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Memorandum

Date: January 13, 2017

To: Health Care Clients

From: Holland & Knight

Re: ACA Repeal/Budget Reconciliation

Given the immense uncertainty and confusion regarding "repealing and replacing Obamacare," we thought it would be useful to provide our thoughts regarding the road ahead.

The Rules of the Game

The Budget Resolution

Congressional Republicans are using a Fiscal Year 2017 budget resolution as the vehicle to set up a repeal/replace bill. Once the Budget Resolution is adopted by the House and the Senate (it doesn't go to the President) it allows for a process to write a health care bill that makes changes to the Affordable Care Act (ACA), Medicare, Medicaid or other health programs. This "reconciliation" bill however can only include provisions that have a direct impact on spending, revenues or the debt. It cannot contain "extraneous" provisions. As long as the bill (and any amendments) stick to this requirement, it cannot be filibustered -- only 51 votes are required in the Senate to bring it up and pass it.

Repealing Obamacare

Under this budget-related requirement, the reconciliation bill could repeal all of the ACA's tax and revenue provisions, as well as its spending provisions -- such as the premium tax credits to subsidize the purchase of insurance policies, the various forms of financial support for insurers offering plans, and the funding for expanded Medicaid matching funds to cover adults. But some provisions probably cannot be repealed because they don't meet the requirement of being directly budget-related. And there is no requirement that the bill repeal all of the spending and revenue provisions -- it might, for example, phase out the expanded Medicaid funding or leave some "Obamacare" taxes in place.

Replacing Obamacare

With regard to "replacing" Obamacare, the same rule applies -- only provisions that are directly budget related can be put in a reconciliation bill. So, for example, the GOP could create a new tax credit, a new insurance subsidy, a new pool of funds for states to use with the uninsured, or a revised funding

allocation for Medicaid. But it may be a tough argument with the Senate Parliamentarian that revising insurance regulation, redefining required benefits, and making major reforms to the rules of the Medicaid program can fit in this bill.

Additional Legislation?

Anything that can't be included in the budget-related reconciliation bill, would have to be addressed in an additional bill. The Budget Resolution makes room for such a bill -- which could use money from a reserve fund and could be protected from some points of order in the Senate. But such a bill would still require 60 votes in the Senate. That means there would need to be some bipartisan cooperation to get it passed. Right now, the Senate Democratic Leader is vowing that his side will not cooperate on efforts to take down the ACA.

Executive Action

Vice-President-elect Pence recently indicated that there would be executive actions related to the Affordable Care Act once the new Administration takes power. While the scope of those actions is not clear, it would likely include relaxing certain regulatory requirements around health insurance products and perhaps changing the rules governing insurer subsidies. The new Administration may take an aggressive approach to exercise its authority on these issues or it might move more cautiously.

The State of Play

Content of the Budget Resolution

The fiscal year (FY) 2017 budget resolution was released on the first day of the 115th Congress. It contains instructions for two committees in both the House and Senate to draft health care related legislation under the reconciliation process. The House Ways and Means Committee, House Energy and Commerce Committee, Senate Finance Committee, and Senate Health, Education, Labor and Pensions (HELP) Committee would have until January 27 to draft legislative language. ***It is important to note that the January 27th date is essentially advisory -- in the event that the committees take longer, there is no meaningful consequence.***

The budget resolution includes reserve funds for the purpose of preserving savings resulting from the repeal of ACA provisions in order to offset the cost of a replacement plan. The idea is that these funds could be used in a subsequent health care bill that is allowed by the budget resolution (but not free from the need to get 60 votes in the Senate). The Budget Resolution (and a recent change in House rules) would allow the cost of such a replacement bill to exceed savings from repealing the current law.

Procedural Status

The budget resolution passed in the Senate on Thursday, January 12 by a vote of 51-48. The House of Representatives passed the budget resolution the following day by a near party-line vote of 227-198. As mentioned above, the committees of jurisdiction will now draft legislation to implement the direction set by the budget resolution. Once the Committees finish drafting their changes, they will be sent to the Budget Committees, which merge the language into a single bill. Then the House and Senate will act on the bills produced by their budget committees. In the House, this is likely an up-or-down vote on the product whereas in the Senate, as discussed above, any amendments meeting the budget-related

requirement could be offered. Finally, the House and Senate would need to resolve differences in their bills and a final bill would then be passed and sent to the President who, presumably, would sign it into law.

What can be Expected to be Included in Obamacare Repeal/Replace Legislation?

The "\$64,000 Question" in Washington, D.C. right now is "what will be in the reconciliation bill?" Nobody can definitively answer that question right now because it is clear that the Congressional Republicans are still debating it amongst themselves.

The original plan was to quickly move legislation that would repeal as much of Obamacare as possible, probably with a one or two year delay in the effective date of those repeal provisions, and leave the question of developing and adopting a replacement approach to later legislation. House Republicans hoped to complete the reconciliation process and have a repeal bill on the President's desk by February 20th. The Republicans did not want to replace one 2,700 page bill with another one. They also didn't want to get into a messy internal debate about how to replace Obamacare. However, for a number of reasons, that approach is becoming less and less appealing to a lot of elected officials. First of all, as discussed above, the replacement legislation would not receive the same procedural protection as in a reconciliation bill, meaning it could quickly become bogged down in the legislative process. Secondly, the great uncertainty created by such an approach is unnerving to the health care industry and the financial markets. Thirdly, if the various subsidies that support the sale and purchase of insurance products for individuals and small businesses are repealed and not replaced with a new approach (while coverage mandates and regulations stay in place), there could be a near-term crisis in the availability of such insurance. This would be very disruptive for many Americans and politically embarrassing for the Republicans.

As a result, there is now an increasing number of statements from senior elected GOP officials and the President-elect articulating different approaches such as "step-wise" repeal and replace, "nearly simultaneous" repeal and replace, or doing it all at once. While no cohesive plan has emerged, which fuels the uncertainty, the direction of movement is toward having more replacement features included in the repeal bill that is considered in the next few months under the protection of reconciliation.

If this holds, we would expect to see a more robust reconciliation bill that addresses in some manner the following major items:

- *Phasing out or rolling back the enhanced Medicaid matching funds for adults.* The ACA change whereby the federal government provides 90 cents on the dollar coverage of all adults up to 138% of the federal poverty line would be phased out or repealed by a certain date.
- *Providing alternative funds for the States.* Congress could mitigate the impact of withdrawing the enhanced adult Medicaid matching funds by providing other resources to the States. This could include new funding for high-risk pools and innovation pools as well as targeted Medicaid funding to provide help with some portion of the expansion population that would lose enhanced funding. It could even include new, higher matching rates for the states.
- *Ending the availability of Premium Tax Credits.* These credits are a central feature of the ACA and are available to families and individuals under 400% of poverty to purchase plans on ACA state exchanges. A central feature of a repeal bill would be to eliminate these tax credits.

- Creating a new Individual/Family Tax Credit. The Republicans are interested in the idea of creating a tax credit to defray the cost of purchasing health insurance. Their version of such a credit would be much more flexible and portable (and perhaps less generous) than the Obamacare Premium Tax Credit. It would not be tied to purchasing a plan on a health exchange and the plan would not be required to meet all ACA requirements regarding coverage and cost sharing.
- Ending Health Insurer Subsidies. To incentivize insurer participation in an uncertain market, the ACA provided a number of protections including cost sharing subsidies for extremely low-income enrollees, insurer-financed reinsurance provisions, a risk corridor protection program, and a risk adjustment program. The GOP has called for the elimination of most of these provisions, perhaps by some future date.
- Providing new Insurer Protections. It is likely that insurers will still find themselves subject to requirements to provide guaranteed coverage to individuals with pre-existing conditions at regulated rates. Accordingly, to avoid extensive insurer flight from the marketplace, some form of subsidy or financial support, at least on a transitional basis, will be needed.
- Repealing ACA Revenue Provisions. A central GOP promise has been to repeal all of the Obamacare taxes. This list includes, but is not limited to, the device tax, pharmaceutical tax, health insurance plan tax, health insurance "cadillac tax", high earners Medicare tax and tanning salon tax. It is possible some taxes could be left in place, but this seems less likely than that they would all be repealed.

A number of other provisions could make it into final legislation, such as tax provisions supporting health savings accounts. Many other provisions would probably have trouble meeting the budget-related requirement. For example, a number of insurance regulatory features may or may not be able to be included depending on how the Parliamentarian rules. And substantive changes in the definition of essential health benefits or changing Medicaid rules regarding waivers, for example, might not meet this test.

Ultimately, the passage of a repeal and replace bill will depend on the support of the President elect and internal agreement on how generous the GOP decides it wants to be in providing a replacement. Under any scenario, however, it is likely that reconciliation legislation cannot resolve all issues. Whether future non-budget health care legislation can be forced through by the GOP or developed on a bipartisan basis will remain to be seen.