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Association Health Plans for Small Groups and Self-Employed Individuals under the Better Care Reconciliation Act

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The Senate Better Care Reconciliation Act (BCRA), a proposal to repeal and replace the Affordable Care Act (ACA), includes a provision to create new association health plan options for small employers and self-employed individuals. These so-called “small business health plans” (SBHPs) would be considered part of the large group market, which has different rules than the small group market. In particular, the ACA requirement that premiums cannot vary based on health status does not apply in the large group market. Neither does the requirement for policies to cover ten categories of essential health benefits. If enacted, this provision would considerably disrupt the small group market because small employers could seek lower rates or less comprehensive coverage in an SBHP when their employees are healthy, but theoretically move back to regular small group market plans if an employee becomes ill or if the group wants more comprehensive benefits. This type of adverse selection could result in significant premium increases and instability in the small group market. The provision could disrupt the non-group market in a similar manner because it would permit self-employed individuals (in states that choose to regulate very small groups of one as small employers) to join SBHPs when they are healthy or want few benefits, but move back to regular non-group coverage if their health or circumstances change.

Background

Under the BCRA, new association health plan options would be available to small employers and to the self-employed in certain states. The bill amends the federal Employee Retirement Income Security Act of 1974 (ERISA) to establish the following rules, standards, and definitions for small business health plans:

Large group market rules apply. A SBHP is defined as a fully insured group health plan, sponsored by a certified entity, and offered by a health insurer in the large group market. Several key requirements for small group market insurers do not apply in the large group market. Insurers in the small group market cannot consider the health or claims of a small group’s employees, and must cover the 10 categories of essential health benefits (though states could waive that requirement under the BCRA). These rules do not apply in the large group market. The BCRA sets no standards for SBHPs in terms of what benefits must be covered or how premiums would be set for small firms that want to participate. For example, the insurer covering the SBHP could medically screen small firms applying, and charge relatively low rates for healthy groups but very high rates for groups with sick employees. In addition, the insurer could consider a group’s health and claims at renewal and give them considerably higher rate increases than other groups. The same practices could apply to self-employed individuals. Small businesses could join and enroll in SBHPs, as could self-employed

individuals with no other participating employees (i.e., groups of one) in states that choose to regulate such arrangements as small group health insurance.

Federally regulated. The sponsor of a SBHP must be certified by the Secretary of Labor. Federal certification is deemed approved after 90 days unless the Secretary denies the application for cause. To do business in a state, a certified SBHP must provide written notice of its certification to the insurance regulator in every state in which it will operate. The federal government also has enforcement authority over the business practices of SBHPs. The bill includes broad preemption language stating that federal standards “shall supersede any and all State laws insofar as they may now or hereafter preclude a health insurance issuer from offering health insurance coverage in connection with a [certified] small business health plan.” This appears to prohibit a state from requiring that a SBHP be regulated as small group coverage and may preempt other state insurance rules, as well. The Secretary is required to coordinate with the State in which a particular SBHP is domiciled regarding the exercise of federal authority to certify a SBHP and enforce federal standards. The Secretary is also required to ensure that only one domicile state will be recognized with respect to any particular SBHP. The bill does not provide that the rules of the domicile state will supersede the laws of other states.

Nondiscrimination standards. The entity that sponsors a SBHP must be organized for a purpose other than providing health benefits, although it appears that providing health benefits could be the primary purpose of the organization. For example, a sponsoring entity could be a bona fide trade association, organized primarily for professional or industry-related purposes. Or it could adopt broadly inclusive membership standards to permit virtually any small group or individual to join. In addition, the sponsor of the SBHP is prohibited from conditioning membership on the size of its member groups. The bill does not prohibit a sponsoring entity from conditioning membership on the health status of small businesses; a nondiscrimination provision in the bill states that a requirement not to discriminate against employers and eligible employees is satisfied if the SBHP makes information about all coverage options readily available to any eligible small employer.

Under the BCRA, the SBHP provisions become effective 1 year after the date of enactment and the Secretary of Labor is required to issue implementing regulations no later than 6 months after the date of enactment.

Effects on Small Employers, Self-Employed Persons, and Traditional Markets

The establishment of small business health plans could affect the way health insurance operates for small employers, and could affect the entire small group health insurance market, in several ways:

Premium instability for small businesses and self-employed individuals – Because SBHPs would be able to set premiums for small firm and self-employed members based on health and risk status, it could be possible for SBHP members to obtain lower premiums for coverage as long as their workers and their family members are healthy. However, in the event a covered individual becomes seriously ill or injured, nothing under federal law would prevent the SBHP insurer from raising the premium for that small employer or self-employed individual, even to unaffordable levels. The affected small employer or self-employed person might

then try to seek coverage in the traditional small group market or non-group market, where health status rating is prohibited, though as discussed below, premiums there could also become unaffordable.

Increased premiums in traditional small group and non-group markets – Selection of coverage options, based on which market rules are most advantageous at the time, is sometimes called adverse selection. The asymmetry of rules applied to SBHPs and the traditional small group market would tend to segment small employers based on risk, steering more expensive groups to the traditional market and driving up community rated premiums. This could lead to premiums in the traditional small group market becoming much higher for employers who need to seek coverage there. Eventually, the impact of selection could force insurers to stop offering traditional small group coverage because they could not predict the risk of potential enrollees. The SBHPs would also be open to self-employed individuals in states that permit very small groups of one to buy small group coverage, as [14 states](#) did prior to the ACA. In 2014, [one in five](#) marketplace consumers was a small business owner or self-employed. As a result, adverse selection from SBHPs could also affect premiums in the individual market.

Lack of clear regulatory authority – The BCRA requires that SBHPs must be fully insured group health plans, suggesting that states would continue to have regulatory authority over the insurance product itself, for example, to apply and enforce state standards related to risk based capital and solvency. However, preemption language in the bill is broad, and does not specify which state laws could still be enforced, including for example, laws relating to qualifications of SBHP sponsoring entities, or the covered benefits or rating practices under such plans. At a minimum, it seems legal challenges could arise if states would try to regulate SBHPs more closely. In the past, in response to federal proposals to create new small group insurance arrangements that would not be subject to all state small group market regulation, the [National Association of Insurance Commissioners](#), the [American Academy of Actuaries](#), and others have raised concerns that market fragmentation and harm to small businesses and consumers could result.

Discussion

The Senate SBHP proposal sets up competing and unequal regulatory regimes for small group health insurance that could undermine the traditional market. It also would potentially increase non-group premiums because healthy self-employed people could leave that market while people with health problems would not qualify for SBHP rates. In addition, small groups and the self-employed could choose less comprehensive policies while they are healthy, but move to more comprehensive plans if their health changed (if they remain available). Such adverse selection could drive up the cost of coverage in these markets, making health insurance less affordable for sick individuals and small groups who would have to rely on them, and potentially not available at all.