

Client Update

The “Better Care Act”: Winners and Losers in the Healthcare Industry

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The Better Care Act that was released last Thursday by Senate majority leader Mitch McConnell and amended Monday would, if enacted, have significant consequences for every subsector of the healthcare industry.

It is always difficult to predict the outcomes from a major piece of legislation like the Better Care Act because there are inevitably unanticipated consequences. The Better Care Act presents an additional challenge. Many of the changes in federal funding for the Medicaid program and for subsidies that support the purchase of health insurance by low-income individuals would not take place until at least after the next presidential election. Future changes in the political environment could have a significant impact on how much of the Better Care Act’s spending cutbacks would actually be implemented. That being said, we offer our thoughts below on the potential impact of the Better Care Act.

HEALTH INSURERS

The Better Care Act contains multiple provisions that appear to be highly beneficial to insurers. Over the past several years, insurers have been leaving the Exchanges created by the Affordable Care Act (“ACA”) over concerns about the unprofitability of individual plans. More recently, insurers have expressed concern about the potential loss of funding for Cost-Sharing Reductions. Cost-Sharing Reductions are subsidies that cover out-of-pocket healthcare expenses incurred by people who earn between 100% and 250% of the federal poverty level. The Better Care Act would address these issues, at least for several years, by providing appropriations for Cost-Sharing Reductions and by creating a fund that would allow for billions of dollars worth of direct payments to insurers.

The Better Care Act would also benefit insurers by devolving to states the ability to set medical loss ratios. A medical loss ratio is the percentage of premiums that an insurer must pay out to cover expenses incurred by its beneficiaries. Under the

ACA, the medical loss ratio is generally 80%. That means insurers can allocate only 20% of their premiums to administration, marketing and profit. If states were allowed to set medical loss ratios, some states inevitably would reduce them. Reductions on medical loss ratios would likely translate into increased profits for at least some insurers.

The Better Care Act, however, is not all upside for insurers. States rely on commercial insurers to operate managed care plans for many Medicaid beneficiaries. The Better Care Act includes measures that would reduce the percentage of each state's Medicaid expenditures that are reimbursed by the federal government. It would also reduce the cap on the taxes that states can levy on healthcare providers to fund the Medicaid program. Facing budgetary pressures, states may squeeze the margins of insurers that are operating Medicaid-managed care plans.

Insurers may also lose business to the extent that people stop purchasing health insurance plans. That may happen if the six-month waiting period for people that have a 63-day gap in insurance coverage does not provide sufficient incentive to remain insured. Additionally, the reductions in subsidies may lead people—particularly those who are healthy—to conclude that health insurance is unaffordable or not worth the cost.

MEDICAL DEVICE MANUFACTURERS

The Better Care Act would be beneficial to device manufacturers because it would repeal the excise tax on devices. Device manufacturers, however, could lose sales to the extent that people lose insurance coverage or purchase only thin coverage that results in their being unable to afford medical devices, or if states limit device purchases as part of Medicaid cuts necessitated by reduced federal contributions.

HOSPITALS

Hospitals often treat patients without regard to their ability to pay and write off the bills of uninsured patients as bad debt or charity care. The ACA—and in particular the Medicaid expansion to cover childless adults not traditionally covered by Medicaid—has been a boon to hospitals because many previously uninsured patients are now covered by health insurance. To the extent the Better Care Act would result in more uninsured patients once again, the bottom line of hospitals may suffer.

The Better Care Act may provide some offsetting benefits to hospitals including the following provisions:

- The reduction in the cap on provider taxes that states can levy to support the Medicaid program;
- The federal funding for state healthcare programs (the Long-Term State Stability and Innovation Program). States could use this money to make direct payments to providers, including hospitals, that treat indigent patients; and
- The restoration of cuts to benefit Disproportionate Share Hospitals (“DSHs”) located in states that did not expand Medicaid. The ACA reduced payments to DSHs because it was anticipated that hospitals would treat fewer uninsured patients. The Better Care Act would restore those cuts to DSHs in non-expansion states where more low-income “childless adults” may be uninsured.

PHYSICIAN GROUPS

Physician groups benefitted from the ACA because the rise in the number of insured patients meant that more people could afford to see physicians on a regular basis. To the extent the Better Care Act would result in more people becoming uninsured, physician groups may lose some or all of the gains they have seen since the ACA was passed (particularly those groups that service lower-income patients). Like hospitals, physician groups may benefit the reduction in the cap on provider taxes and from funding that could support direct payments to physicians that provide indigent care.

PHARMACEUTICAL INDUSTRY

The Better Care Act would likely have upsides and downsides for the pharmaceutical industry.

The ACA reflected a complex bargain between the Obama Administration and the pharmaceutical industry. The pharmaceutical industry benefitted from more insured people who could afford to purchase more drugs. It also benefitted from the closing of the “doughnut hole,” the coverage gap between an initial threshold of drug costs that would be covered by Medicare Part D and a much higher catastrophic maximum after which Part D coverage would resume. In return, the branded pharmaceutical industry agreed to an annual tax of about \$3 billion (allocated among branded pharmaceutical companies based on their shares of the branded pharmaceutical market) and cutbacks on Medicaid reimbursements for prescription drugs.

The Better Care Act would partially unwind this bargain. It would benefit the pharmaceutical industry by repealing the \$3 billion annual tax on the branded pharmaceutical industry and maintaining the closure of the doughnut hole. Additionally, repealing the “medicine cabinet tax” (which prohibited the use of money from Health Saving Accounts or Flexible Saving Accounts to purchase over-the-counter medicines without a prescription) may boost the sale of over-the-counter drugs. But the pharmaceutical industry would lose to the extent that people reduce purchases of prescription drugs because they lose their health insurance or are covered by plans that provide only limited coverage for expensive drugs, even while the ACA’s cutbacks on Medicaid rebates are left intact.

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Please do not hesitate to contact us with any questions.