News Alert – December 20, 2017

President to sign tax bill that repeals individual mandate, cuts orphan drug tax credit

Congress passed tax legislation today (H.R.1) that repeals all individual mandate penalties under the Affordable Care Act (ACA) starting in 2019 while cutting the orphan drug tax credit in half. The measure is expected to be signed by the President in the coming weeks.

Repealing the ACA's mandate that everyone purchase minimum coverage they can afford has been a primary goal of Republican lawmakers since the law was enacted, even though it was first proposed by conservative economists with the Heritage Foundation in 1989 as a means to ensure individuals took responsibility for their healthcare and prevent "free riders" who forgo coverage and require others to subsidize their uncompensated care. The mandate was the centerpiece of the ACA as it was needed to ensure insurer risk pools are adequately balanced between healthier and sicker consumers so that private insurers can remain profitable despite having to accept everyone.

Republican leaders acknowledge that repealing the individual mandate without a replacement mechanism (such as increasing premiums for those who fail to maintain continuous coverage) could destabilize the entire individual market and lead to significant rate hikes and insurer departures. The Congressional Budget Office (CBO) predicts that it will increase ACA Marketplace premiums for 2019 by an average of at least ten percent and cause 13 million Americans to become uninsured.

Insurers, providers, and consumer groups opposed the repeal, with the American Academy of Actuaries warning that it would mean that "insurers would likely reconsider their future participation in the market [which would] lead to severe market disruption and loss of coverage"

Despite these dire projections, Republican leaders had little alternative but to include the individual mandate repeal as part of their tax cut package, as it was the only way they could show sufficient savings to use the budget reconciliation process and move H.R.1 through the Senate with only a bare majority. (The measure received zero support from Democrats).

Republican leaders were able to secure the support of key moderates like Senator Susan Collins (R-ME) by promising to separately pass legislation that would help stabilize the Marketplaces. This includes the compromise between Senators Lamar Alexander (R-TN) and Patty Murray (D-WA) that would restore the ACA's cost-sharing reductions, which the Trump Administration terminated in October. Senator Collins is also sponsoring legislation with Senator Bill Nelson (D-FL) (H.R.1835) that would create a reinsurance program to compensate insurers for exceptional claims.

However, despite assurances to the contrary from Senate Majority Leader Mitch McConnell (R-TN), neither the Alexander-Murray nor the Collins-Nelson bill has yet to be scheduled for a vote in either chamber or included as part of any larger legislation. Even if enacted, CBO has already determined that neither measure would have a "significant" impact on mitigating the upward pressure on premiums that would be caused by repealing the individual mandate without a replacement. A subsequent analysis by Avalere Health consultants concluded that only 40 percent of the "premium rate shock" caused by the individual mandate repeal would be offset by both measures.

Senator Collins was also promised that Senate leaders would pass a waiver from "pay as you go" rules that would avoid the $25 billion in Medicare cuts that H.R.1 will automatically trigger, since it increases the deficit by $1.5 trillion. However, it remains unclear how Senate leaders will be able to pass such a waiver without the support of at least eight Senate Democrats need to break the 60-vote Senate filibuster. (The President may wait to sign H.R.1 to see if the waiver will first be approved.)

Senator Collins did succeed in removing provisions passed by the House that would have eliminated the tax deduction for medical expenses and replaced them with a provision that would temporarily lower the threshold for claiming the deduction from ten percent to 7.5 percent of income (where it was prior to the ACA). While this change is favorable to consumers, the new law also caps the orphan drug tax credit at 25 percent of research costs instead of the current 50 percent threshold. Consumer groups insist that such a steep reduction will greatly slow the development of these drugs.

The new law remains one of the most unpopular pieces of legislation in history, with Quinnipiac and Gallup polling showing it is favored by less than 30 percent of adults surveyed. This appears to be due to analyses from CBO and other consulting groups concluding that despite the dramatic reduction in tax rates for corporations and the wealthiest Americans, those earning less than $75,000 per year would ultimately see their tax bills rise as the increase in their standard deduction would be lost by other popular deductions being capped or eliminated.

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