ACA COMPLIANCE BULLETIN

HIGHLIGHTS

- Senate Republicans released their ACA replacement legislation, called the Better Care Reconciliation Act.
- The Senate bill closely mirrors the House proposal—the American Health Care Act—including by:
  - Enhancing HSAs;
  - Repealing the employer and individual mandates; and
  - Preserving some ACA protections.

IMPORTANT DATES

June 22, 2017
Senate Republicans issued their own draft ACA repeal and replacement bill.

July 4, 2017
Senate Republicans were pushing for a vote before the July 4 recess, but have indicated that they need more time.

Provided By:
ABC Insurance Trust

SENATE RELEASES DRAFT ACA REPLACEMENT BILL

OVERVIEW

On June 22, 2017, Republicans in the U.S. Senate released a draft of their proposal to repeal and replace the Affordable Care Act (ACA), called the **Better Care Reconciliation Act** (BCRA). The Senate bill closely mirrors the proposal passed in the House of Representatives—the American Health Care Act (AHCA)—with some differences. For example, unlike the AHCA, the BCRA:

- ✓ Would enhance the ACA's Section 1332 State Innovation Waiver program; and
- ✓ Would not allow issuers to impose a surcharge for individuals who do not maintain continuous coverage.

IMPACT ON EMPLOYERS

The Senate has not voted on any ACA repeal or replacement proposal at this time. The proposal would need a simple majority vote in the Senate to pass. However, amendments may be made before a Senate vote is taken. Republicans were pushing for a vote prior to the Senate's July 4 recess, but have now indicated that they need more time. If the BCRA passes the Senate, it would need to go back to the House for approval before being signed into law by President Donald Trump.

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Legislative Process

On May 4, 2017, the U.S. House of Representatives voted 217-213 to pass the AHCA, which is their proposal to repeal and replace the ACA. As a result, the AHCA moved on to the Senate for consideration. In response, the Senate drafted the BCRA as their own ACA repeal and replacement bill. Because the Senate version differs from the House version, the proposal, if passed by the Senate, would need to be approved by the House before moving on to the president to be signed into law.

Both the House and Senate's proposed ACA repeal and replacement legislation are budget reconciliation bills, which mean that they can only address ACA provisions that directly relate to budgetary issues—specifically, federal spending and taxation. As a result, these proposals cannot fully repeal the ACA. Budget reconciliation legislation can be passed by both houses with a simple majority vote. However, a full repeal of the ACA must be introduced as a separate bill that would require 60 votes in the Senate to pass.

ACA Provisions Not Impacted

Like the AHCA, the BCRA would not affect the majority of the ACA. For example, the following key ACA provisions would remain in place:

- ✓ Cost-sharing limits on essential health benefits (EHBs) for non-grandfathered plans (currently $7,150 for self-only coverage and $14,300 for family coverage)
- ✓ Prohibition on lifetime and annual limits for EHBs
- ✓ Requirements to cover pre-existing conditions
- ✓ Coverage for adult children up to age 26
- ✓ Guaranteed availability and renewability of coverage
- ✓ Nondiscrimination rules (on the basis of race, nationality, disability, age or sex)
- ✓ Prohibition on health status underwriting

Similarly, the requirement to offer the EHB package for individual and small group plans also remains in place. In addition, age rating restrictions would also continue to apply, with the age ratio limit being revised to 5:1 (instead of 3:1), and states would be allowed to set their own limits.

Repealing the Employer and Individual Mandates

The ACA imposes both an employer and individual mandate. Like the AHCA, the BCRA would **reduce the penalties imposed under these provisions to zero**, effectively repealing both mandates (although they would technically still exist). These changes would apply retroactively for months beginning after Dec. 31, 2015.

The AHCA would have allowed issuers to add a 30 percent late-enrollment surcharge to the premium for applicants that had a lapse in coverage, in an effort to limit adverse selection and encourage individuals to maintain health coverage. However, the BCRA **removed this late-enrollment surcharge**, so that issuers may not charge higher premiums for individuals who do not maintain continuous coverage.

Note that **neither the AHCA nor the BCRA would repeal the ACA's reporting requirements** related to the employer and individual mandates (Section 6055 and Section 6056 reporting).

Replacing Health Insurance Subsidies with Tax Credits

The ACA currently offers federal subsidies in the form of premium tax credits and cost-sharing reductions to certain low-income individuals who purchase coverage through the Exchanges. Like the AHCA, the BCRA would repeal the cost-sharing reductions, effective in 2020. The BCRA would, however, technically leave the premium tax credit provision in place, with heavy amendments taking effect in 2020. These amendments would essentially replace the ACA's premium tax credits with a portable, monthly tax credit to all individuals that can be used to purchase individual health insurance coverage. The BCRA would:

- ✓ Restrict individual eligibility for premium tax credits to those with incomes not exceeding 350 percent of the federal poverty level (reduced from the current eligibility limit of 400 percent);
- ✓ Eliminate the cap on repaying Exchange subsidy overpayments; and
- ✓ Amend the "applicable percentage" schedule for determining the amount of premium tax credits an individual is eligible for, so that younger individuals would be eligible for higher tax credits.

The BCRA (like the AHCA) would also repeal the ACA's small business tax credit, beginning in 2020. In addition, between 2018 and 2020, the small business tax credit generally would not be available with respect to a qualified health plan that provides coverage relating to elective abortions.

State Waivers

The AHCA included an option for states to obtain limited waivers from certain ACA standards, in an effort to lower premiums and expand the number of insured. Specifically, states could apply for waivers from the EHB requirement and community rating rules (except strict limitations applied with respect to rating based on gender, age and health status). **The BCRA eliminated this state waiver option**.

However, the BCRA would provide states additional flexibility to use waivers that currently exist under Section 1332 of the ACA. The ACA's Section 1332 State Innovation Waivers are intended to allow states to pursue innovative strategies for providing their residents with access to high quality, affordable health insurance while retaining the basic protections of the ACA. Currently, four states have submitted applications for Section 1332 Waivers (Alaska, Hawaii, Vermont and Iowa; California submitted an application, but later withdrew it).

The BCRA would expand the ACA provisions that could be waived under Section 1332, and lower the standards that states must meet in order to be eligible for a Section 1332 Waiver. In addition, the BCRA would also allow

the Department of Health and Human Services (HHS) to fast-track waiver applications from states experiencing an urgent or emergency situation with respect to health insurance coverage within the state.

State Stability Fund

The AHCA would have established a Patient and State Stability Fund for 2018 through 2023 to provide funding to states that have applied for, and been granted, a state waiver from the ACA's community rating rules. Because the state waivers would not be available under the Senate proposal, the BCRA decreases the amount available through this fund, to be used to help address coverage and access disruption.

In addition, the BCRA would establish a second long-term state innovation fund that would dedicate $62 billion over eight years to encourage states to assist high-cost and low-income individuals to purchase health insurance by making it more affordable. In 2018, the BCRA would also provide $2 billion in state grants for substance abuse disorder treatment or recovery support services for individuals with mental health or substance use disorders to address the opioid crisis.

Enhancements to Health Savings Accounts (HSAs)

HSAs are tax-advantaged savings accounts that are tied to a high deductible health plan (HDHP), which can be used to pay for certain medical expenses. To incentivize use of HSAs, the BCRA (like the AHCA) would:

- **Increase the maximum HSA contribution limit**: The HSA contribution limit for 2017 is $3,400 for self-only coverage and $6,750 for family coverage. Beginning in 2018, the BCRA would allow HSA contributions up to the maximum out-of-pocket limits allowed by law (at least $6,550 for self-only coverage and $13,100 for family coverage).
- **Allow both spouses to make catch-up contributions to the same HSA**: The BCRA would allow both spouses of a married couple to make catch-up contributions to one HSA, beginning in 2018, if both spouses are eligible for catch-up contributions and either has family coverage.
- **Address expenses incurred prior to establishment of an HSA**: Under the BCRA, starting in 2018, if an HSA is established within 60 days after an individual's HDHP coverage begins, the HSA funds would be able to be used to pay for expenses incurred starting on the date the HDHP coverage began.

Relief from ACA Tax Changes

Like the AHCA, the BCRA would provide relief from many of the ACA's tax provisions. The affected tax provisions include the following:

- **Cadillac tax:** The ACA imposes a 40 percent excise tax on high cost employer-sponsored health coverage, effective in 2020. Like the AHCA, the BCRA would delay the effective date of the Cadillac tax to 2026.

- **Restrictions on using HSAs for over-the-counter (OTC) medications:** The ACA prohibits taxpayers from using certain tax-advantaged HSAs to help pay for OTC medications. Like the AHCA, the BCRA would allow these accounts to be used for OTC purchases, beginning in 2017.
- **Increased tax on withdrawals from HSAs:** Distributions from an HSA (or Archer medical savings account) that are not used for qualified medical expenses are includible in income and are generally subject to an additional tax. The ACA increased the tax rate on these distributions to 20 percent. Like the AHCA, the BCRA would lower the rate to pre-ACA percentages, beginning with distributions in 2017.
- **Health flexible spending account (FSA) limit:** The ACA limits the amount an individual may contribute to a health FSA to $2,500 (as adjusted each year). Like the AHCA, the BCRA would repeal the limitation on health FSA contributions for taxable years beginning in 2018.
- **Additional Medicare tax**: The ACA increased the Medicare tax rate for high-income individuals, requiring an additional 0.9 percent of wages, compensation and self-employment income over certain thresholds to be withheld. Like the AHCA, the BCRA would repeal this additional Medicare tax beginning in 2023.
- **Deduction limitation for Medicare Part D subsidy:** The ACA eliminated the ability for employers receiving the retiree drug subsidy to take a tax deduction on the value of this subsidy. Like the AHCA, the BCRA would repeal this ACA change and reinstate the business-expense deduction for retiree prescription drug costs without reduction by the amount of any federal subsidy, effective in 2017.

Beginning in 2018, both the AHCA and the BCRA would also repeal the medical devices excise tax, the health insurance providers fee and the fee on certain brand pharmaceutical manufacturers. The 10 percent sales tax on indoor tanning services would be repealed effective Oct. 1, 2017, to reflect the quarterly nature of this collected tax. Finally, the BCRA would also reduce the medical expense deduction income threshold to 7.5 percent, beginning in 2017.

Modernize Medicaid

Most of the differences between the AHCA and the BCRA relate to the Medicaid program. Like the AHCA, the BCRA would repeal the ACA's Medicaid expansion, and make certain other changes aimed at modernizing and strengthening the Medicaid program. For example, the BCRA would provide enhanced federal payments to states that already expanded their Medicaid programs, and then transition Medicaid's financing to a "per capita allotment" model starting in 2021, where per-enrollee limits would be imposed on federal payments to states. Unlike the AHCA, though, the BCRA would also guarantee coverage for children with medically complex disabilities and ease restrictions on coverage of treatment for mental diseases in psychiatric hospitals.