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ATTORNEYS AT LAW

MEMORANDUM

To: ATRA

From: Peter Thomas, Peggy Tighe, Steve Postal, Leif Brierley, and Jill O'Brien

Date: June 26, 2017

Re: Senate Releases Draft of the Better Care Reconciliation Act (BCRA)

Summary

On Thursday, June 22, 2017, the U.S. Senate Committee on the Budget released draft legislation to repeal and replace the Patient Protection and Affordable Care Act (ACA), Public Law 111–148 and Public Law 111–152). The draft bill, entitled the Better Care Reconciliation Act (BCRA) of 2017, was accompanied by a synopsis, found here. The legislation would significantly impact the Medicaid program and the individual and small group markets for health care coverage, with many of its sections repealing or significantly altering key components of the ACA, which has been federal law since 2010. The Senate draft follows the passage of the American Health Care Act (AHCA) of 2017 (H.R. 1628) in the House on May 4 by a vote of 217-213, and much of the Senate bill mirrors the framework of the AHCA.

The nonpartisan Congressional Budget Office (CBO) plans to release its analysis of the cost of the legislation and the expected impacts of the bill's various provisions on Monday or Tuesday of this week. The Senate parliamentarian is also expected to decide whether certain provisions of the bill may remain included under the budget reconciliation rules. The Senate is expected to debate the bill on Wednesday and is currently scheduled to begin voting on Thursday. Currently, at least five Republican Senators oppose the bill in its current form, meaning the legislation as drafted does not have the votes to pass. However, changes to the draft legislation can be expected this week. If passed, the Senate bill will return to the House either for an expeditious vote or the House will appoint conferees to negotiate a conference agreement.

This memorandum offers a summary of the Senate draft legislation, current as of June 26, as compared with the House bill and the ACA.

Medicaid Reforms

- **Overall Structure**
  - **ACA.** The ACA does not change the basic structure of the "original" Medicaid program. It mainly focuses on expanding Medicaid eligibility to cover more low income adults. Costs are shared under Medicaid by the federal government and the states.
  - **BCRA.** Beginning in 2020, the Senate bill changes the federal entitlement program to either a block grant or a per-capita cap structure, per the state's

decision. Either option would mean a fixed federal revenue stream to the states each year, instead of open-ended or "entitlement" funding. While payments would increase every year to reflect inflation, the Senate bill contains lower growth rates than the House bill, particularly in the out years. Certain populations such as children with disabilities would be exempted from payment caps.

- **Work Requirement**
  - **ACA.** The ACA does not contain work requirements.
  - **BCRA.** The Senate bill allows states to have a work requirement for Medicaid coverage for recipients that are not pregnant, disabled, or elderly. This same provision is in the House bill.

- **Medicaid Expansion**
  - **ACA.** Under the ACA, thirty-one states and Washington, D.C. opted to expand their Medicaid program eligibility to low-income adults without children. These states receive enhanced federal payments paid for almost entirely by the federal government.
  - **BCRA.** The enhanced federal payments will continue for three years under the Senate bill. These enhanced payments will then decrease over a period of three years beginning in 2021, culminating in traditional Medicaid funding rates. The House bill would eliminate additional Medicaid expansion funding by 2020, while the Senate bill would phase out these funds from 2020 through 2024.

- **Medicaid's Essential Health Benefits Package**
  - **ACA.** The ACA required Medicaid "expansion" plans to provide the "essential health benefits" package, as required of plans in the individual and small group markets.
  - **BCRA.** The Senate bill repeals this requirement. This is the same as in the House bill.

<u>Insurance Reforms</u>

The Senate draft bill makes significant changes to the structure, financing, and coverage of the individual and small group health insurance markets. Among the key insurance provisions addressed by the Senate draft bill are:

- **Individual Mandate**
  - **ACA.** The ACA requires U.S. citizens and legal residents to have health insurance coverage. Individuals without coverage are assessed a tax penalty of the greater of $695 per year, indexed by inflation, or 2.5% of household income. Exemptions are granted for affordability, financial hardship, religious objections, and other reasons.[1] That penalty grows over time and this current tax year, it can reach as high as $2000 for some taxpayers.

[1] http://kff.org/interactive/proposals-to-replace-the-affordable-care-act/

  - **BCRA.** Like the House bill, the Senate draft bill eliminates the financial penalties for non-compliance with the individual mandate, retroactive to December 31, 2015, effectively repealing the ACA mandate that all individuals have health insurance coverage.

- **Employer Mandate**
  - **ACA.** Requires employers with 50 or more full-time employees to offer coverage that meets standards for affordability and minimum value or face a penalty. Employers with more than 200 employees must auto-enroll employees into a group health plan, although employees may opt out of coverage.
  - **BCRA.** The Senate draft bill, like the House bill, eliminates the financial penalties on employers that fail to comply with the employer mandate, retroactive to December 31, 2015, effectively repealing the ACA mandate that employers offer health insurance coverage to their employees.

- **Insurance Marketplaces**
  - **ACA.** The ACA set up health insurance marketplaces where people can shop for, compare, and purchase health plan coverage. All health insurance plans sold on the marketplaces are required to provide a basic set of benefits and follow other federal insurance rules.
  - **BCRA.** Under both the Senate and the House bills, the marketplaces are left intact but it remains unclear how they will operate, as insurers will be able to offer health plans that do not offer the basic set of benefits.

- **State Innovation Waivers**
  - **ACA.** The ACA contains Section 1332 state innovation waivers that allow states to implement innovative ways to provide access to quality health care that can only be granted if the states comply with requirements for coverage, affordability, and comprehensiveness. The waivers must also be deficit neutral.
  - **House bill.** The House bill allowed for state waivers for age bands, EHBs and pre-existing conditions under certain circumstances.
  - **BCRA.** The Senate draft bill grants $2 billion in funding between FY 2017 and FY 2019 to incentivize states to seek expedited approval for 1332 waivers. The only requirement for these expedited waivers is that they not increase the federal deficit. Under these waivers, states will be able to waive essential health benefits (EHBs), actuarial value (AV) levels, cost sharing rules, the requirement to have an Exchange, and a single Marketplace risk pool. Although the bill does not specifically address lifetime limits in benefits, this would clearly be affected if a state were to redefine EHB.

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- **Medical Loss Ratio**
  - **ACA.** The ACA requires most insurance companies to spend at least 80% of their premium income on health care claims and quality improvement, leaving the remaining 20% for administration, marketing, and profit.[2] This is known as the medical loss ratio (MLR).
  - **BCRA.** Starting in 2019, the Senate bill allows states to define their own "medical loss ratio." (MLR). The House bill has no such provision.

- **Age-based Premium Rating**
  - **ACA.** Under the Affordable Care Act, insurers are allowed to charge up to three times more for coverage to older beneficiaries.
  - **BCRA.** The Senate bill will allow insurers to charge older beneficiaries up to five times more than younger beneficiaries for the same benefits, the same as the House bill. This is expected to lead to less expensive coverage for younger enrollees and more expensive coverage for older enrollees.

- **Dependent Coverage.** Like the ACA and the House bill, the Senate bill maintains protections for young adults to stay on their parent's plan until age 26.

- **Risk Pool Funding**
  - **House bill.** The House bill provides $115 billion for the Patient and State Stability Fund, $15 billion for the Federal Invisible Risk Sharing Program, and $8 billion to states that opted out of community waiver regulations.
  - **BCRA.** The Senate bill provides for a Long-Term State Innovation Fund, which will provide $62 billion over 8 years to states so they can provide coverage for high-risk and low-income residents. The Senate bill also provides for a Short-Term Stabilization Fund which will provide $15 billion per year in 2018 and 2019, and $10 billion per year in 2020 and 2021, to assist in balancing premium costs. The Senate bill also provides for $5 billion for federal reinsurance, the remainder of which can be used for out-of-pocket spending, high-cost patients, and invisible risk pools.

- **Coverage for People With Preexisting Medical Conditions**
  - **ACA.** The ACA guarantees health care coverage for persons with pre-existing conditions and prevents insurers from charging individuals with pre-existing medical conditions more for their insurance coverage.
  - **House bill.** The House bill alters the ACA provision prohibiting pre-existing condition exclusions, allowing insurers to charge enrollees more for certain preexisting conditions, and to deny coverage altogether in certain cases. The House bill provides states access to additional federal funding to assist individuals with costly insurance policies and/or medical conditions.

[2] http://www.kff.org/health-reform/fact-sheet/explaining-health-care-reform-medical-loss-ratio-mlr/

  - **BCRA.** The Senate draft bill retains the ACA provision that insurance companies cannot deny persons coverage based on a pre-existing condition. However, the draft bill allows states to obtain waivers to alter the "essential health benefits" and the actuarial value of benefits established by the ACA (see section on State Innovation Waivers). This would give insurers some discretion over the types of services covered in particular plans, and may change what insurers are able to charge for more comprehensive coverage.

- **Small business health plans.** Unlike the House bill, which has no such provision, the Senate bill establishes such plans to allow trade and membership associations to provide health insurance exempt from a host of state and federal insurance regulations. These insurance plans would be able to be sold across state lines without the approval of the Secretary of Labor or state insurance commissioners.

- **Health Savings Accounts**. The BCRA, like the House bill, expands the use of tax-free Health Savings Accounts, including increased contribution limits and catch up contributions for married spouses.

Taxes and Financing

The Senate draft bill repeals many of the funding mechanisms (i.e., taxes) used to fund expansion of coverage under the ACA, and addresses some deductions and tax-related provisions related to current law, including:

- **Premium Tax Credits**
  - **ACA.** Current law provides refundable premium tax credits to individuals or families based on their income, ranging from 100-400 percent of the federal poverty level (FPL), to assist with the purchase of health insurance on the individual market.
  - **BCRA.** The Senate draft bill will preserve this federal assistance from the ACA through 2019 for lower-income Americans on the individual market. Eligibility thereafter would be limited to 350 percent of the federal poverty level (FPL) but extended to more low-income people who don't qualify for Medicaid. The amount of the insurance subsidy will be linked to income.
  - **House bill.** Under the House bill, consumers could still receive subsidies if their household income does not exceed $75,000. The formula for determining the size of the subsidy would be based on age, not income.

- **Pharmaceutical, Device, Insurance, and Medicare Taxes**
  - **ACA.** The ACA imposed new taxes on over-the-counter medications, a 2.3 percent excise tax on the sale of certain medical devices (the "medical device tax"), and new taxes on health insurers and pharmaceutical manufacturers.
  - **BCRA.** The Senate draft bill, like the House bill, repeals these taxes.

- **"Cadillac" Tax**
  - **ACA.** The law currently will apply a tax penalty on high-cost ("Cadillac") employer-sponsored health plans beginning in 2020.
  - **BCRA.** The Senate draft bill, like the House bill, delays this tax through December 31, 2025.

Planned Parenthood Funding

- **ACA.** The Affordable Care Act provides federal funds to Planned Parenthood through Medicaid reimbursements and grants in accordance with federal law.
- **BCRA.** The Senate proposal blocks Medicaid reimbursements from Planned Parenthood for a period of one year. Sec. 124 of the Senate Draft prohibits federal funds available to states through direct spending from being provided to a "prohibited entity" for the period of one year, which is defined in the draft bill. The House bill contains similar language.

Mental Health

- **BCRA.** The Senate proposal states that there is $2 billion for FY 2018 appropriated for the Secretary of Health and Human Services to provide grants to States to support substance use disorder treatment and recovery support services for individuals with mental or substance use disorders. The proposal states that these funds shall remain available until expended.