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What Does the Future Hold for the Tax Provisions of the Affordable Care Act?

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The structure and design of healthcare reform under the incoming administration of President-Elect Trump is likely to include tax law changes. Although the form of healthcare reform is far from certain, this article speculates as to the path legislation might take and the aspects of current healthcare law that could change.

One of Donald Trump's stated priorities as President-Elect is the repeal and replacement of the Affordable Care Act (the "ACA").¹ A complete repeal of the ACA appears unlikely—although the Republicans have retained control of the House of Representatives and the Senate, they do not have sufficient votes in the Senate to block a filibuster. (In general, 60 votes are needed to pass legislation in the Senate.) Also, President-Elect Trump has signaled that he may want to retain certain provisions of the ACA (such as the ban on pre-existing condition exclusions and the requirement that children be offered coverage under a parent's health plan until age 26). A more likely alternative to a complete repeal of the ACA is the repeal of selected provisions, with separate legislation to replace targeted aspects of the ACA framework. The mechanism for the "repeal" portion of this equation is likely to be a budget reconciliation bill, which is a powerful legislative tool that comes with some important limitations.

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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.

What Is a Budget Reconciliation Bill?

The Congressional Budget Act of 1974, which provides the framework for the federal budget process, created an expedited but complex “reconciliation” process for legislation that addresses spending and tax matters as well as the federal debt ceiling. Reconciliation bills are not subject to filibuster, and can be passed in the Senate by a simple majority.

The process for a reconciliation bill starts when the House and Senate pass a budget resolution. A budget resolution does not go to the President for signature or veto, and consequently, it may not be used to pass new law. The resolution can, however, include “reconciliation directives” that instruct specified congressional committees to develop legislation that brings spending and tax revenues into conformity with targets in the budget resolution. The designated committees then develop legislative proposals, which are assembled into a reconciliation bill and considered by the full House and Senate. The Congressional Budget Act limits Senate debate of a reconciliation bill to 20 hours, thereby eliminating the possibility of a filibuster and allowing passage of a reconciliation bill by a simple majority in the Senate. After any differences between the House and Senate versions have been resolved, the final bill is passed by both houses and it goes to the President for signature or veto.

A reconciliation bill may only address matters related to spending, tax revenue, and the debt ceiling. Extraneous provisions are limited by the “Byrd Rule,” which prohibits provisions that do not change the level of spending or revenue, and provisions in which the change in spending or revenue is merely incidental to the non-budgetary aspects of the legislation. The Byrd Rule imposes other constraints, including a bar on provisions that increase the federal deficit beyond the period covered by the reconciliation directive. The determination of whether a reconciliation bill complies with the Byrd Rule or other procedural requirements is made by the Senate Parliamentarian.

Congress does not pass a budget resolution every year, and in fact Congress has not yet passed one for fiscal year 2017. Consequently, the Republicans may have an unusual opportunity to pass two reconciliation bills during 2017—one with respect to the fiscal year 2017 budget and one with respect to the fiscal year 2018 budget. This could give the Republicans two chances to pass legislation affecting tax law—perhaps the first bill to address the ACA and a second reconciliation bill to address overall tax reform.

What Are the ACA Tax Provisions That Could be Affected by a Reconciliation Bill?

Much of the ACA was not only paid for, but also implemented through, the tax law. This makes key elements of the ACA vulnerable to repeal or amendment by way of a budget reconciliation bill. Tax provisions in the ACA include (but are not limited to):

- Premium assistance tax credits for individuals
- Small business healthcare tax credit

- Tax on individual mandate violators
- Tax on employer mandate violators
- Added requirements and excise taxes for tax-exempt hospitals (section 501(r))
- Annual fee on health insurance providers under section 9010 of the ACA
- Limited deduction for compensation paid by health insurance providers (section 162(m)(6))
- Modification of the tax treatment of Blue Cross Blue Shield organizations (section 833(c)(5))
- The medical device excise tax
- The branded prescription drug fee under section 9008 of the ACA
- The so-called “Cadillac tax” on high-cost employer-sponsored health plans
- Modification of the itemized deduction for medical expenses, increasing the threshold from 7.5 to 10 percent
- Tax on indoor tanning services
- Net investment income tax
- Codification of the economic substance doctrine
- Various information reporting requirements

Repealing or amending these tax provisions would not constitute a complete repeal of the ACA. It would, however, dismantle some of the most structurally significant components and would serve to defund many of the operative, non-tax provisions.

President-Elect Trump has not detailed what his “repeal and replace” of the ACA will look like, nor has he commented on the existing tax provisions of the ACA. However, his high-level healthcare reform plan suggests that taxes may play a part in future healthcare reform under his administration.² For example, he has proposed that individuals purchasing health insurance in the open market should be allowed to fully deduct health insurance premiums. In addition, his seven-point plan includes expanding the use of Health Savings Accounts for individuals, allowing for funds within them to accumulate throughout life and pass to the account holder’s heirs.

² For a description of President-elect Trump’s healthcare reform plan, see <https://www.donaldjtrump.com/positions/healthcare-reform>.

For further guidance on what Republican legislation to “repeal” the ACA might look like, we can look to the budget reconciliation bill that was passed by the House and Senate and vetoed by President Obama in January of this year (H.R. 3762, the Restoring Americans’ Healthcare Freedom Reconciliation Act). That bill would have repealed the following tax provisions of the ACA:

- Premium assistance tax credits for individuals
- Small business healthcare tax credit
- Tax on individual mandate violators
- Tax on employer mandate violators
- The “Cadillac tax” on high-cost employer-sponsored health plans
- Annual fee on health insurance providers under ACA section 9010
- Limited deduction for compensation paid by health insurance providers (section 162(m)(6))
- The medical device excise tax
- The branded prescription drug fee under ACA section 9008
- Increase in the threshold for the itemized deduction for medical expenses from 7.5 to 10 percent
- Tax on indoor tanning services
- Medicare tax on unearned income, and
- Codification of the economic substance doctrine

Notably, H.R. 3762 would not have repealed every tax provision in the ACA. Among the ACA tax provisions that would have continued in effect are section 501(r) and the excise taxes imposed for violations of that provision; the modifications to the taxation of Blue Cross Blue Shield organizations; and the information reporting provisions for employers and health insurers. This reconciliation bill was a revenue raiser; the Congressional Budget Office and the Joint Committee on Taxation estimated that its passage would decrease deficits by approximately \$474 billion over the ten-year period ending in 2025.

In addition, the House Republicans released a blue print for healthcare reform in June of this year—titled “A Better Way”—that may provide additional preview of tax law changes we might see in forthcoming health care reform legislation.³ The “Better Way” plan calls out various tax increases in the

³ The document can be found at http://abetterway.speaker.gov/_assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf.

ACA for repeal, including: the taxes on individual and employer mandate violators; the annual fee on health insurance providers; the medical device excise tax; the branded prescription drug fee; the “Cadillac tax” on high-cost employer-sponsored health plans; the modification of the itemized deduction for medical expenses, increasing the threshold from 7.5 to 10 percent; and the net investment income tax.

The plan then provides a broad-brush description of various proposals that would replace the ACA. These proposals include the following tax provisions:

- A refundable tax credit for individuals who do not have access to job-based coverage
- Expansions for tax-advantaged Health Savings Accounts, and
- A cap on the exclusion from taxable income for employer-paid health care premiums.

Conclusion

Tax law has long played an important role in shaping healthcare policy in the United States. The exact contours of healthcare reform under President-Elect Trump, and the path that his administration will take to get there, are far from certain. But when President-Elect Trump calls for the “repeal and replacement” of the ACA, tax law is likely to play a key role in both elements of that equation.



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