranging from $2,000 for individuals age 29 or under up to $4,000 for individuals age 60 or above;
- Allow families to claim collective tax credits up to $14,000/year;
- Reduce available tax credits by 10% for individuals with annual income at or above $75,000, and eliminate tax credits for those with an annual income of $95,000 for single individuals up to age 29, and $115,000 for adults age 60 or above; and
- Allow credits to be applied to eligible (state certified) health insurance plans sold on or off the Exchange.

This bill would also:

- Eliminate the small business tax credit currently available for employers with fewer than 50 employees as of January 1, 2020;
- Eliminate cost-sharing subsidies for out-of-pocket costs effective January 1, 2020; and
- Provide flexibility to Health Savings Account and Flexible Spending Account rules, including increasing the allowable contribution limit and allowing FSA funds to be used on over-the-counter products; effective January 1, 2018.

Changes to Health Insurance Market Reforms

The most high-profile changes to the individual health insurance market were included in an amendment negotiated by Congressman Tom MacArthur (R-NJ) to give states flexibility to opt out of certain benefit design and consumer protection mandates under the ACA. A state would be able to waive essential health benefits, age rating restrictions, and the prohibition on pricing based on health status for applicable plans in that state. States seeking waivers to these ACA requirements must describe how waiving these requirements would stabilize the insurance market or increase access to health coverage in that state. More specifically:

- Beginning in 2018, states may request to expand the age rating band for insurance premiums from a ratio of 3:1 (under current law) to a ratio of 5:1 or greater.

- Beginning in 2019, states may request a waiver of the prohibition against underwriting based on health status, including the presence of pre-existing conditions, for individuals that had a break in continuous for 63 days or more.

- Beginning in 2020, states may request a waiver to redefine the category of essential health benefits that must be included in plans offered in that state's individual and small group markets.

In addition, beginning in 2020, insurers and health plan sponsors would not be required to offer plans meeting specific actuarial values (i.e., bronze, silver, gold, and platinum plan levels).

The AHCA continues other consumer protection provisions in the ACA, such as the requirement to extend dependent coverage up to age 26, limits on maximum out-of-pocket expenses, preventive services at no cost to plan members, and guaranteed issue requirements during open enrollment. However, critics of the bill have raised concerns about the unknown and potentially widespread effects of the waiver provisions, both to individuals in the individual market for those states were granted waivers and for individuals covered by employer-based insurance plans. For example, although a consumer's out-of-pocket costs must be capped for essential health benefits covered under a qualified health plan, a state's decision to omit a particular benefit category would likely mean that a maximum limit on out of pocket costs for that benefit category would no longer apply. Sponsors of employer-based health plans, which are required to base their coverage decisions on a benchmark plan within a state, could choose a less-generous state for the benchmark and thereby reduce the available benefits for their plan members.

Related to the provisions discussed above, the AHCA establishes the Patient and State Stability Fund (PSSF) to provide $138 billion in grants to states from 2018-2026 for initiatives to increase health care access and make plans more affordable to consumers in the market. This funding may be used to fund high risk pools, provide cost-sharing subsidies, or promote access to preventive services and would also include specific funding:

- $15 billion would be directed to a new Federal Invisible Risk Sharing Program (FIRSP), pursuant to an amendment proposed by Congressmen Gary Palmer (R-AL) and David Schweikert (R-AZ). FIRSP funds could be used in combination with any unallocated PSSF funds. CMS would be responsible for developing the FIRSP program and defining eligibility within 60 days of the enactment, and states would be able to assume operation of the program starting in 2020.

- $15 billion would be allocated to support maternity care, substance abuse, and mental health services.

- $8 billion, as secured by an amendment authored by Congressman Fred Upton (R-MI), would be available to states that have been granted a waiver from community rating pursuant to the MacArthur amendment

provisions above, to provide assistance to reduce premiums or other out-of-pocket costs to individuals who may who may be subject to an increase in their monthly premium rates as a result of the state waiver.

Amendments to Public Health Provisions

The AHCA repeals funding for the Prevention and Public Health Fund established under the ACA, prohibits funding for Planned Parenthood for one year, and provides $422 million in 2017 supplemental funding for community health centers.

Changes to the Medicaid Program

The AHCA makes a number of changes to the Medicaid program, codifying that Medicaid expansion is optional for states effective January 1, 2020 and eliminating the option to extend coverage of adults above 133% FPL as of December 31, 2017. Beginning in Fiscal Year 2020, federal payments for Medicaid will be made based on a per capita cap. The per enrollee cap (for elderly, blind & disabled, children, expansion adults, other adults) will be based on Fiscal Year 2016 expenditures (with certain exclusions), divided by the number of enrollees in each group, trended forward by application of Medical CPI.

- The AHCA repeals Medicaid Disproportionate Share Hospital (DSH) cuts for Fiscal Years 2020-2025. States that did not expand Medicaid would be exempt from DSH cuts for Fiscal Years 2018-2019.

- The AHCA provides safety net funding of $10 billion over five years, from Fiscal Years 2018-22, for non-expansion states. Allotments would be based upon the number of individuals below 138% FPL in 2015 as compared with the total number of individuals below 138% FPL in all non-expansion states in 2015.

- The AHCA would add a new state plan option to permit states to require non-disabled, non-elderly, non-pregnant adults to work as a condition of Medicaid eligibility.

Repeal of Healthcare-Related Taxes, User Fees, and Deduction Limits

The House bill would immediately eliminate nearly all of the taxes and annual fees implemented under the ACA, including:

- The tax on employee health insurance premiums and health plan benefits under IRC § 4980L;

- Taxes on amounts spent on over-the-counter medications in connection with employee benefits under IRC § 106;

- The increase of taxes on HSAs and Archer MSAs under IRC § 223(f)(4)(A);

- The fee imposed on sales of branded prescription drugs ends December 31, 2017;

- The medical device excise tax imposed under IRC § 4191(a)

- The annual fee imposed on health insurance providers;

- The increased chronic care tax under IRC § 213(a);

- The additional 0.9 percent Medicare tax on high-income earners;

- The excise tax on indoor tanning services;
- The 3.8% net investment tax for high-income earners under IRC § 2A;
- The limitation on contributions to FSAs under IRC § 125(i);
- The cap on corporate deductions for employee salary compensation as applied to insurance providers under IRC § 162(m)(6); and
- The elimination of the deduction for expenses allocable to Medicare Part D subsidies.

Finally, the proposed bill would further delay the effective date of the 40-percent excise tax on high-cost health plans (the "Cadillac tax") until 2026.