Segal Consulting

update

Compliance News for Staff Plans

December 22, 2016

Congress Likely to Amend Affordable Care Act in 2017

A few changes have been made to the Affordable Care Act since it was passed. Most notably, Public Law 114-113, which was successfully passed in 2015, delayed the effective date of the 40 percent excise tax on high-cost health plans (also known as the "Cadillac tax") from 2018 to 2020; suspended the health insurance provider fee for 2017; and suspended the medical device tax for 2016 and 2017.[1] More changes to the law are on the horizon.

Segal expects that the 115th Congress, which convenes in January 2017, will act quickly to repeal the parts of the Affordable Care Act that can be repealed without triggering a filibuster in the Senate. This will likely involve a process known as "budget reconciliation." This is the process that Congress followed in late 2015 and early 2016 when it passed HR 3762, legislation to repeal the significant parts of the Affordable Care Act. That legislation was vetoed by President Obama on January 8, 2016, and the House failed to override the veto on February 2, 2016. Congress will likely pass much of this legislation again, and this time a bill will be signed, not vetoed.

This *Update* provides background on the budget process, including what can — and cannot — be achieved through it. The *Update* also briefly addresses the regulatory and enforcement process and what may occur using those administrative tools.

Background on Budget Reconciliation

Budget reconciliation was created by Congress to allow expedited consideration of certain tax, spending and debt-limit legislation. Consequently, reconciliation bills are not subject to a filibuster in the Senate and can be passed with a simple majority, which is currently held by the Republican party. In addition, the scope of amendments is limited and reconciliation bills can only be debated for 20 hours in the Senate.

Under budget reconciliation, Congress could repeal the parts of the Affordable Care Act that have a budgetary impact. This includes taxes and expenditures, such as the 40 percent excise tax or the expenditure for insurance subsidies in the federal Marketplace and state Exchanges. Due to complicated rules governing budget reconciliation, some provisions (*e.g.*, the employer mandate) might not be repealed outright, but the associated tax penalties could be changed to "zero," thus eliminating the tax penalty for noncompliance. However,

Health Compliance News Highlights:

- Congress will likely pass significant modifications to the Affordable Care Act in January, which will be signed by the incoming president.
- The Affordable Care Act mandates that affect group health plans are unlikely to be repealed in early 2017.
- Tax reform could target the exclusion from income for employer-sponsored coverage in future legislation.

[1] For a summary of those changes, see Segal Consulting's December 22, 2015 *Update*, "2016 Appropriations Law Delays Three Affordable Care Act Taxes, Including the 40 Percent Excise Tax on High-Cost Health Plans."

Congress could not repeal those Affordable Care Act sections that do not affect the budget, such as the mandate to cover dependent children to age 26 or a requirement to cover certain benefits. If separate efforts are made to repeal these types of provisions it is likely that Senate Democrats would oppose the effort and filibuster these attempts.

At Risk of Repeal via Budget Reconciliation

Based on the budget reconciliation bill that Congress passed in 2015/2016 that was vetoed by President Obama, this section notes which parts of the Affordable Care Act could be repealed in 2017 through a budget reconciliation bill.

Individual Mandate

The amount of the penalty for not having health coverage — the greater of $695 or a percentage of income (indexed) — could be reduced to zero.

Employer Mandate

Like the individual mandate, the amount of the employer penalty — the original $2,000 or $3,000 penalties under Internal Revenue Code (IRC) Section 4980H(a) and (b) — could be reduced to zero. However, it is unclear what would happen to the employer and plan reporting obligations under IRC Sections 6055 and 6056 (the 1094 and 1095 forms). Those sections likely could not be repealed, and some form of reporting may continue to be necessary in the type of replacement system that is implemented.

The State Health Insurance Exchanges/Federal Marketplace

The subsidies for individuals to purchase coverage in the Exchanges/Marketplace could be reduced to zero through budget reconciliation even though the Affordable Care Act provisions creating the Exchanges could not be repealed through that process. In addition, the penalties that apply to individuals who receive a subsidy in error could be increased. The cost-sharing assistance available to low-income individuals purchasing coverage could also be eliminated, because these subsidies also flow from the federal government to the insurers.

Risk-Stabilization Programs

Collections and expenditures under the three risk-stabilization programs created by the Affordable Care Act (reinsurance, risk adjustment and risk corridors) could be reduced or eliminated through budget reconciliation. Transitional reinsurance expires in 2016, but the collection efforts in 2017 could be affected. Litigation concerning some of these programs initiated by some health insurers is ongoing.

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Medicaid Expansion

The optional state Medicaid expansion (to individuals with incomes up to 138 percent of the federal poverty level) could also be repealed. Under the Affordable Care Act, the federal government pays for nearly the entire cost of the expansion.

Small Business Tax Credit

This tax credit, available to very small employers (those with fewer than 25 full-time equivalent employees) that purchase coverage in the Exchanges and whose employees earn wages below a certain amount ($50,000 a year per full-time equivalent (indexed annually), could be repealed through budget reconciliation.

Taxes

The following tax provisions could be repealed:

- While the 40 percent excise tax on high-cost plans has already been delayed to 2020, and could be completely repealed in budget reconciliation, there are proposals to replace the tax with a cap on the exclusion from income for employer-sponsored health coverage. It is likely that the requirement for employers to report the cost of coverage on the Form W-2 would not be repealed in budget reconciliation.
- Other taxes that could be repealed include the medical device tax, the health insurance provider fee, the fee on manufacturers and importers of branded

prescription drugs, the Medicare payroll tax for certain high-income individuals and the Medicare tax on investment income.[2]

- The tax provision that sets the threshold for deducting medical expenses on personal income tax returns could be changed. For example, it could be lowered from the current 10 percent of adjusted gross income to the pre-Affordable Care Act level of 7.5 percent).

Various Provisions Affecting Account-Based Plans

These provisions could be changed through budget reconciliation:

- The cap on the salary reduction for Health Flexible Spending Arrangements could be modified or eliminated.
- The tax penalty for withdrawing money from Health Savings Accounts for non-medical expenses could be lowered (*e.g.*, from 20 percent to the pre-Affordable Care Act amount of 10 percent).
- The tax on reimbursing over-the-counter medications without a prescription could be eliminated, thus making these expenses reimbursable without a prescription.

Non-Deductibility of Medicare Part D Retiree Drug Subsidy (RDS)

The Affordable Care Act eliminated the ability of plan sponsors to take a tax deduction for prescription drug expenses reimbursed by the RDS program. These expenses could become tax deductible again.

The Medicare Part D program itself is unlikely to be modified in budget reconciliation. Therefore, the RDS and Employer Group Waiver Programs (EGWPs), and funding for them, are unlikely to change in the immediate future.

Provisions *Not* Subject to Repeal via Budget Reconciliation

Many provisions in the Affordable Care Act could *not* be repealed using the budget reconciliation process. These include provisions that directly affect group health plans,[3] such as the following coverage or benefit mandates (not an exhaustive list):

- Extension of coverage to adult children to age 26;
- Ban on preexisting condition exclusions;
- Ban on annual and lifetime dollar limits on essential health benefits (EHB);[4]
- Ban on retroactive termination of coverage (*i.e.*, rescissions);
- Ban on waiting periods exceeding 90 days;
- Requirement to provide a Summary of Benefits and Coverage (SBC);[5]

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[2] HR 3762 did not repeal the comparative effectiveness research fees.

[3] Retiree-only group health plans are already exempt from many of these requirements, and that is unlikely to change in budget reconciliation.

[4] EHBs are defined in the Affordable Care Act to include 10 services: Ambulatory patient services, emergency services, hospitalization, pregnancy, maternity, and newborn care, mental health and substance use disorder services, prescription drugs, rehabilitative and habilitative services, laboratory services, preventive benefits, and pediatric services, including oral and vision care.

[5] While this provision in its entirely could not be repealed through budget reconciliation, the incoming administration could re-design the SBC forms or provide greater flexibility in how they are completed.

- Requirement to pay for certain preventive services without cost sharing[6] (applicable to non-grandfathered plans);
- Cost-sharing limit (applicable to non-grandfathered plans);
- Revised internal appeals procedures and external review by an Independent Review Organization (IRO) (applicable to non-grandfathered plans);
- Provisions governing payment for emergency room services in hospitals (applicable to non-grandfathered plans);
- Coverage for routine patient costs incurred in connection with certain approved clinical trials for cancer or other life-threatening conditions (applicable to non-grandfathered plans); and
- Provider nondiscrimination rules (applicable to non-grandfathered plans).

Nondiscrimination requirements under Section 1557 of the Affordable Care Act also could not be repealed through budget reconciliation, but the final regulations released in May 2016 could be re-proposed. These rules prohibit covered entities (including plans that receive the Medicare Part D RDS program) from discriminating on the basis of race, color, national origin, sex, age or disability. The most controversial aspect of these rules is the interpretation that discrimination on the basis of sex encompasses discrimination on the basis of gender identity, thus effectively requiring covered entities to cover transgender health benefits. Other provisions in these regulations require protections for individuals with limited English proficiency. In addition, litigation is pending that could affect the definition of "sex discrimination" under the law.

Insurance-market reforms affecting insurers in the individual and small group markets could not be repealed through this process. These include the requirement to cover the full range of essential health benefits, requirements relating to medical loss ratios, and the rating rules that prohibit medical underwriting and limit age rating to a 3:1 ratio.

Regulatory/Enforcement Process

In addition to legislative change, the incoming administration also has both regulatory and enforcement tools available to it to attempt to change or undermine portions of the Affordable Care Act. While existing final regulations could generally be overturned only through formal rulemaking (after notice and comment), there is a great deal of sub-regulatory guidance on the ACA, such as answers to frequently asked questions (FAQs), that could be changed or removed without a formal process. The incoming Administration will also set its own enforcement priorities and could clearly signal a different set of priorities.

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The Bottom Line

It seems certain that Congress will proceed with the budget reconciliation process when the new Congress convenes in January. It is even possible that Congress will put a reconciliation bill on the new president's desk on, or soon after, January 20. Many decisions remain to be made by leaders in Congress, including what would be included in the bill, when the changes would take effect, and how soon Congress will turn to the "replace-Obamacare" portion of the Republicans' legislative agenda.

[6] While this provision in its entirely could not be repealed through budget reconciliation, many believe that the incoming administration might amend the list of required women's preventive services to, for example, eliminate or modify the requirement to pay for all FDA-approved contraception methods. This list was created by the Health Resources & Services Administration, which is part of the Department of Health and Human Services. Additionally, the administration might seek to expand the group of plan sponsors who could decline to provide this coverage (or other coverage) for religious or moral reasons.

While these efforts have profound implications for the country as a whole, especially for the people who benefit from the Medicaid expansion or the subsidies to purchase coverage on the Exchanges/Marketplace, sponsors of large group health plans are unlikely to see any immediate, significant changes. The effective repeal of the employer penalty would be the most significant change, especially if this is made retroactive.

On the “replace” side of the agenda, fundamental questions loom, including the stability of the individual insurance market and whether future proposals would cap the tax exclusion for employer-provided coverage. Clearly, all eyes will be on Congress when it convenes in January 2017.

How Segal Can Help

Segal will keep you informed about developments related to the Affordable Care Act. As always, plan sponsors should rely on legal counsel for authoritative advice on laws and regulations.

Questions?

For more information about how these new rules may affect your plan, please contact your Segal consultant or the Segal office nearest you.

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