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Reconciliation Redux

Dems' Last Best Chance for Major Health Reforms

Earlier today, House Democrats made a big step towards passing major health reforms. Learn more about the process and what got passed in today's issue of *Health Care in Motion*.

With narrow margins in both chambers of Congress, the Democratic legislative agenda has hit major roadblocks, not from Republicans, but from divisions between progressive and centrist wings of the Democratic Party. As a reminder, Democrats are using an increasingly popular mechanism to pass legislation in a divided Congress: budget reconciliation. With budget reconciliation, one only needs a simple majority in both the House and the Senate, rather than the usual 60-vote filibuster proof majority needed in the Senate to pass regular order legislation.

In August 2021, the House and Senate passed a concurrent budget resolution along party lines, setting a $3.5T (yes, that's T for trillion) cap for spending over a ten-year period. The resolution included instructions for sweeping spending priorities across "families, climate, health care, and infrastructure and jobs." Since then, progress on a legislative package has stalled, as Democratic centrists balked at both the price tag and more controversial elements of the bill. On October 28th, President Biden unveiled a compromise framework, bringing the overall price tag of the "Build Back Better" package down to $1.75T and trimming many of the lofty progressive provisions originally envisioned. In the new smaller Build Back Better framework, many of the health care provisions are significantly curtailed or set to expire in only a few years, setting up a political fight down the road when Congress will have to decide whether to let these programs expire (a potentially politically unpopular option) or find more funding to continue them.

Budget Reconciliation 101

- Must be attached to a budget resolution, so typically one per fiscal year
- Cannot increase the deficit beyond the cap indicated in the budget resolution over ten years
- Can only address spending, revenue, and debt ceiling ("the Byrd Rule")
- Needs only a simple majority in the House and Senate to pass

The House took a big step this morning, passing H.R. 5376 "Build Back Better Act" with a vote of 220-213. The legislation now moves to the Senate. To find out what's in and what's out on health care and what happens next, read on.

Health Care: What's in and What's out

It has been a wild ride as members of Congress worked with the White House to scale back the original vision of the reconciliation bill, while fighting for massive investments into Democratic social spending priorities. Many of the original health care provisions have either been scrapped or pared down to stay within the newest $1.85T top line figure. Here is where things stand:

Medicaid Coverage Gap Fix

CHLPI Leading the Fight for Inclusion of Medicaid Coverage Gap Fix in Build Back Better

- CHLPI organized a sign on letter to members of Congress from HIV advocates, garnering support from over 30 organizations and highlighting the need to expand Medicaid in every state in order to end the HIV epidemic.
- In May 2021, CHLPI convened groups representing individuals with chronic conditions and disabilities (the Chronic Illness and Disability Partnership) to discuss strategy for inclusion of a Medicaid coverage gap solution via reconciliation.

Advocates – including CHLPI – have spent months making the case for inclusion of a federal fix for the individuals living in the 12 states that have not expanded Medicaid under the Affordable Care Act (ACA). Congress listened. The House bill would allow individuals with income under the federal poverty level to access heavily subsidized Marketplace plans. While this provision would go into effect for every state, not just the 12 non-Medicaid expansion states, the current rules that make anyone eligible for or enrolled in Medicaid ineligible for Marketplace subsidies would still apply. The expanded access to subsidies for those under the federal poverty level would start in January 2022 and phase out after 2025. Members of Congress are making a political bet that it will be very difficult to take away health care once it is in effect, a bet that paid off during the ACA repeal and replace fights. Starting in 2024, plans would have to cover additional benefits for this population in line with what Medicaid must cover (e.g., non-emergency medical transportation). For states that have already adopted Medicaid expansion under the ACA, the bill adds an enhanced federal match for the Medicaid expansion population from 2023-2025.

Extension of American Rescue Plan Act (ARPA) Enhanced Marketplace Subsidies

The bill extends most of the ARPA enhanced Marketplace subsidies – including the increased premium tax credits that have meant that anyone making under 150% FPL can get a $0 premium plan as well as the extension of premium tax credits to those with incomes over 400% FPL – through 2025. There has been some wrangling over continuation of the enhanced subsidies for those who received unemployment benefits (ARPA allowed anyone who received unemployment benefits in 2021 to qualify for the maximum amount of ACA subsidies for all of 2021). In the current version, the enhanced subsidies for those who received unemployment benefits would be extended through 2022.

Drug Pricing and Affordability

The drug pricing provisions were included in the House bill after a near death experience, where they were left out of the revised Build Back Better framework President Biden released on October 28th. After some intra-party jockeying, particularly with centrist holdouts in the Senate, a pared down version of the drug pricing reforms included in the now infamous HR3 – the Lower Drug Costs Now Act, helmed by Speaker Pelosi's office – have made it into the House bill. While the current bill may be watered down from the grand vision of HR3, it still packs a punch.

The bill would give authority to the Secretary of Health and Human Services to negotiate prices for a select number of Medicare Part D and Medicare Part B drugs starting in 2025. The federal government would be able to negotiate prices for ten of the highest cost drugs that have been on the market for a set amount of time (nine years for most drugs and 12 for biologics) starting in 2025 and that number would gradually rise to 20 drugs per year. Unlike in HR3, the price the federal government will pay would not be pegged to international prices, but instead would be capped at a percentage of commercial insurance prices. Manufacturers who did not negotiate would be hit with a steep excise tax. The relatively small number of drugs subject to negotiation, combined with the more generous criteria to determine a "fair price" will undoubtedly lessen the impact of this provision on both manufacturers and consumers. Antiretroviral drugs used to treat and prevent HIV, for instance, do not make it to the top 20 list of high-cost drugs in the United States right now. Over time, as more drugs are added each year, these provisions could impact the antiretroviral space, but likely not in the short term.

Drug Pricing and 340B

Many 340B providers are concerned that if the federal government aggressively regulates the price of prescription drugs, 340B providers may lose an important revenue stream. This is because the 340B program allows 340B entities to generate a "spread" when they purchase drugs at a very low 340B discount and then get reimbursed by public and private insurance payers at a much higher "usual and customary" price. For better or worse, the ability to generate this revenue and reinvest it into programs is very much a part of how the 340B program is intended to operate and is keeping the lights on at many safety net clinics.

Beginning in 2025, manufacturers will be subject to penalties if they raise Medicare and commercial insurance drug prices faster than the rate of inflation (this is similar to what already happens in Medicaid).

In response to persistent advocacy to lower the high prescription cost sharing Medicare Part D beneficiaries face, beginning in 2024, Medicare Part D beneficiaries (and those who receive prescription drug benefits through a Medicare Advantage plan) will have a maximum out-of-pocket cap of $2,000 per year. This is a major change from current law, where there is no out-of-pocket maximum for Medicare prescription drugs and beneficiaries still pay five percent of costs even in the catastrophic phase of coverage. The bill also lowers the amount beneficiaries have to pay in the catastrophic phase of coverage and foists more of the costs of drugs in the catastrophic phase onto plans (current law has the federal government paying the majority of drug costs in this phase), with the hope that this will incentivize plans to negotiate with manufacturers for lower prices. Finally, starting in 2025, the bill provides beneficiaries with an option to "smooth" out-of-pocket costs over 12 months, rather than paying a large amount in early months and then zero after the maximum is hit.

And finally, beginning in 2023, all individual and group plans (in addition to Medicare) must provide insulin coverage with no more than $35/month cost sharing.

Birth Equity

The package advances several provisions from the Black Maternal Health Momnibus Act of 2021, ushering in critical investments for social determinants of health, mental health equity, community-based organizations working to promote birth equity, and the perinatal workforce. These efforts will help diversify and grow more localized initiatives across the country—progress towards ending preventable maternal deaths. (The majority of pregnancy-related deaths are preventable.)

The bill also strengthens Medicaid's role in addressing the maternal health crisis and improving pregnancy-related health outcomes. First, the bill permanently extends postpartum coverage to individuals who have given birth for 12 months following the birth (current law only requires coverage during the pregnancy and for 60 days following the birth). This measure is truly significant as Medicaid covers approximately half of all births in the country and a high proportion of pregnancy-related deaths occur during the postpartum period. Disruptions in care during this period are especially a risk for women of color. States will also have a new option to adopt a maternal health home model. The model aims to improve outcomes by leading with person-centered care and supporting care coordination across medical and social services teams. States pursuing this approach will receive a 15 percentage-point increase in their FMAP (used to determine how much matching funds a state will receive from the federal government for Medicaid expenditures) for payments to teams in the first two years of implementation.

Investments in Home and Community Based Services (HCBS)

The bill would increase the federal match for Medicaid HCBS and provide other federal funding, including grants to states and funding for demonstration projects, to increase the capacity of the direct care workforce. The increased funding should address the long waiting lists states have in place for HCBS services.

Other Health Provisions

In addition to the big ticket items discussed above, the latest version of Build Back Better would:

- *Adjust the employer firewall*
  Under the ACA, individuals with an offer of employer coverage are only eligible for premium tax credits if the coverage is "unaffordable." The Build Back Better legislation would adjust this requirement by amending the definition of unaffordable. Specifically, the bill would deem employer sponsored coverage that costs more than 8.5% of an individual's household income unaffordable (a change from current law, which requires the employer coverage to cost over 9.5% of an individual's household income to meet the unaffordability test).

- *Increase federal Medicaid funding for Puerto Rico and other territories*
  Historically, federal Medicaid funding for Puerto Rico and other territories has been capped, resulting in inadequate funding. Starting in 2022, the Build Back Better bill provides a permanent increase in federal funding by raising the block grant amounts and increasing the federal match for the territories to 83 percent.

Stay tuned…

CHLPI is currently working on an assessment of Build Back Better and its impact on health equity, including an analysis of the impact of provisions on systemic racism and health disparities.

- *Expand Medicare coverage to include hearing benefits*
  Beginning on January 1, 2023, the Medicare program would cover hearing aids, aural rehabilitation and treatment services, and hearing assessment services.

- *Require state Medicaid programs to cover eligible incarcerated individuals 30 days before release from prison or jail*
  Beginning two years from the passage of the reconciliation bill, federal law would no longer bar Medicaid coverage for people in prison or jail for the 30-day period prior to their release. This requirement is expected to reduce harmful disruptions in care and treatment as individuals leave prison by making it easier to transition to Medicaid coverage before release.

What Happened and What Happens Next?

On Thursday afternoon, the Congressional Budget Office (CBO) released a cost analysis of the Build Back Better bill, something several centrists had demanded before a vote happened. The CBO's analysis estimates that over the next decade, the bill would add $367 billion to the national deficit, not taking into account revenue received from increased tax enforcement. (For comparison purposes, the recently passed infrastructure bill was projected to add $256 billion to the deficit over a 2021-2031 period and the 2017 Tax Cuts and Jobs Act was projected to add $1.455 trillion to the deficit over a decade.) The CBO's analysis notes that sections of the bill that address the Medicaid gap and extend ACA marketplace subsidies would likely result in 1.7 million and 1.2 million fewer uninsured people respectively. The analysis also estimates that over

the next decade, the bill may cause one less drug to enter the U.S. market (and four less and five less over the following two decades).

After a lengthy speech from Minority Leader Kevin McCarthy pushed the vote from yesterday to today, the House has successfully passed the bill largely along party lines (Democrat Rep. Jared Golden from Maine voted against the bill). The bill now moves to the Senate. There, the first hurdle will be the Senate Parliamentarian. Because the bill is moving through the budget reconciliation process, all provisions must have a direct impact on spending, revenue, or the debt ceiling (also known as "the Byrd Rule"). The Senate Parliamentarian is the ultimate arbiter of what passes the Byrd Rule and what doesn't. Next, the bill goes through what is known as "vote-a-rama," where Senators can offer amendments to the bill. Once it passes the Senate, the bill goes back to the House for approval of any changes the Senate made.

There are many other pressing legislative priorities that could push the timeline for the reconciliation bill, including averting a partial government shutdown when the current Continuing Resolution ends in early December and raising the debt limit. The only timeline governing the reconciliation bill is that Congress must pass the budget reconciliation bill attached to the FY22 budget resolution before it begins work on the FY23 budget. Technically, they have until the end of the fiscal year to pass the bill (so the end of September 2022), but practically, Congress will need to start work on the FY23 budget much earlier than that, meaning the fight will likely not be able to continue beyond early next year.

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