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Taxes and Healthcare Reform: Now What?

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Efforts in Congress to repeal and replace the Affordable Care Act (the "ACA")[1] have continued this year. While healthcare reform developments occur almost daily (and sometimes more often), to date no legislation has been enacted. All healthcare industry participants continue to advocate for their respective positions at the same time the legislative agenda surrounding healthcare reform continues to evolve. This article summarizes the healthcare reform "state of the union" from a tax perspective and discusses the implications of future healthcare reform possibilities on the ACA's tax provisions.

What has happened to date?

Here is a high level summary of what has happened since the 2016 presidential election as Republican policymakers have pursued healthcare reform:

- January 13: Congress passed a budget resolution for fiscal year 2017 (i.e., the fiscal year that began October 1, 2016). It was anticipated that the resolution would set the stage for a future budget reconciliation bill that would repeal certain (but not all) provisions of the ACA, including many tax provisions.[2]

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1 References to the ACA are to the Patient Protection and Affordable Care Act, P.L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, P.L. 111-152.

2 For additional discussion of the budget reconciliation process, see the *What's News in Tax* article, "What Does the Future Hold for the Tax Provisions of the Affordable Care Act?" (Nov. 29, 2016).

- January 20: On his first day in office, President Trump signed an executive order directing federal agencies to scale back certain parts of the ACA (including its tax provisions) to the maximum extent permitted by law.[3]

- January and February: A number of healthcare reform proposals were introduced in Congress, none of which gained much traction.[4]

- March: The first bill to be acted upon was The American Health Care Act (the "AHCA"). It was introduced as H.R. 1628 on March 20 in the House of Representatives but pulled from the House floor on March 24 prior to a vote.

- May 4: With some modifications, the AHCA was passed by the House of Representatives.[5]

- June 22: The Senate released a "discussion draft" (procedurally, structured as an amendment to the AHCA and given a new name, the "Better Care Reconciliation Act of 2017").[6]

- July 13: The Senate revised its discussion draft. Notably, the new draft did not include any changes from current law to the net investment income tax, the additional Medicare health insurance tax, or the remuneration tax on executive compensation paid by certain health insurance providers (section 162(m)(6) of the Internal Revenue Code). Within days of its release, several Republican senators publicly stated they would not support the legislation.

- July 25: The Senate agreed, 51-50, to begin debate on the House-passed AHCA. The vote was 50 Republican senators in favor of the motion to proceed. Two Republican senators and 48 Democratic senators voted against the motion; Vice President Pence voted in favor of the motion to break the tie. After the motion passed, the Senate began 20 hours of debate over the course of two days.

- Beginning on July 25, the Senate developed and released several amendments to modify the AHCA. Senators engaged in a marathon voting session that lasted into the early hours of the morning on July 28; however, none of the amendments received enough votes in the Senate to pass. These included:

  - The Better Care Reconciliation Act—which was not voted on in its initial form, but as modified based on certain non-tax changes led by Senator Ted Cruz (R-TX)—was defeated in a 43-57 vote.

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[3] The executive order is published online at https://www.whitehouse.gov/the-press-office/2017/01/2/executive-order-minimizing-economic-burden-patient-protection-and.

[4] For a summary of the more significant proposals during this timeframe, see the *What's News in Tax* article, "Potential Tax Implications of Healthcare Reform," (Feb. 28, 2017).

[5] For coverage of the tax provisions that would be affected by the AHCA if enacted, please see the *What's News in Tax* article, "Taxes and the American Health Care Act: Frequently Asked Questions," (May 22, 2017).

[6] For coverage of the Better Care Reconciliation Act's tax provisions, please see the *What's News in Tax* article, "Taxes and the Better Care Reconciliation Act of 2017: Senate Discussion Draft," (Jun. 27, 2017).

- The Obamacare Repeal Reconciliation Act of 2017, which resembled a bill passed by Congress but vetoed by President Obama in January 2016 and would have repealed many of the ACA's tax provisions, was defeated in a 45-55 vote.
- The Health Care Freedom Act of 2017 (referred to in the press as the "skinny repeal")—which would have repealed the individual mandate but not the Medicaid expansion—was narrowly defeated in a 49-51 vote. The skinny repeal bill would have also suspended the employer mandate through 2024, extended the moratorium for the medical device excise tax through 2020, and increased contribution limits for health savings accounts.

What are the possible scenarios going forward?

Modification of the ACA is still possible. The Senate's recent failure to pass a healthcare bill has not quieted discussions of healthcare reform in Congress, by the Trump administration, or by the public. It is unclear at this time what healthcare reform legislation might look like or whether such legislation will be enacted in the short term. However, a few possible paths are emerging.

One potential path is to try again to pass a healthcare reform bill in September when Congress returns from its recess. To date, the Republican strategy for passing healthcare reform has been to employ the Senate's reconciliation rules (which require a simple majority vote), with the legislative vehicle being the fiscal year 2017 budget resolution passed in January. Republicans face a number of other priorities in September, including the debt ceiling and appropriation for the 2018 fiscal year, which begins October 1, 2017.

Beginning in October, Congress faces a limited number of options for passing healthcare reform. One path it could take would be to abandon its budget reconciliation approach and try to move bipartisan legislation, which would require a supermajority in the Senate as a practical matter (to avoid a possible filibuster) but can be done on a stand-alone basis at any time. Reaching agreement on a bipartisan bill might not be easy.

Alternatively, Congress could continue with its budget reconciliation approach. This might involve considering whether the budget resolution for the current fiscal year could continue to be used after the end of September; the answer to this question is not clear and may require a ruling from the Senate parliamentarian. Congress also could try to accommodate both health care reform and tax reform (which congressional Republicans also plan to undertake under budget reconciliation procedures) under a new budget resolution for the upcoming fiscal year; however, Congress would have to pass a new budget resolution, which could prove difficult.

There are a few indicators that Congress might try to pursue a bipartisan effort on healthcare reform, even if the result is more limited reform than Republicans have previously pursued. In the House, a newly formed group of more than 40 Democrats and Republicans, who refer to themselves as the

"Problem Solvers Caucus," have been meeting weekly and on July 31 released a five-part plan to stabilize health insurance markets. That plan would:

- Ensure mandatory funding of cost-sharing reduction payments
- Create a dedicated stability fund for states
- Adjust the employer mandate to apply only to businesses of 500 employees or more, and to change the definition of a full-time employee to one who works 40 hours per week
- Repeal the medical device tax
- Amend the rules pertaining to state waivers currently permitted by the ACA

In the plan, the Problem Solvers Caucus expressed an intent that the plan be fully paid for, although it is unclear how the plan might be scored and what (if any) additional offsets might be needed. Other than repealing the medical device excise tax and modifying the employer mandate, the Problem Solvers Caucus has not yet proposed any changes to the ACA's taxes and fees.

In the Senate, it appears that bipartisan hearings will be held on healthcare reform in the coming weeks. Senator Lamar Alexander (R-TN), the Chair of the Senate's Committee on Health, Education, Labor and Pensions ("HELP"), recently announced that the HELP Committee will hold hearings on healthcare reform the week of September 4, focusing on the instability of the individual health insurance market. Notably, Senator Alexander stated that he will "be consulting with Senator Hatch and Senator Wyden so that the Finance Committee is aware of any matters we discuss that might be within its jurisdiction."

Regardless of what path those in Congress pursue, it is unclear whether future legislative attempts would be more or less inclusive when it comes to the repeal of ACA taxes and fees.

In the absence of new healthcare legislation, what is the status of the ACA's existing tax provisions?

Absent the enactment of new healthcare reform legislation, many of the ACA taxes and fees will remain in effect indefinitely. However, a few have delayed effective dates, sunset provisions, or have been suspended temporarily pursuant to post-ACA legislation. The following is a list of ACA taxes that, absent legislative intervention, may come or go:

- **Cadillac Tax:** The tax on high-cost employer-sponsored health insurance (often referred to as the "Cadillac Tax") goes into effect in 2020. The Treasury Department and IRS have published several notices discussing issues raised by the tax,[7] but to date no proposed regulations have been promulgated.

[7] See Notice 2015-16, 2015-10 I.R.B. 732, and Notice 2015-52, 2015-33 I.R.B. 227.

- **PCORI Fee:** The fee paid by health insurers and sponsors of self-insured plans that is used to fund the Patient-Centered Outcomes Research Institute does not apply to policy or plan years ending after September 30, 2019.[8]

- **Annual Health Insurer Fee:** Pursuant to a law enacted at the end of 2015, the annual health insurer fee under section 9010 of the ACA was suspended for 2017.[9] Absent further legislative action, it is scheduled to resume effect in 2018. Health insurers will be required to file Form 8963, *Report of Health Insurance Provider Information*, by April 17, 2018, and pay the fee by October 1, 2018.

- **Medical Device Excise Tax:** The medical device excise tax was suspended for two years pursuant to legislative action in 2015.[10] The medical device excise tax currently does not apply to taxable medical device sales made during the period from January 1, 2016, through December 31, 2017. Absent further legislative changes, the medical device excise tax is scheduled to resume for sales of taxable medical devices made after 2017, and taxpayers will be required to report sales of taxable medical devices made during the first quarter of 2018 on Form 720, *Quarterly Federal Excise Tax Return*, by April 30, 2018.

- **Executive Order:** The executive order signed by President Trump on January 20 remains in effect. It is unclear what, if any, actions Treasury and the IRS will take pursuant to the order.

How might tax reform affect the ACA taxes and fees (and vice versa)?

If healthcare reform legislation is not enacted in 2017, the question remains whether the ACA's taxes and fees could be repealed or modified as part of tax reform (or other tax legislative) efforts.

Republicans had sought to enact healthcare reform before tax reform to help reduce the cost of tax reform. If tax reform is now pursued on a stand-alone basis, addressing the ACA's taxes and fees would factor into the revenue costs of tax reform legislation. Congress might, however, still choose to include selected ACA taxes in its tax reform proposals. For example, if individual tax reform is included in a broad tax bill, Congress might seek to repeal the ACA taxes that affect individuals, such as the Medicare surtax and the net investment income tax. In addition, because there has been broad and bipartisan support for repealing the medical device excise tax in the past, it may be a candidate for repeal as part of tax reform.

It is also possible, although far from certain, that Congress might take up other tax legislation before the end of the year (possibly very late in the year). For example, if Congress has made significant progress on tax reform by the end of the year but determines that enactment in 2017 still remains unlikely, it might decide to move legislation to address some expired provisions and to potentially extend the moratorium on the medical device excise tax late in the year. Nonetheless, congressional leaders also

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[8] Sections 4375(e) and 4376(e) of the Internal Revenue Code.

[9] Consolidated Appropriations Act of 2016, Title II, § 201 (P.L. 114-113).

[10] Ibid § 174.

may prefer to address these kinds of issues in the context of tax reform (in part to build support for a tax reform bill). Thus, the prospects of such a bill are very uncertain.

With all the uncertainty surrounding healthcare reform or other legislation affecting the ACA taxes and fees, what should taxpayers do?

The paths to healthcare reform and tax reform remain unclear with respect to the likelihood of enactment, the timing of enactment, and the content of any legislation. While events continue to unfold in Washington, DC, taxpayers affected by the ACA's taxes and fees should consider the following:

- **Monitor legislative developments:** While it is easier said than done to keep abreast of what Congress is doing, having a basic working knowledge of the tax provisions in legislative proposals allows for the most effective planning.
- **Monitor IRS and Treasury guidance:** Now that the Treasury Department's Office of Tax Policy is more fully staffed, and because healthcare reform has not been enacted to date, it is more likely that we will start seeing tax guidance on healthcare tax issues.
- **Continue compliance:** For the time being, the ACA's tax provisions remain unchanged. Therefore, continued compliance with timely reporting and payment related to ACA taxes and fees is necessary.
- **Be aware of tax issues in times of change:** As healthcare organizations look for strategies to survive and grow in the current environment, be watchful for tax issues. New business models and new sources of revenue can lead to tax accounting issues, tax-exemption considerations, partnership tax issues, and potential exposure to the section 162(m)(6) deduction disallowance.