

Holland & Knight

800 17th Street, N.W., Suite 1100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

Memorandum

Date: July 14, 2017

To: Healthcare Clients

From: Holland & Knight

Re: Revisions to the Senate Better Care Reconciliation Act

Yesterday, Senate Republicans unveiled a revised version of the *Better Care Reconciliation Act* (BCRA), their plan to replace the *Affordable Care Act* (ACA). The new version comes after Senate Majority Leader Mitch McConnell (R-KY) delayed a vote to proceed to the legislation because he lacked the necessary 50 votes.

The revised bill is similar in many respects to the [original version](#) (see *H&K highlights of the original version in the provided hyperlink*)—it would still repeal the employer and individual mandates and still includes significant reforms to Medicaid. However, the new bill also includes several noteworthy changes, such as a proposal offered by Senators Ted Cruz (R-TX) and Mike Lee (R-UT) termed the *Consumer Freedom Amendment*. Under this proposal, an insurer must certify that they offer, through a state health exchange at least three qualified health plans (QHPs) throughout a state rating area. One of these plans must be a Gold level QHP, one a Silver Level QHP and one a benchmark (i.e. “Bronze” 58% actuarial value) plan. If so, the insurer could elect to also offer in such rating area an off-exchange plan that does not necessarily meet numerous insurance regulatory requirements that otherwise apply to individual plans under the ACA, such as minimum essential health benefits requirements. A purchaser of such a non-ACA compliant plan could not receive a federal premium tax credit to subsidize the cost of such a plan. Insurers who offer the required three (or more) exchange plans and the non-compliant off-exchange plan in a rating area could then apply to the Federal government to receive a portion of a \$70 billion fund that they would then use to defray some of the cost of covering “high risk” individuals enrolled in one of their qualified exchange plans. The idea behind this proposal is to allow a lower cost “skinnier” insurance product to be made available in a rating area while providing federal funds to mitigate the potential impact on premiums for those remaining in the on-exchange QHP product. Those funds would be targeted at the higher cost individuals. This is known as an “invisible” risk pool arrangement. There are sharp differences of opinion as to whether this would create a workable arrangement (i.e. a low-cost option and an affordable on-exchange option), or whether it would split the risk pool in a rating area and not provide an adequate invisible risk subsidy and thereby render the QHP plans prohibitively expensive. The Congressional Budget Office (CBO) is evaluating the revised BCRA both with and without the Cruz/Lee proposal. The revised bill also contains significant new funding for opioid treatment and money for states meant to lower premiums for high-cost enrollees.

Like the original BCRA, the revised bill would fundamentally change Medicaid financing through per-capita-caps and block grants. However, some alterations were made in the revised discussion draft. Specifically, the maximum amount of excluded expenditures for public health emergencies in a given fiscal year would be equal to the amount by which (1) medical assistance expenditures for 1903A enrollees in

areas of the state subject to public health emergency declarations during the period of such declarations exceeds (2) the medical assistance expenditures for such enrollees in such area during the most recent fiscal year or portion of a fiscal year of equal length before the public health emergency was declared. However, the public health emergency funding would last only five years and would max out at \$5 billion in additional payments across all states.

As in the original draft bill, from 2020 to 2024, the cap's growth rate for adult and child beneficiaries would still be tied to the Consumer Price Index for Medical Care (CPI-M). The growth rate for adults with disabilities and the elderly would be tied to CPI-M plus one percentage point. From 2025 on, the cap's growth rate would be tied to CPI-U, a broader measure of inflation across the economy.

The bill also would still phase out enhanced federal funding for the ACA's Medicaid expansion beginning in 2021. However, the revised bill will:

- Allow states to apply for 1115 waivers from Medicaid spending limits that aim to continue and/or improve community-based and home care services for the elderly and individuals with disabilities;
- Loosen restrictions around block grants by letting states that expanded Medicaid opt to cover the expansion population under their block grants (in addition to the non-elderly, non-disabled adults who could be covered under block grants in the original BCRA).

For certain non-expansion states eligible for an increase in Medicaid Disproportionate Share Hospital (DSH) payments, the revised bill would increase such payments relative to the number of uninsured individuals in such state, rather than the number of Medicaid enrollees. This will result in an increase in DSH allotment for states with a low-DSH allotment relative to a high uninsured population.

The revised bill would also:

- Retain taxes on Medicare Health Insurance (HI) Tax, net investment income, and executive compensation for particular health insurance executives;
- Allow eligible individuals to receive tax credits for catastrophic plans that cover three primary care visits and limit patients' out-of-pocket costs;
- Allow individuals to use Health Savings Accounts to pay their premiums;
- Provide \$182 billion for innovations that states believe would reduce premiums and out-of-pocket costs (the original BCRA provided \$112 billion for such innovations); and
- Provide approximately \$45 billion to help fight the opioid crisis (the original BCRA provided \$2 billion for this purpose) and \$50.4 million for FY 2018-FY 2022 for research on addiction.

It is uncertain whether this version of the bill will pass the Senate. Shortly after its release, Sen. Susan Collins (R-ME) and Sen. Rand Paul (R-KY) both said they intend to vote against letting the bill advance. Discussions are still fluid even after the release of the revised BCRA. GOP leaders are telling concerned Republican senators that they can try to change the bill during the open amendment process that follows the first procedural vote. Senate Democrats remain vehemently opposed. A procedural vote and CBO score are expected next week. If the Republicans secure sufficient votes to proceed to consideration of the legislation, numerous amendments are expected to be offered by both Republicans and Democrats.

The Holland & Knight team will continue to provide updates as developments warrant.

Update as of 7/17: Senate Majority Leader Mitch McConnell this weekend delayed plans to hold a procedural vote this week to move forward with the Senate's health care reform bill while Sen. John McCain (R-AZ) recovers from surgery to remove a blood clot from above his left eye. The Congressional Budget Office also is no longer expected to release a revised score of the bill today.