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Senate unveils PPACA repeal-and-replacement bill; outlook unclear as modifications seem likely

Senate Republican leaders unveiled draft legislation June 22 aimed at repealing and replacing major elements of the Patient Protection and Affordable Care Act of 2010 (PPACA); but its outlook for passage remains unclear amid dissent within the caucus, and modifications seem likely to be offered either before, or in conjunction with, its consideration on the Senate floor, something that Majority Leader Mitch McConnell, R-Ky., hopes will happen before lawmakers leave for the Independence Day recess. (The last scheduled working day before the recess is June 30.)

The big picture

The draft bill – formally known as the Better Coverage Reconciliation Act of 2017 – generally follows the contours of the PPACA repeal-and-replacement package that narrowly cleared the House on May 4. (For prior coverage, see *Tax News & Views*, Vol. 18, No. 16, May 5, 2017.) But the Senate proposal would temper key aspects of the House measure that some moderate Republicans found objectionable. For example, it phases out under the PPACA's Medicaid expansion over three years beginning in 2021 (the House bill would freeze new enrollment in 2020) and proposes a

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more generous premium tax credit regime to assist those who do not receive coverage through their employer or a government program such as Medicare or Medicaid.
URL: https://www.budget.senate.gov/bettercare
URL: http://newsletters.usdbriefs.com/2017/Tax/TNV/170505_1.html

Familiar language (so far) on taxes: On taxes, the Senate draft hews quite closely the House-passed bill and would, in general, eliminate most of new taxes enacted as part of the PPACA on a more-or-less immediate basis. But those provisions could be modified, particularly if Republicans need to identify savings to offset changes to the bill that may emerge in the coming days. (The tax provisions are discussed in more detail below. A table comparing tax provisions in the House and Senate tax proposals with current law is available from Deloitte Tax LLP.)
URL: http://newsletters.usdbriefs.com/2017/Tax/TNV/170623_1suppA.pdf

Notable coverage provisions: The Senate plan would leave in place PPACA requirements around covering individuals with pre-existing conditions and allowing children to stay on their parents' plan through age 26, while funding insurer reimbursements related to covering certain low-income Americans – payments which are the subject of current litigation – through 2019.

Structural change to Medicaid: At least one Senate change actually falls to the right of the House-passed bill, however. With respect to traditional Medicaid (i.e., outside the PPACA Medicaid expansion), the Senate draft, like the House proposal, provides that beginning in 2020 the program would no longer be structured as an open-ended entitlement and instead would allow states to choose between receiving either a block grant or a "per capita cap." But beginning in the 2025, the Senate measure would base those payments on a lower growth rate.

Most PPACA mandates and taxes repealed – some retroactively

Like the House bill, the Senate draft would effectively repeal the PPACA's individual and employer mandates by reducing the penalty for noncompliance to zero for months after December 31, 2015.

Notably absent from the Senate draft, however, is a continuous coverage provision in the House bill that would permit health insurance companies to impose a surcharge of up to 30 percent on individuals who failed to maintain insurance coverage for the prior year. (The House provision is intended to encourage those with health insurance to keep it.)

Business provisions: The Senate plan also would repeal the following business taxes enacted under the PPACA, generally effective after December 31, 2017:

- The annual fee on US health insurance providers;
- The annual fee on manufacturers and importers of branded drugs; and
- The 2.3 percent excise tax on manufacturers and importers of certain medical devices.

(Under the House-passed bill these provisions generally would be repealed beginning after December 31, 2016.)

Like the House bill, the Senate draft would repeal the $500,000 deduction limitation on remuneration paid to officers, employees, directors, and service providers of covered health insurance providers, and reinstate the deduction for expenses allocable to the Medicare Part D subsidy – both effective for taxable years beginning after December 31, 2016.

Individual provisions: On the individual side, the Senate draft would eliminate:

- The 3.8 percent net investment income tax on certain unearned income of individuals with adjusted gross income (AGI) over $250,000 for joint filers ($200,000 for single filers);
- The so-called "medicine cabinet tax," which provides that the purchase of over-the-counter drugs is not a qualified expense for purposes of rules governing health savings accounts (HSAs) and flexible spending accounts;
- The increased (20 percent) penalty for nonqualified distributions from an HSA or an Archer medical savings account, which would be lowered to 10 and 15 percent, respectively;
- The $2,500 limitation (indexed) on annual salary-reduction contributions to health flexible spending accounts in cafeteria plans; and
- The 10 percent excise tax on indoor tanning services.

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As with the House-approved bill, the majority of these provisions would take effect retroactive to December 31, 2016; however, under the Senate proposal, the $2,500 limitation to HSA contributions would remain in effect until the end of 2017. Repeal of the 10 percent excise tax on indoor tanning services would become effective for services performed after September 30, 2017 (June 30, 2017, in the House bill).

Floor for medical expense deduction: The Senate proposal would return the floor for itemized medical deductions to its pre-PPACA level of 7.5 percent of AGI, effective for taxable years beginning after December 31, 2016. (In the run-up to passage of the House bill, GOP leaders reduced the floor in their proposal to 5.8 percent as a strategic move to carve out revenue that would allow the Senate to enhance the premium subsidy credit for individuals once the House measure made its way across the Capitol. The Congressional Budget Office had estimated that the change to the medical expense deduction would decrease federal receipts by roughly $90 billion over 10 years.)

Repeal of additional Medicare HI tax *delayed*: The Senate draft and the House proposal would repeal the additional 0.9 percent Medicare hospital insurance tax on wages over $250,000 for joint filers ($200,000 for single filers) for taxable years beginning after December 31, 2022.

Delayed Cadillac tax

Like the House-passed bill, the draft Senate plan would retain, but further delay implementation of, the so-called "Cadillac" tax on high-cost employer-provided health plans. Under current law, the 40 percent excise tax levied at the insurance company level is scheduled to come on-line in 2020. The Senate measure would further delay its effective date to 2026.

As a practical matter, retention of this tax with a further delayed effective date is likely intended to help ensure the overall bill complies the Byrd Rule prohibition against increasing the deficit in the years beyond the budget window.

Economic substance doctrine remains intact

One Affordable Care Act revenue raiser left untouched in both the draft Senate plan and the House-passed bill is the "economic substance" doctrine, codified in section 7701(o), which generally requires taxpayers to show that a transaction changed their economic position in a meaningful way apart from the federal income tax effects and that they had a substantial nontax business purpose for entering into a transaction. It also imposes a strict liability penalty on understatements attributable to transactions determined to lack economic substance. (The penalty varies depending on whether or not the transaction was disclosed.)

Revamped premium assistance tax credits

The draft Senate plan would revamp the PPACA's tax credit system designed to help low- and moderate-income households pay for coverage in the nongroup market.

Beginning in 2020, the top-end income threshold that determines which individuals are eligible for the credits would be reduced from 400 percent of the federal poverty level to 350 percent. The credit amounts also would be adjusted based on the taxpayer's age, as well as the cost of coverage in the area in which the taxpayer resides. In calculating credit amounts, premium costs would be pegged to the "applicable median cost benchmark plan," as defined in the bill, which is likely to be less generous than the "second lowest cost silver plan" that is the benchmark under current law. Still, the Senate plan's tax credit regime is seen as more generous than the House-passed bill, which would have capped the credit's value at between $2,000 and $4,000 per year, depending on the taxpayer's age, and limited the total credit amount to $14,000 per household.

As under current law, the tax credits in the Senate plan would be refundable and advanceable (meaning they are available at the time of purchasing coverage, rather than at the time of filing a tax return).

House bill's HSA enhancements remain in place

The Senate draft retains provisions from the House bill that would expand access to and increase the flexibility of HSAs – tax-preferred savings accounts which, when used in conjunction with a high-deductible health insurance plan, allow individuals to pay for qualifying out-of-pocket health care expenses "using tax-free dollars." These include:

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- Increasing the maximum HSA contribution limit to the combined amount of the plan's deductible and out-of-pocket contribution requirement;
- Allowing both spouses to make catch-up contributions to the same HSA; and
- Providing an administrative fix to allow certain expenses incurred after a taxpayer purchases an eligible high-deductible insurance plan, but before the taxpayer establishes an HSA, to be treated as eligible expenses under the HSA.

These provisions generally would take effect after December 31, 2017.

Next steps: CBO score will be critical

Key to the Senate's consideration of the bill, and the politics surrounding its debate, will be an estimate of the budgetary effects of the plan – and also its effects on coverage levels and premiums – from the nonpartisan Congressional Budget Office (CBO), which is expected to be released early in the week of June 26.

Importantly, the CBO score also will be utilized by the Senate parliamentarian to determine the bill's compliance with the rules of budget reconciliation – the complex procedural process under which Republicans are moving their health care legislation.

Provided certain strict budgetary and procedural rules are met – such as prohibitions on increasing the deficit in any year beyond the 10-year budget window and provisions that do not have an effect on the federal budget – legislation moved under reconciliation can be passed with a simple majority in the Senate (50 votes in this case, considering the tie-breaking vote of Vice President Mike Pence), rather than the 60 votes normally needed to advance legislation in that chamber under regular order. Republicans currently control 52 Senate seats.

These restrictions – commonly referred to as "Byrd Rules" (named after the late Sen. Robert Byrd, D-W.Va.) – generally apply on a provision-by-provision basis, raising the specter that any offending provisions identified by the parliamentarian may be removed from the bill. (Points of order raised against offending provisions may be waived with 60 votes, but it is not considered likely the GOP could generate 60 votes for any part of the bill in the face of what is expected to be unanimous opposition from Democrats.)

Reconciliation bills are afforded 20 hours of debate on the Senate floor, after which time an unlimited number of amendments may be offered and voted upon without debate – a marathon process commonly referred to as a "vote-a-rama."

Are the votes there?

But the CBO report isn't the only hurdle facing the legislation. Majority Leader McConnell's desire to hold a vote on the health care measure before Congress leaves Washington for its July 4 recess seems to factor in Republicans' need to move on to the myriad other legislative deadlines they face in the coming months. Those include fiscal year 2018 appropriations, a debt limit increase, lapsing authorizations for a handful of programs including the Federal Aviation Administration, and a fiscal year 2018 budget resolution that Republicans are relying on to lay the procedural groundwork for tax reform.

However, based on early comments from certain members of McConnell's caucus, the bill's passage – in its current form, at least – is far from certain, which likely portends more negotiations and, ultimately, changes to the discussion draft.

A quartet of conservative Republicans – Sens. Ted Cruz of Texas, Ron Johnson of Wisconsin, Mike Lee of Utah, and Rand Paul of Kentucky – expressed their opposition in a joint statement released June 22:

"Currently, for a variety of reasons, we are not ready to vote for this bill, but we are open to negotiation and obtaining more information before it is brought to the floor. There are provisions in this draft that represent an improvement to our current health care system but it does not appear this draft as written will accomplish the most important promise that we made to Americans: to repeal Obamacare and lower their health care costs," they wrote.

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At the other end of the Republican political spectrum, moderate Sen. Susan Collins of Maine indicated she was reserving judgment until CBO's analysis is complete. Other moderates also withheld judgment while they learn more about the bill and its impact on coverage and premiums.

Given the GOP's narrow margin of control in the Senate and the fact that no Democrats are expected to support the measure, Republican leaders can only afford two defections within their own ranks if they hope to clinch a victory.

— Alex Brosseau, Michael DeHoff, and Jacob Puhl
Tax Policy Group
Deloitte Tax LLP

Comprehensive, permanent tax reform possible this year, Ryan says

Just ahead of the first anniversary the release of the House Republican tax reform blueprint, Speaker Paul Ryan, R-Wis., delivered a speech on June 20 reiterating the plan's broad principles and goals and confidently forecasting the enactment of comprehensive legislation this calendar year. Ryan's remarks came as GOP taxwriters continue to huddle with Trump administration officials to craft a joint proposal that they can move through Congress in the fall and as Senate Republicans work to develop alternative base erosion measures to replace the blueprint's controversial border-adjustment tax provision.

In what Ryan's office billed as his "first major speech on tax reform," delivered to a Republican-friendly audience at the National Association of Manufacturer's (NAM) annual summit in Washington, the speaker – who previously chaired the House Ways and Means Committee – walked through the general contours of the 2016 "Better Way" blueprint without delving into significant details or breaking any new ground. The speech touched on lower rates for both individuals and businesses, parity for passthrough entities, a shift to a territorial system for taxing foreign-source income of US multinationals, and the simplification – or elimination – of current-law tax deductions and credits.

Emphasis on permanent reforms

Ryan also emphasized his belief that "these tax reforms – these tax cuts – need to be permanent." Speaking to reporters on June 21, though, he hedged some, saying "[t]here are also provisions in tax reform that don't have to be permanent. But the key ones like rates, the things that businesses plan on, those things require the certainty of permanence, and that's where you get the economic growth."

Permanency is a subject that has been debated in recent weeks, as some Republicans have argued that a simpler bill focusing largely on tax cuts rather than comprehensive reform might be more easily achieved. Such cuts, without significant accompanying revenue offsets, would have to be temporary in order to meet the budget reconciliation rules that Republicans are currently planning to use for tax reform, which preclude legislation that increases the deficit beyond the budget window. (In recent Congresses, the budget window has been 10 years, although there is no statutory requirement that budget blueprints cover a decade.) One work-around to achieving deficit neutrality would be to lengthen the budget window beyond its current 10 years. This idea has been floated by some Republicans and was recently backed by Senate Finance Committee Chairman Orrin Hatch, R-Utah, but ran into opposition this week from both Ryan and current House Ways and Means Committee Chairman Kevin Brady, R-Texas.

Border-adjustment tax not mentioned (by name, at least): Notably, Ryan did not specifically mention in his speech the proposed border-adjustment tax – which would tax all products and services imported into the US at a rate of 20 percent while exempting all US exports from taxation – a proposal that has become the most high-profile flashpoint of the House's tax reform outline and does not have the support of many congressional Republicans or the White House in its current form.

In his remarks, Ryan argued that the tax code should encourage US businesses to "make things here and export them around the world." He added that "[t]here are a number of ways to achieve this – we in the House have our own idea – and that is one of the things that we are discussing with the administration."

When asked about the proposal in an interview with CNBC immediately after his speech, Ryan noted that Senate Finance Committee Republicans are working on an alternative (more on that below) and said: "What we're doing right

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now...is comparing and contrasting various versions of reform to get the best possible one, that gives us the lowest possible rates and the most internationally competitive tax system – and the best one we can pass."

Ryan first admitted in late April that "in its present form, [the border-adjustment tax] needs to be modified," and Ways and Means Chairman Brady recently proposed a five-year phase-in and some sector-specific exceptions. (For prior coverage, see *Tax News & Views*, Vol. 18, No. 21, June 16, 2017.) In talking to CNBC, Ryan pointed out that eliminating the proposal entirely from the plan not only would create a "revenue hole" – the original proposal has been unofficially estimated to raise about $1.2 trillion to offset the cost lower corporate rates – but also would leave lawmakers scrambling for another way to address US tax base erosion.
URL: http://newsletters.usdbriefs.com/2017/Tax/TNV/170616_1.html

State and local tax deduction: Also in his interview with CNBC, Ryan stated unequivocally that he still fully supports repealing the state and local tax deduction – something President Trump has also endorsed; however, a group of 70 House members – including seven Republicans – from states that would be most impacted by this change sent a letter to Treasury Secretary Steven Mnuchin on June 19 advocating retention of the deduction.
URL: http://pascrell.house.gov/media-center/press-releases/pascrell-lance-lead-bipartisan-letter-in-support-of-state-and-local-tax

Get this done, this year: While acknowledging that comprehensive tax reform will be a challenge to finalize in the remaining legislative days this year – and that it may be declared "dead" and then "back on track" multiple times – Ryan expressed confidence in eventual success to the NAM audience.

"I am here to tell you: We are going to get this done in 2017," he said. "You know why we're going to get this done in 2017? Because we have to get this done in 2017."

Senate Republicans scouring previous tax reform proposals

In the Senate, where the border-adjustment tax proposal has been fairly roundly criticized – Republican Lindsey Graham of South Carolina commented this spring that the provision "won't get 10 votes" in that chamber – taxwriters and staff have been dusting off ideas from previous years as they look for alternatives to address base erosion and raise revenue. Republican Finance Committee members including Sens. Mike Enzi of Wyoming, Rob Portman of Ohio, John Thune of South Dakota, and Pat Toomey of Pennsylvania have all indicated they are involved in the discussions.

One proposal senators are studying is draft legislation introduced in 2014 by then-chairman of the House Ways and Means Committee Dave Camp, R-Mich., that included a bifurcated minimum worldwide effective tax rate of 15 percent on foreign base company intangible income and 12.5 percent on sales income. A minimum tax – also proposed by the Obama administration but at a higher rate of 19 percent – is one way to address base erosion concerns that would accompany a shift from the current worldwide tax system to a territorial system for taxing foreign-source income. (Camp's proposal was not embraced at the time by the business community or many congressional Republicans.)

The Camp draft also called for the elimination or modification of some deductions and credits that have not been specifically addressed by House taxwriters to date but are said to be part of Senate discussions, including amortization of the deduction for advertising expenses, the repeal of last-in-first-out (LIFO) accounting, changes to the research and development tax credit, and a set of provisions aimed at the insurance industry. (For details on Camp's proposal, see *Tax News & Views*, Vol. 15, No. 9, Feb. 27, 2014.)
URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140227_1.html

Another previously introduced bill reportedly getting a second look is an international tax reform proposal introduced by Sen. Enzi in 2012.
URL: https://www.congress.gov/bill/112th-congress/senate-bill/2091?q=%7B%22search%22%3A%5B%22enzi%22%5D%7D

Hatch seeks stakeholder comments: As part of the Senate's work to develop its own ideas, Finance Committee Chairman Hatch on June 16 issued a call to stakeholders for comments on tax reform.
URL: https://www.finance.senate.gov/chairmans-news/hatch-calls-for-feedback-on-tax-reform

Hatch indicated he is particularly interested in recommendations to:

- Provide relief to the middle-class individuals and families through reforms to the individual income tax system;
- Lower business tax rates and broaden the tax base;

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- Remove impediments and disincentives for savings and investment in the current tax system; and
- Update our international tax system to make the US more competitive globally and preserve the US tax base.

Interested parties are requested to provide comments – which Hatch says will be kept confidential – by July 17 to taxreform2017@finance.senate.gov.
URL: mailto:taxreform2017@finance.senate.gov?subject=Interested%20party%20requested%20comments

— Storme Sixeas
Tax Policy Group
Deloitte Tax LLP

House approves 'mobile workforce' legislation

The House of Representatives on June 20 approved by voice vote legislation that would impose restrictions on when a state may tax nonresident employees who travel to that state to perform work and require employers to implement state income tax withholding and reporting with respect to wages or other remuneration earned by those employees.

The Mobile Workforce State Income Tax Simplification Act (H.R. 1393), which was introduced in March by Judiciary Committee member Mike Bishop, R-Mich., would limit state taxation of wages or other remuneration of any employee who performs duties in more than one state to:

- The state of the employee's residence and
- The state(s) in which the employee is "present and performing employment duties for more than 30 days during the calendar year in which the wages or remuneration is earned."

These same standards would apply to an employer's state income tax withholding and reporting requirements.

For purposes of determining the application of employer penalties related to a state's withholding and reporting requirements, the legislation provides that in the absence of certain instances of fraud or collusion an employer may generally rely on an employee's determination of the time he or she will spend in each state during the year. This would apply unless the employer maintains a "time and attendance system" that records and tracks where employees perform their daily duties, in which case such system would be used to determine the number of days an employee works in each state. An employer is considered to maintain a "time and attendance system" if: (1) each employee is required to contemporaneously record his or her work location for every day worked outside of his or her primary employment state, and (2) the system permits the employer to allocate each employee's wages among states in which such employee performs employment duties.

The legislation generally defines "employee" according to the definition used in the applicable state where the employee performs his or her duties. However, the legislation specifically notes that its provisions would *not* apply to:

- Professional athletes;
- Professional entertainers;
- Qualified production employees (that is, certain individuals who perform services in connection with film, television, or other video productions); and
- Certain public figures.

The legislation also provides that an employee would be deemed to work a "day" in the state where he or she performs the most duties for the day, not including travel time. However, if an employee performs duties in his or her resident state and only one nonresident state during a particular day, the employee would be considered to perform more employment duties in the nonresident state for that day.

If enacted, the measure would be effective on January 1 of the second year that begins after the date of enactment.

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Next steps

An identical companion measure (S. 540) was introduced in the Senate in March by Finance Committee member John Thune, R-S.D. Finance Committee Chairman Orrin Hatch, R-Utah, has not so far announced plans to mark up that legislation.

— Michael DeHoff
Tax Policy Group
Deloitte Tax LLP

House OKs expansion of advanced nuclear power production credit

The House of Representatives approved by voice vote on June 20 legislation (H.R. 1551) that would expand the advanced nuclear power production tax credit by making it available to facilities that are placed in service beyond the current-law cut-off date and allowing public entities to transfer credits to an eligible project partner.

H.R. 1551 is sponsored by Ways and Means Committee Republican Tom Rice of South Carolina and includes among its cosponsors Democratic taxwriter Earl Blumenauer of Oregon.

Placed-in-service limitation removed, credit transfers allowed

Under current law, a qualifying advanced nuclear facility may claim a credit for production of electricity based on the ratio of the allocated capacity it receives from the Treasury Secretary to its rated nameplate capacity. Among other restrictions, the credit is limited to 6,000 megawatts of national capacity and is available only for facilities placed in service by December 31, 2020.

H.R. 1551 would modify the megawatt capacity limitation for purposes of the credit by requiring the Treasury Secretary to allocate any unutilized capacity first to facilities placed in service before 2021 (to the extent they did not receive an allocation equal to their full nameplate capacity) and then to facilities placed in service on or after January 1, 2021, in the order in which they were brought on-line.

The proposal also would allow qualified public entities to elect to forgo credits to which they otherwise would be entitled and transfer them to an eligible project partner. Qualified public entities are defined as (1) a federal, state, or local government; (2) a mutual or cooperative electric company; or (3) a not-for-profit electric utility which has or had received a loan or loan guarantee under the Rural Electrification Act of 1936. An eligible project partner under the proposal generally includes any person who designed or constructed the nuclear power plant, participates in the provision of nuclear steam or nuclear fuel to the power plant, or has an ownership interest in the facility.

Effective date and cost estimate

The provision requiring reallocation of unutilized national megawatt capacity limitation would be effective on the date of enactment; the provision allowing transfer of credits to eligible project partners would be effective for taxable years beginning after the date of enactment.

The Joint Committee on Taxation staff estimates the measure would reduce federal receipts by $16 million over 10 years.
URL: https://www.jct.gov/publications.html?func=startdown&id=5001

Next steps unclear

An identical companion bill (S. 666) has been introduced in the Senate by Republican taxwriter Tim Scott of South Carolina. Senate Finance Committee Chairman Orrin Hatch, R-Utah, has not scheduled a mark-up for the measure and it is unclear if Senate leaders intend to take it up as freestanding legislation or incorporate it into an eventual tax reform package.

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— Michael DeHoff
Tax Policy Group
Deloitte Tax LLP

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