ROPES & GRAY

Health Care

Statement

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Update on Repeal and Replace

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On Thursday, July 13th, Senate Republicans released a new version of their Better Care Reconciliation Act (herein "BCRA 2.0") to repeal and replace the Affordable Care Act ("ACA"). We have summarized below the main changes to the Senate bill. On the whole, BCRA 2.0 largely maintains the basic elements of its first iteration. Somewhat surprisingly, BCRA 2.0 does little to reduce the original bill's cuts to Medicaid (i.e., it maintains a three-year phase out of the ACA's Medicaid expansion from 2021 through 2023 as well as the transition to a per capita cap model), nor does it provide for more generous premium tax credits than the original bill. Like the original bill, BCRA 2.0 defunds Planned Parenthood, repeals or delays most ACA taxes, expands health savings accounts, raises the age rating band, funds cost-sharing reductions (CSRs) for two years, and allows states to waive the ACA's essential health benefits requirements.

The Congressional Budget Office (CBO) is expected to release its estimate of this version in the near future. Majority Leader Mitch McConnell has pledged to bring the bill to the floor shortly thereafter. The prospects for passage remain murky, as McConnell can only afford to lose two Republican senators. After the release of BCRA 2.0, two Republican senators—conservative Rand Paul (R-KY) and centrist Susan Collins (R-ME)—said they would oppose a motion to proceed to the bill. Several senators, including conservative Mike Lee (R-UT) and moderates Shelley Moore Capito (R-WV), Dean Heller (R-NV), Lisa Murkowski (R-AK), and Rob Portman (R-OH) have not expressed their plans.

Changes in BCRA 2.0

1. **The "Cruz Amendment":** Most notably, BCRA 2.0 currently includes a modified version of an amendment recently pushed by Sen. Ted Cruz (R-TX). Beginning in 2020, Section 301 would allow insurers to offer health plans that do not comply with ACA regulations (e.g., essential health benefits and community rating for those with pre-existing conditions), so long as they also offer plans that are ACA-compliant. The bill would also provide a $70 billion fund between 2020 and 2026 to help states cover people with health problems. Many commentators have expressed concerns that segmenting the market will drive healthy people to the cheaper, non-compliant plans, while causing a death spiral of increasing premiums for those with preexisting conditions who must turn to the ACA-compliant plans. Whether this provision remains in the final bill will likely depend on CBO's score and the reaction of moderate Republicans who might view it as a subtle attempt to undercut protections for those with pre-existing conditions. The insurance industry denounced the amendment as "unworkable in any form" in a joint letter from the heads of America's Health Insurance Plans (AHIP) and the Blue Cross Blue Shield Association.

2. **Increased State Stability Funds:** BCRA 2.0 Section 106 adds an additional $70 billion for long-term state stability funding from 2022 to 2026. States can use such funds to help cover high-risk individuals, stabilize premiums and promote insurance competition (e.g., through reinsurance programs), increase provider reimbursement for certain services, and/or reduce out-of-pocket costs.

In total, BCRA 2.0 allocates $182 billion over nine years to short- and long-term insurance stability programs, up from $112 billion in the original bill. The bill also sets aside 1% of the funds in the $50 billion short-term reinsurance program for states where premiums are at least 75% higher than the national average. The Kaiser Family Foundation noted that only one state—Alaska—fits that description, which suggests this was included by McConnell to woo Alaska Senators Lisa Murkowski and Dan Sullivan.

3. **Keep Medicare Taxes on the Wealthy:** BCRA 2.0 keeps two ACA taxes on high-wealth individuals: (1) the 3.8% surtax on net investment income of high-wealth individuals; and (2) the 0.9% Medicare Hospital Insurance surtax on wages of wealthy individuals. The House bill and the original BCRA would have repealed the net investment tax immediately and the payroll surtax beginning in 2023. Preserving the two taxes will create roughly $230 billion in additional savings compared to the original Senate bill.

4. **Increased Funding for Opioid and Substance Abuse:** The original Senate bill provided $2 billion in 2018 for state grants to address the opioid epidemic. BCRA 2.0 Section 202 significantly increases funding for such grants to nearly $5 billion per year from 2018 through 2026 (for a total of nearly $45 billion). This was a top priority for Senators Capito and Portman.

5. **Expanded Catastrophic Plans:** Under the ACA, only individuals below 30 years of age or those who receive an individual mandate hardship waiver can enroll in catastrophic plans, which are defined as having an actuarial value below that of a bronze plan (i.e., roughly 60% AV). Starting in 2019, BCRA 2.0 Section 208 would allow anyone to purchase a catastrophic plan. Unlike under the ACA, individuals would be able to use premium tax credits to purchase such plans. To avoid the risk of market segmentation, BCRA 2.0 would require insurers to include catastrophic plan enrollees in the same risk pool as their other individual market enrollees.

6. **Expanded Health Savings Accounts (HSAs):** Effective 2018, BCRA 2.0 Section 118 would allow individuals to use tax-exempt HSA funds to pay premiums for high deductible health plans (HDHP) under certain circumstances. HSA funds, however, cannot be used to purchase a HDHP that covers abortion, except in cases of rape, incest, or when necessary to save the mother's life (Section 120).

7. **Medicaid DSH Calculation:** Under BCRA 2.0 Section 126, Medicaid Disproportionate Share Hospital (DSH) payments would be calculated on the basis of the number of uninsured individuals in the state, rather than the number of Medicaid beneficiaries. This would benefit states that did not expand Medicaid and, thus, likely have a higher uninsured rate.

8. **Preserves Medicaid "Stairstep" Children:** The House and original Senate bills repealed the ACA's expansion of mandatory Medicaid coverage for children aged 6 to 19 years from 100% or below the federal poverty level (FPL) to 133% FPL or below. BCRA 2.0 would *not* repeal this expansion.

9. **Medicaid Retroactive Coverage:** Under the ACA, states are required to cover Medicaid benefits retroactively for the three months preceding the month of enrollment for new beneficiaries. The House and original Senate bills would have limited this to one month of retroactive coverage. BCRA 2.0 Section 127 would move to one month for most Medicaid beneficiaries, but would maintain the three-month coverage period for the aged, blind, and disabled.

10. **Medicaid Per Capita Caps:** BCRA 2.0 Section 132 creates a process for the HHS Secretary to exclude increases in Medicaid spending caused by a public health emergency from a state's per capita cap. The aggregate limit for all excluded expenditures would be $5 billion between 2020 and 2024. Section 132 also allows states that recently expanded Medicaid to select a smaller base period for calculating its per capita cap.

11. **Expanded Medicaid Block Grants:** In lieu of the Medicaid per capita cap model, states could elect to receive a block grant for certain populations instead under both the House and Senate bills. The original Senate bill limited the block grant option to the category of non-elderly, non-disabled, and non-expansion adults. BCRA 2.0 Section 133 would also allow states to elect the block grant for expansion enrollees.

12. **Enhanced FMAP for Eligible Indians:** BCRA 2.0 Section 138 would provide for a 100% federal matching rate (FMAP) for services provided to a Medicaid beneficiary who is a member of an Indian tribe.

13. **Home and Community-Based Services:** BCRA 2.0 Section 132 would create a new, four-year demonstration project from 2020-2023 to fund state grants to expand and improve home and community-based services (HCBS). Priority would be given to states with low population densities. The bill allocates $8 billion to the program.

14. **Continuous Coverage Penalty:** The initial Senate bill repealed the individual mandate and did not have an alternative policy to encourage enrollment. A few days later, the Senate added a continuation of coverage provision that, beginning in 2019, would require individual market plans to impose a six-month waiting period before coverage goes into effect for enrollees who went more than 63 days without coverage in the past year. BCRA 2.0 Section 206 keeps this waiting period provision.

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