Wolters Kluwer

ACA Repeal And Replacement

May 5, 2017

Special Report

HIGHLIGHTS

- Repeal Of NII Tax
- Elimination Of Employer And Individual Mandates
- Repeal Of Medical Device Excise Tax
- Modifications To Code Sec. 36B Credit
- Enhancements To Health Savings Accounts
- Senate Expected To Make Changes

INSIDE

House Approves ACA Repeal And Replacement Bill; Benefits Remain

The House voted along party lines on May 4 to approve a repeal and replacement plan for the Affordable Care Act (ACA). The American Health Care Act (AHCA) (H.R. 1628), approved by a 217 to 213 margin, would eliminate most of the ACA's taxes, including the penalties connected with the individual and employer mandates. The House bill now moves to the Senate where changes are expected; indeed, the Senate may craft its own ACA repeal and replacement bill.

IMPACT. *Under the House bill, the ACA would not be repealed in its entirety at one instance. Republicans in Congress plan to use the budget reconciliation process to repeal and replace the ACA. The rules for reconciliation are complex and beyond the scope of this Briefing. Because of reconciliation and other considerations, some ACA provisions would be repealed over time or delayed. The Trump Administration and Republicans in Congress also plan to roll back and/or undo ACA regulations through administrative actions, particularly at the U.S. Department of Health and Human Services (HHS), and use regular order to pass other ACA repeal and replacement bills.*

IMPACT. *The differences between the original House AHCA bill that was pulled from a floor vote on March 24 and the final version largely involve non-tax changes. These changes, among others, include revisions to the scope of coverage of pre-existing conditions and the definition of essential health benefits, as well as a set-aside to increase premium health credits for qualified individuals.*

COMMENT. *This Briefing is intended to present a high-level overview of the House bill focusing on the tax provisions. The House bill also encompasses changes to Medicaid and many other non-tax provisions. Changes are expected when the Senate takes up consideration of the bill.*

TAX PROVISIONS

The ACA contains a number of tax provisions, put in place to encourage compliance or help offset the cost of the health care reform. The House bill would repeal all of the ACA's tax provisions with one exception. The House bill delays the excise tax on high-dollar health plans.

Individual and Employer Mandate Penalties

One key to the ACA's overall hope for success was to have as many individuals as possible covered by health insurance in an effort to spread the risk and lower the costs. Part of this goal was to be achieved through credits and other incentives; as well as through a penalty structure by way of the individual and employer mandates.

These mandates would be repealed under the House bill by retroactively reducing the penalties to zero.

IMPACT. *To discourage healthy individuals on insurance plans from leaving, which would tend to drive overall premiums up, the House bill would amend the ACA market reforms to* *permit insurance companies to impose up to a 30 percent premium penalty for up to a year on those who let their insurance lapse. This change, along with permission to raise premiums for older individuals and lower them for younger individuals, is designed as a substitute for the individual mandate.*

Net Investment Income Tax

The Net Investment Income Tax (NII tax) on individuals equals 3.8 percent of the lesser of net investment income for the tax year, or the excess, if any, of the individual's modified adjusted gross income (MAGI) for the tax year, over the threshold amount. The threshold amounts are $250,000 in the case of a taxpayer making a joint return or a surviving spouse, $125,000 in the case of a married taxpayer filing a separate return, and $200,000 in any other case. The House bill repeals the NII tax.

IMPACT. *The NII tax is expansive in its reach. Repeal would mean the loss of significant tax revenue. According to the Joint Committee on Taxation, repeal of the NII tax would cost approximately $158 billion over 10 years.*

Additional Medicare Tax

Closely-related to the NII tax is the 0.9 percent Additional Medicare tax on employee compensation and self-employment income above certain threshold amounts (the same as for the NII tax). An amendment to the House bill, however, would delay its repeal until 2023.

> "The House bill now moves to the Senate where changes are expected…."

Excise Tax on High-Dollar Health Plans

When the aggregate cost of qualified employer-sponsored health insurance coverage (known as "Cadillac plans") exceeds certain dollar amounts, the ACA imposes a 40 percent excise tax. The original effective date for this provision was for tax years beginning after 2017. In 2015 legislation delayed that date until 2020. The House bill would now delay the tax further.

Manager's Amendment – Accelerated Relief

Late additions to the final version of H.R. 1628, according to the House Rules Committee, included a handful of accelerated effective dates by way of the "Manager's Amendment" to the bill. Effective beginning in 2017 rather than in 2018 as first proposed, the Manager's Amendment would accelerate to the start of 2017 the repeal of:

- the net investment income tax,
- the over-the-counter medication tax,
- the tax on health savings accounts,
- the excise tax on medical devices,
- the Medicare tax increase,
- the tax on prescription medications, and
- the health insurance tax.

An amendment would also accelerate relief from the medical expense deduction, effective starting in 2017, by reducing the adjusted gross income (AGI) threshold from 10 percent to 5.8 percent.

Medical Device Excise Tax

The ACA imposes a 2.3 percent excise tax on the sale of certain medical devices. In 2015, Congress approved a moratorium on the excise tax for two years. The House bill would repeal the medical device tax.

Excise Tax on Tanning Services

Amounts paid for indoor tanning services are subject to a 10 percent excise tax, the first tax under the ACA to go into effect immediately in 2010. The House bill would repeal the excise tax on tanning services, effective July 1, 2017.

Health Insurance Provider Fee

The ACA imposes a fee on health insurance providers. In 2015, Congress imposed a moratorium on the fee for one year (2017). The House bill repeals the fee.

TAX CREDITS

The ACA created a number of tax credits to help offset the cost of health insurance coverage. The House bill repeals these credits but creates a new refundable credit for health insurance.

New Refundable Credit for Health Insurance Coverage

The House bill modifies and then repeals the Code Sec. 36B premium assistance tax credit, and creates an advanceable, refundable tax credit for individuals to purchase state-approved, major medical health insurance and unsubsidized COBRA coverage. Eligible individuals must not have access to government health insurance programs or an offer of health insurance from any employer. The credits would be adjusted by age:

Under age 30	$2,000
Between 30-39	$2,500
Between 40-49	$3,000
Between 50-59	$3,500
Over age 60	$4,000

Total age-based credits for any family would be capped. The credits and cap would be inflation adjusted.

IMPACT. *Despite the income caps, critics of the bill have raised the concern that many lower-income individuals would not receive as much premium assistance with this new credit as they did under the ACA. Concern has also been raised over not considering the varying cost of insurance dependent upon geographic area. Note that the credit is not available for abortion coverage except when the woman's life is at risk or a pregnancy resulting from rape or incest.*

COMMENT. *Before repeal of the Code Sec. 36B credit, the House plan would make some modifications to the credit, such as directing states to determine essential health benefits for purposes of the credit.*

A program of simplified reporting on Form W-2s to verify an offer of coverage will be established. This reporting will phase out the current reporting scheme under Code Sec. 6056.

IMPACT. *Although employers would be subject to less reporting under the proposed ACA repeal-and-replace, state jurisdictions may require stepped up reporting to monitor health insurance more oriented toward states, individual markets and state-run pools.*

IMPACT. *Because of procedural restrictions on a reconciliation bill Congress cannot use this bill to repeal the current employer reporting requirements under the ACA. However, the Treasury Secretary would be authorized to not enforce the ACA reporting when it is not needed for tax purposes.*

Code Sec. 45R Small Employer Credit

Qualified small employers are currently eligible for a tax credit if they offer health insurance to their employees. The House bill would repeal the Code Sec. 45R small employer credit.

OTHER PROVISIONS

Included in the House GOP plan are a number of other provisions, impacting the medical expense deduction, health savings accounts and more.

Medical Expense Deduction

The ACA revised the threshold to claim an itemized deduction for unreimbursed medical expenses from 7.5 percent of adjusted gross income (AGI) to 10 percent of AGI for tax years beginning after December 31, 2012. A manager's amendment to the bill would, in addition, lower the AGI floor to 5.8 percent.

IMPACT. *The ACA only changed the medical expense deduction for purposes of regular tax. The ACA left untouched the rules for the medical expense deduction for alternative minimum tax (AMT) purposes.*

	ACA	AHCA
Individuals	Mandate: Taxpayers must either maintain coverage or pay a penalty unless exempt	Incentive: Beginning in 2019, taxpayers who go longer than a certain number of days in the prior 12 months without continuous coverage may be charged a penalty of a certain percentage of their premium for the first 12 months of coverage
Employers	Mandate: Large employers must either provide affordable, minimum value coverage or pay a penalty	No mandate or incentive

Health Flexible Spending Arrangements

The ACA limits contributions to health flexible spending arrangements (health FSAs) to $2,500 (adjusted for inflation). The House bill would repeal this limitation.

Over-the-Counter Medicines

Generally, expenses for health FSAs and similar arrangements incurred for a medicine or drug are treated as a reimbursement for a medical expense only if the medicine or drug is a prescribed drug or insulin. The House bill eliminates this rule.

Remuneration

Under the ACA, the allowable deduction for applicable individual remuneration and deferred deduction remuneration attributable to services performed by applicable individuals that is otherwise deductible by a covered health insurance provider is limited to $500,000. The House bill would repeal this provision.

Retiree Drug Subsidy

The House bill would re-instate the business-expense deduction by employers for the value for providing retiree prescription drug subsidies without deduction for the amount of any federal subsidy, including Medicare Part D.

Branded Prescription Drug Fee

The ACA imposes an annual fee on each covered entity engaged in the business of manufacturing or importing branded prescription drugs. The House bill would repeal the branded prescription drug fee.

Health Savings Accounts

The House GOP plan would increase the annual limit on aggregate health savings account (HSA) contributions to equal the sum of the maximum of the sum of the annual deductible and out-of-pocket expenses permitted under a high deductible plan.

Also both spouses would effectively be allowed to make a catch-up contribution to a single HSA.

HSA withdrawals would be able to be used to pay qualified medical expenses incurred up to 60-days before the HSA is established by treating coverage as beginning on the date that an individual's coverage under a high deductible health plan begins.

	ACA	AHCA
Tax on Health Savings Accounts	20% tax on distributions from HSAs or Archer MSAs that are not used for qualified medical expenses	10% tax on distributions from HSAs (15% tax on Archer MSAs) that are not used for qualified medical expenses
Maximum Contribution Limit to HSAs	$3,400 for self-only coverage, $6,750 for family coverage in 2017	$6,550 for self-only coverage, $13,100 for family coverage
HSA Catch-Up Contributions	Each spouse may make catch-up contributions to their own HSA account	Both spouses may make contributions to one HSA
Medical Expenses Incurred Before HSA was Established	HSA is treated as established on the day it is actually established	If an HSA is established during the 60 day period beginning on the date that an individual's coverage under a HDHP begins, then HSA treated as having been established on date coverage begins under the HDHP

IMPACT. *Distributions from health savings accounts (HSAs) and Archer medical savings accounts (MSAs) not used to cover qualified medical expenses have been subject to an additional 20 percent tax as well as being included in taxable income. The House bill would revert the 20 percent tax back to 10 percent for HSAs and 15 percent for MSAs.*

COMMENT *According to House Speaker Paul Ryan, R-Wisc., the ACA repeal and replacement process will consist of three distinct phases. The bill being passed through budget reconciliation is phase 1. Next, Health and Human Service Secretary Tom Price will deregulate the marketplace to lower costs and stabilize the market," Ryan said. Finally the House will have "phase 3" bills to address certain issues that are not permitted to be passed through reconciliation because of budget rules, according to Ryan. Association health plans and interstate coverage are two of the issues Ryan expects to address in subsequent legislation.*

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