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HOUSE COMMITTEES RELEASE PROPOSED LEGISLATION TO REPEAL AND REPLACE THE ACA

On Monday, March 6, the U.S. House of Representatives Ways and Means and Energy and Commerce Committees released the American Health Care Act (AHCA), their **proposed** legislation to repeal and replace the Affordable Care Act (ACA) through the budget reconciliation process, which requires a simple majority vote of Congress. Key provisions of the bill, **if enacted**, would:

- retroactively repeal the individual and employer mandate penalties to months after December 31, 2015;
- delay the 40% "Cadillac Tax" on employer-sponsored health plans until 2025 (but would not include a cap on the employer-provided health care tax exclusion, which had been proposed in an earlier leaked draft of the AHCA and which some had expected would replace the Cadillac tax and fund the replacement provisions);
- make significant changes to the ACA insurance coverage and marketplace stabilization provisions;
- enhance health savings accounts (HSAs) and provide a monthly tax credit;
- provide relief from many of the ACA's taxes and fees; and
- curtail Medicaid reforms.

PRESERVATION OF A MAJORITY OF ACA'S PROTECTIONS

The AHCA would preserve a majority of the ACA's protections. For example, the following key ACA provisions would remain in place under the terms of the AHCA:

- out-of-pocket 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 dollar limits for EHBs;
- prohibition on pre-existing condition exclusions;
- 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); and
- prohibition on health status underwriting.

The requirement to offer the EHB package for individual and small group plans also remains in place, although the actuarial value requirement would be repealed. The bill would allow states to permit rates to vary by age with a ratio of 5:1 (instead of the current 3:1 ratio) for plan years beginning on or after January 1, 2018.

RETROACTIVE REPEAL TO 2016 OF INDIVIDUAL AND EMPLOYER MANDATE PENALTIES

The AHCA would eliminate both the individual and employer mandate penalties by reducing to "zero" effective retroactively to 2016 the Section 5000A individual shared responsibility tax ("individual mandate") and the Section 4980H employer shared responsibility tax ("employer mandate"). Practically, this would mean that individuals who paid the individual mandate penalty for 2016 might be able to request a refund. Large employers presumably would still be responsible for any penalties for 2015.

The ACA's reporting requirements under Section 6055 and 6056 are not expressly repealed in the proposed bill. However, the AHCA does outline a new prospective reporting process (discussed further below), under which employers would indicate an offer of health coverage on the employee's W-2 tax form, which would make the current reporting redundant. The Ways and Means section-by-section summary notes that "reconciliation rules limit the ability of Congress to repeal the current reporting, but, when the current reporting becomes redundant and replaced by the reporting mechanism called for in the bill, then the Secretary of the Treasury can stop enforcing reporting that is not needed for taxable purposes."

REPLACING LOW-INCOME PREMIUM TAX CREDITS WITH AGE-ADJUSTED TAX CREDITS BEGINNING IN 2020

The bill would completely repeal the ACA premium tax credits. In addition, the cost-sharing subsidies paid to insurers that covered low income individuals would be repealed beginning in 2020.

Under current law, the amount a household is required to pay towards their premiums is based on income. For households with incomes less than 400% of the federal poverty level there are certain limits on the amount the household is required to repay the federal government for the excess premium tax credits. The legislation would end current income-based caps on excess advance premium tax credits, requiring households that received excess premium tax credits to repay the entire excess amount, regardless of income, for 2018 and 2019. Under current law, qualified health plans must meet certain requirements for households to be eligible for the premium tax credit. The bill would also modify the credit so that the credit could be used for certain non-Exchange and "catastrophic-only" coverage. The modified tax credits may not be applied for the purchase of any coverage that includes abortions (but does not prohibit the purchase of a separate policy that includes abortions). The bill also revises the schedule under which an individual's or family's share of premiums is determined by adjusting for household income and the age of the individual or family members.

Beginning in 2020, age-adjusted tax credit would be available for individuals purchasing insurance in the individual market, with older individuals receiving larger credits. The tax credit is **refundable** and **advanceable** on a monthly-basis to pay for individual market premiums (i.e., not employer coverage) or any unsubsidized COBRA coverage from a former employer. The annual tax credit amount is established as follows per individual:

- $2,000 for those under 30;
- $2,500 for those between 30 and 40;
- $3,000 for those between 40 and 50;
- $3,500 for those between 50 and 60; and
- $4,000 for those over 60.

The new tax credits would be capped at $14,000 per family and would be adjusted for inflation over time. In addition, the tax credit begins to phase out when a taxpayer's modified adjusted gross income reaches $75,000 ($150,000 for joint filers) adjusted annually by the consumer price index plus one percentage point for inflation after 2020.

To be eligible for the tax credit, the individual may not be eligible for employer-sponsored health care coverage or government coverage such as Medicare or Medicaid. The proposed legislation would require employers to report on an employee's Form W-2 for each month of the year whether the employee has an offer of eligible employer-sponsored coverage. Insurers also would continue to have additional coverage reporting obligations regarding off-Exchange coverage for 2018 and 2019, and under a new Section 6050X for coverage that is eligible for the premium tax credit that would be available beginning in 2020.

REPEAL OF SMALL BUSINESS TAX CREDITS BEGINNING IN 2020

The ACHA would repeal the ACA's small business tax credit beginning in 2020. Between 2018 and 2020, under the proposal, the small business tax credit would generally not be available with respect to a qualified health plan that provides coverage relating to elective abortions.

PRESERVATION OF PRE-EXISTING CONDITIONS AND ADDITION OF A CONTINUOUS COVERAGE REQUIREMENT BEGINNING WITH OPEN ENROLLMENT IN 2019

The proposed legislation does not eliminate the ACA requirement that insurers must offer coverage to individuals without pre-existing condition exclusions. However, beginning in 2019, the bill would replace the individual mandate with a continuous coverage requirement. To avoid a 30% premium surcharge, individuals would have to prove that they did not have a gap in creditable coverage of at least 63 continuous days during the 12 months preceding coverage. The penalty would last for the remainder of the plan year for special enrollments during 2018 (such as a dependent aging out), and for the 12-month period beginning with the first day of the plan year for 2019 and succeeding years. One practical implication of this requirement may be renewed reporting of HIPAA creditable coverage that existed prior to the ACA's enactment.

ENHANCED HSAS BEGINNING IN 2018

The bill also contains various provisions to encourage use of health savings accounts (HSAs). The AHCA would:

- increase the maximum annual contribution limits on HSAs to match the annual deductible and out-of-pocket expenses under a high deductible health plan (HDHP) (at least $6,550 for individuals and $13,100 for families beginning next year);
- allow both spouses to make catch-up contributions to the same HSA; and
- allow HSAs to cover medical expenses incurred during the first 60 days of HDHP coverage as long as the HSA is established within that 60-day period, with all provisions effective for 2018.

REPEAL OF VARIOUS ACA TAXES

In addition to the individual and employer mandates and small business tax credits discussed above, below is a list of some of the other tax relief provisions in the ACHA, which, if the bill is enacted, would effectively revert these taxes to pre-ACA limits in most cases:

TAX OR FEE	REPEAL EFFECTIVE DATE
10% sales tax on indoor tanning services	Services performed after December 31, 2017
Annual fee on certain branded prescription drug tax	2018
Annual health insurance provider tax	2018
3.8% Net Investment Income Tax	Tax years beginning after December 31, 2017
Over-the-counter medication excluded as qualified medical expense	2018
Increase of tax on distributions from Health Savings Accounts (from 10% to 20%)	Distributions after December 31, 2017
Limitation on health flexible spending accounts ($2,600 in 2017)	Tax years after December 31, 2017
Elimination of the deduction for expenses allocable to Medicare Part D subsidy	Tax years beginning after December 31, 2017
Increase in income threshold for medical expense itemized deduction (from 7.5% to 10%)	2018
Additional 0.9% Medicare Hospital Insurance (HI) Tax	2018

The proposed legislation does not appear to repeal the Patient Center Outcomes Research Insurance (PCORI) fees at this time.

MEDICAID EXPANSION CURTAILED BEGINNING IN 2020

The bill would maintain the ACA Medicaid expansion through Jan. 1, 2020. At that time, enrollment would be frozen and states would no longer be able to admit new enrollees, with the expectation that enrollment would slowly decline as enrollees' incomes change and they shift off the program. Another significant change to Medicaid under the bill would be a conversion of Medicaid to a "per capita cap" system, where states would get a lump sum from the federal government for each enrollee. By contrast, under current Medicaid funding, the federal government has an open-ended commitment to paying all of a Medicaid enrollee's health care costs, regardless of how high those costs go.

NEXT STEPS

The AHCA is only the House Republicans' initial proposal to repeal and replace the ACA and there is likely to continue to be significant debate over the legislation. For instance, Sen. Rand Paul (R-Ky.) is among several other conservative senators who oppose the plan to provide income-based tax credits. Additionally, four key Republican senators, Sens. Rob Portman (Ohio), Shelley Moore Capito (W.Va.), Cory Gardner (Colo.) and Lisa Murkowski (Alaska), all from states that opted to expand Medicaid under the ACA, said they would oppose any new plan that does not include stability for Medicaid expansion populations or flexibility for states.

There is currently no Congressional Budget Office (CBO) score for the AHCA, which makes it impossible to determine if the bill complies with congressional PAYGO (pay-as-you-go) requirements. PAYGO compels new spending or tax changes not to add to the federal debt. Under the PAYGO rules a new proposal must either be "budget neutral" or offset with savings derived from existing funds.

Because the GOP leaders are maintaining a path to passage that does not include Democrats, the bill must be limited to the budget reconciliation process to avoid a filibuster and preserve the ability to pass by simple majority in the Senate. A potential problem with budget reconciliation is the Byrd rule which limits reconciliation provisions in the Senate to provisions that affect government revenues and outlays. This severely restricts what the bill is capable of achieving through substantive legislative change. Several provisions of the bill, such as the age rating or continuous coverage requirements, might violate the Byrd rule.

The Byrd rule also means that the bill cannot include several items that have regularly been raised as part of a replacement measure, such as tort reform, nor can it repeal McCarran-Ferguson, which would eliminate the antitrust exemption for insurance, remove states as the primary authority to regulate the industry, and create an insurance market expansion across state lines.

Any final legislation may look very different than the initial AHCA proposal and employers and other stakeholders should stay the course on ACA compliance at this time while they continue to monitor for changes as the AHCA makes its way through the legislative process.

About The Authors. This alert was prepared for Marsh & McLennan Agency by Marathas Barrow Weatherhead Lent LLP, a national law firm with recognized experts on the Affordable Care Act. Contact Peter Marathas or Stacy Barrow at pmarathas@marbarlaw.com or sbarrow@marbarlaw.com.