

BCRA Update: McCain Health Scare Delays Senate Vote; Newly Added “Consumer Freedom Option” is Criticized

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Healthcare Alert

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Senate Majority Leader Mitch McConnell has again delayed a vote on the Better Care Reconciliation Act (BCRA[1]) – the Senate’s attempt to revise the House’s ObamaCare repeal and replace bill, the AHCA – because of anticipated poor Congressional Budget Office (CBO) scoring and health concerns about Senator John McCain.

The “Consumer Freedom Option”

A key addition to the BCRA as originally proposed is the “Consumer Freedom Option” – a version of the BCRA amendment (known as the “Cruz Amendment”) championed by Senators Ted Cruz and Mike Lee that allows insurers to sell plans on the exchanges that do not meet the minimum requirements of ObamaCare regulations, provided they also sell at least one plan that does meet those regulations.

The “Consumer Freedom Option” essentially adopts the Cruz Amendment, but adds additional funding to attempt to compensate for the reality that those with pre-existing conditions will be priced out of the market.

Insurance Industry Response

In a sharply worded response to the BCRA’s inclusion of the “Consumer Freedom Option,” the CEOs of America’s Health Insurance Plans (AHIP) and the Blue Cross and Blue Shield Association (BCBSA) sent a public letter to Majority Leader McConnell and Minority Leader Chuck Schumer on July 14, 2017. The AHIP is a national organization representing approximately 1,300 member companies that sell health insurance coverage to more than 200,000,000 Americans. The BCBSA is a federation of 36 “blue” health insurers that provide health insurance coverage for more than 106,000,000 Americans.

The joint AHIP/BCBSA letter urges the Senate to strike the “Consumer Freedom Option” from the BCRA because “it is simply unworkable in any form and would undermine protections for those with pre-existing medical conditions, increase premiums and lead to widespread terminations of coverage for people currently enrolled in the individual market.”

The CEOs of AHIP and BCBSA articulate that the “Consumer Freedom Option” would allow insurers to refuse coverage to certain individuals, charge different rates based upon age and gender, and fail to provide comprehensive coverage. They argue that this would sanction the “cherry picking” of only healthy people from the existing market, making coverage unaffordable for millions who need or want comprehensive coverage for medical care, mental health care, and prescription drug coverage.

AHIP and BCBSA claim that the “Consumer Freedom Option” does not, in reality, establish what is necessary for the vitality of any insurance market: a single risk pool that includes all insureds, regardless of health, to determine premiums. Instead, the joint AHIP/BCBSA letter contends that the “Consumer Freedom Option” actually creates two pools: one for healthy people and one for sick people. The American Academy of Actuaries (AAA) confirms this interpretation.

AHIP and BCBSA argue that the additional funding that the "Consumer Freedom Option" provides, and any "additional funding" that could be added, is insufficient to assist with making coverage for persons with pre-existing conditions affordable in a two-tier risk pool. They worry that, as healthy individuals move to the less-regulated plans, those with significant medical needs will have no choice but to stay in the comprehensive plans, and their premiums "will skyrocket" – hurting middle-income families that are not eligible for tax credits the most.

Perhaps most concerning, AHIP and BCBSA believe that the "Consumer Freedom Option" will lead to far fewer, if any, coverage options for consumers who purchase their plans in the individual market – resulting in millions more individuals being uninsured.

Senator McCain Health Scare

Following the release of the AHIP/BCBSA letter, and before the CBO scored the updated BCRA with the added "Consumer Freedom Option," developments on an unrelated front caused Majority Leader McConnell to have to table a vote on the BCRA indefinitely. It was learned that Senator John McCain was on an indefinite medical leave of absence from the Senate.

With GOP Senators Rand Paul and Susan Collins already declaring that they will not vote for the BCRA in its current form, and with just one more GOP defection meaning defeat, Senator McCain's vote is necessary in order for the GOP to pass the current version of the BCRA.

Senator McCain underwent a minimally-invasive craniotomy with eyebrow incision at Mayo Clinic Hospital in Phoenix, AZ, to remove a 5 cm blood clot from above his left eye. While little information about the specifics of the Senator's condition are known, *The New York Times* interviewed Dr. David J. Langer, the Chairman of Neurosurgery at Lenox Hill Hospital in New York City, who speculates that, given the nature of description of the surgery performed, Senator McCain likely suffered a subdural hematoma – a collection of blood between the dura (the membrane that covers the surface of the brain) and the brain itself. While subdural hematomas can be caused in a variety of ways, and are not uncommon in older adults, one concern in Senator McCain's case would be that he is a melanoma skin cancer survivor. Tissue pathology samples were taken during Senator McCain's surgery, and are expected back in several days.

The timetable for Senator McCain's return to the Senate is not yet known. Estimates that have been reported range from one week to "a few weeks" to even longer. During that time period, it is believed that the CBO will be able to fully score the new version of the BCRA. What this scoring portends for the viability of the BCRA in the Senate is yet to be determined.

We will continue to monitor the situation and keep you apprised of material developments as they occur. In the meantime, you can contact Kevin Cottone (cottonek@whiteandwilliams.com; 215.864.7108).

[1] The BCRA, as noted in our client alert on June 29, 2017, is the Senate's proposed bill to amend the Affordable Care Act (ACA) after adverse reaction to the American Health Care Act, the House of Representatives Bill which purported to overhaul the ACA.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.