NASUAD
National Association of States United for Aging and Disabilities

BUDGET RECONCILIATION AND AFFORDABLE CARE ACT REPEAL

Background

With the inauguration of President Trump on January 20, 2017, Republicans now control the White House and both branches of Congress. As the new leadership begins work to fulfill their campaign promise of repealing the Affordable Care Act (ACA), the parliamentary budget reconciliation process has become the focal point of legislative strategies. Congress has passed a budget resolution that sets the stage for ACA repeal, using budget reconciliation legislation as the vehicle. While reconciliation is a powerful tool that can be used to pass significant and sweeping legislation, it also has some stark limitations that restrict the type of changes that can be enacted. Nevertheless, reconciliation can be used to restructure significant components of Federal health and human services programs without requiring a 60-vote threshold in the Senate. Knowledge of the budgetary process and its associated rules will help constituents understand the types of changes that could be made to health and human services programs.

Why Reconciliation is Important

Senate rules require a 3/5ths majority, or 60 votes, to end debate on a piece of legislation and move to a formal vote on the bill, a process known as “invoking cloture.” Without a successful cloture vote, a minority party with control of at least 2/5ths majority, or 40 votes, of the Senate can filibuster a bill and prevent it from passing. The 60-vote threshold for cloture is not a constitutional construction and has been modified in the past,[1] but both the current iteration of Senate rules as well as the chamber’s history provide the minority party with opportunity to derail legislation through filibusters, unless the 60-vote majority exists.

Reconciliation is a parliamentary process used in Congress that enables the Senate to pass specific types of legislation with a simple majority instead of the usual 60 votes required to overcome a filibuster. From a practical standpoint, this allows a majority party to pass legislation without any votes from the minority party in both the House and the Senate.

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How Reconciliation Works

Under the Congressional Budget Act of 1974,[2] the House and Senate can adopt a budget resolution that outlines expected revenue and expenditures for the upcoming fiscal year. The budget can also include instructions to key Congressional committees directing them to draft legislation that aligns spending and revenue with expectations. The budget instructions do not include specific policy prescriptions, but instead will direct the committees to

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[1] Cloture was established in 1917 and initially required a 2/3rds majority vote of the members of the Senate, rather than the current 3/5ths majority. See *http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm*

[2] *http://legcounsel.house.gov/Comps/BUDGET.pdf*

develop legislation that achieves the prescribed goals. Both the Senate and the House can adopt a budget resolution with a simple majority vote. The budget is not sent to the President and is, therefore, not subject to a potential veto.

Once legislation is drafted to meet the goals of the budget instruction, it is taken up in the House and Senate using a specific, expedited process. A noteworthy component of this process is that debate is limited to twenty hours in the Senate. Because debate is limited, no cloture vote is required to end the debate and move to a vote. Thus, a filibuster is impossible. The final legislation requires approval from the President, at which point the President may veto the bill, if desired. President Obama vetoed a reconciliation bill in 2015 that would have repealed portions of the ACA; however, President Trump is likely to sign a Republican-passed ACA repeal bill.

What Reconciliation Can and Cannot Accomplish

There are strict rules regarding the types of changes that reconciliation bills can enact. Due to its embedded nature within the budget process, reconciliation must directly involve budgetary issues. The basic rule of any reconciliation bill is that it must impact at least one of the following components:

- Federal revenue;
- Federal expenditures and outlays; or
- The debt limit.

Provisions that do not directly impact one of these three budgetary items can be challenged and ultimately struck from the bill. This process, which occurs in the Senate, is done under a provision known as the Byrd Rule. The Byrd Rule allows Senators to challenge a provision as extraneous to the reconciliation package. If the challenge is upheld by the Chair, the provision is removed from the package and cannot be reintroduced as a future amendment. Overcoming the Chair's decision, or waiving the Byrd Rule, requires a 3/5ths majority vote in the Senate.

Under the Byrd Rule, provisions are considered extraneous to a budget reconciliation package if one or more of these six conditions apply:

- There is no impact on expenditures/outlays or on revenue;
- The committee is not in compliance with the reconciliation instructions, as the provision either increases spending or decreases revenue;
- The provision is not within the jurisdiction of the committee that authored it;
- The budgetary changes are "incidental" to the actual policy changes;
- The provision would increase the budget deficit for a year that does not fall within the reconciliation budget, without a comparable offset; or
- The provision impacts Social Security (i.e. Old Age, Survivors, and Disability Insurance) Other provisions included in the Social Security Act, such as Medicaid and Medicare, can be altered by reconciliation.[3]

While the Byrd Rule creates some rigid limitations on the scope of reconciliation, the ability to implement policies that directly impact expenditures/outlays enables a wide range of changes to Federal programs. Because of this, reconciliation has been a popular tactic used to pass robust and significant legislation during the past several decades. Well-known bills that advanced through Congress via reconciliation included: welfare reform in 1996, the 2001 and 2003 tax cuts under the George W. Bush administration, and amendments to the ACA in 2010. In 2015, Congress passed a reconciliation bill that would have repealed major components of the ACA.[4] As previously noted, this legislation was vetoed by President Obama, but the case can be used as an example to understand the breadth of changes which may be included in the forthcoming repeal package.

Reconciliation could include significant changes to health and human services programs, including: the repeal of ACA provisions such as the individual mandate,

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[3] See *https://fas.org/sgp/crs/misc/RL30862.pdf*

[4] See *http://budget.house.gov/budgetanalysis/reconciliation-2015.htm*

advance premium tax credits, and Medicaid expansion; a restructuring of Medicaid into block-grant or per-capita cap allotments; or the implementation of new structures regarding health insurance coverage and income tax.

Worthy of note, one of the provisions of the Byrd Rule prevents a reconciliation bill from increasing the deficit over a period outside of the years covered by the budget, which is generally a 10-year period. This requirement is why the Bush-era tax cuts were scheduled to expire during President Obama's tenure. Thus, provisions in the replacement package for the ACA would have to meet at least one of the following criteria:

- Meet budget neutrality requirements by itself;
- Be packaged in a way that the "Repeal and Replace" fully offset each other's cost;
- Expire after 10 years; or
- Secure at least eight Democratic votes to pass under regular order.

When Reconciliation Can Occur

Reconciliation is tied to the annual budgeting process, so it cannot be used to pass multiple pieces of legislation and overcome a filibuster repeatedly. Generally, there is only one reconciliation package available each year; however, there can be up to three distinct reconciliation bills if each one only deals with one component of the budget. For example, there could be one reconciliation bill for revenue, another bill for expenditures, and another for debt limits passed in accordance with one Congressional budget. Nevertheless, there cannot be more than one bill dealing with the same component; so if one reconciliation bill addresses revenue and expenditures, a second bill cannot address these same issues.

Repeal of ACA is likely to impact both revenue and expenditures given its wide scope. As such, once a repeal bill is passed in 2017, any further changes to reconciliation rules would need to wait for a future budgetary cycle. Currently, Congress is working under the 2017 fiscal year (FY2017) budget instructions, so a second reconciliation bill could conceivably be passed later in calendar year 2017, within the FY2018 budgetary process. Early discussions indicate that a second reconciliation bill (FY2018) might be used to implement tax reform; yet, formal plans have not been determined at this time. If/when Congress passes a FY2018 reconciliation bill, the next round of reconciliation could get started in calendar year 2018 for the next fiscal year's budget.

Where Do We Go Next?

As it stands, the reconciliation rules will allow Republicans in Congress to fulfill their campaign promises and repeal the ACA without requiring a single vote from Democrats. In developing the reconciliation bill, the majority party will need to ensure that the provisions adhere to the Byrd Rule, so as to follow the strict restrictions on the types of policies that can be passed. As such, many significant changes can be enacted within tax and spending policy, however, other policy items that are not budgetary in nature could be challenged as extraneous to the bill. Similarly, the policies cannot increase the deficit beyond the budgetary window of ten years.

Key questions remain unanswered, specifically regarding the types of policies that will be included in a replacement bill and whether replacement will be passed concurrently with repeal. The timing of repeal is also under debate, as some Republicans have called for a delayed effective date while others have pushed for immediate repeal. Legislators must also decide whether to aggressively restructure Medicaid or pursue changes to Medicare in the reconciliation bill. Changes to Medicare appear unlikely, but cannot be ruled out completely. Lastly, the reconciliation package could have some impact on long term services and supports (LTSS), as there are a number of options in Medicaid that were added or amended by the ACA. These include: the Community First Choice Option, the 1915(i) State Plan HCBS program, and Health Homes. Depending upon the scope of the repeal, these options could potentially be impacted.

The embedding of reconciliation within the budgetary process means that Congress must complete any bills tied to the FY2017 budget before the end of the fiscal year. It seems likely that Republicans will move the reconciliation package with ACA repeal forward during the spring of 2017; however, the exact timing of the bill remains uncertain.