

## House Passes Build Back Better Act

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On November 19, 2021, the U.S. House of Representatives voted to approve the Build Back Better Act (H.R. 5376, the “BBB Act”), the budget reconciliation bill that includes much of President Biden’s economic and social policy agenda, by a vote of 220 to 212, with all but one House Democrat voting for the bill and all House Republicans voting against it. The BBB Act also includes a number of health and welfare, retirement and executive compensation provisions.

According to a Congressional Budget Office (“CBO”) score of the bill released on November 18, the BBB Act includes approximately \$1.7 trillion in spending on health care, education, child care, climate change and energy incentives and other programs over 10 years and approximately \$1.4 trillion in individual and corporate tax increases and other revenue raisers over 10 years. Although not reflected in the CBO estimate, House Democrats estimate hundreds of billions in additional revenue from the increased IRS enforcement funding.

Senate Majority Leader Chuck Schumer (D-NY) stated that the Senate will consider the BBB Act in December after the Senate returns from its Thanksgiving recess. It is likely the Senate will make significant changes to the legislation, including adjusting policies to secure enough votes for passage and addressing “Byrd rule” issues. For example, it is possible that there will be changes to remove the paid family leave and immigration-related provisions in the House bill and to alter the “SALT” deduction relief in the House bill. Finance Committee Chairman Ron Wyden (D-OR) has also indicated he may try to add additional tax raising provisions, including a new billionaire surtax. This means that the House will have to vote again on the Senate-passed version before the bill can go to President Biden for his signature.

Below, we summarize key health and welfare, retirement and executive compensation provisions that are likely to be of interest to Groom clients.

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## I. Health Provisions

### A. Affordable Care Act (“ACA”) Subsidies and Other Issues

#### *1. Expansion of Premium Tax Credit (“PTC”) and Cost-Sharing Subsidies*

The BBB Act would extend the more-generous “temporary percentages” for calculating the Affordable Care Act (“ACA”) PTC amounts for 2021 and 2022 under the American Rescue Plan Act of 2021 (“ARPA”) until the end of 2025. It would temporarily eliminate the general 400% of federal poverty line income ceiling for PTC eligibility through 2025. It would also temporarily lower the threshold for calculating whether a taxpayer has access to affordable coverage through an employer-sponsored plan from 9.5% to 8.5% of household income for 2022 through 2025, and provide that the affordability thresholds would not be subject to the normal indexing until 2027.

The BBB Act would temporarily amend the ACA employer “firewall” rules through 2025 so that the PTC would be available to individuals whose income generally does not exceed 138% of the federal poverty line, regardless of whether the individual is offered affordable, minimum value employer-sponsored coverage. In addition, an employer would not be subject to an employer “shared responsibility” penalty with respect to such an individual during this time.

The BBB Act would permanently exclude lump-sum Social Security benefit payments from household income for purposes of determining PTC eligibility.

The BBB Act would temporarily limit to \$300 the amount of PTC advance payments that a taxpayer whose household income is less than 200% of the federal poverty line must repay. Additionally, taxpayers who would not otherwise be required to file a tax return but for reconciling an advance payment of the PTC, and whose income for the taxable year generally is not projected to exceed 138% of the federal poverty line, would not be required to file a tax return. This provision would end at the end of 2025.

The BBB Act would modify and extend the provision of ARPA that provides special PTC rules for individuals receiving unemployment compensation through 2022. If a taxpayer receives unemployment compensation for any week beginning during 2021 through the end of 2022, he or she would not be treated as having received household income in excess of 150% of the federal poverty line for purposes of calculating the PTC. It also would amend the ACA to extend cost-sharing subsidies so that individuals receiving unemployment compensation in 2021 or 2022 would not be treated as having received household income in excess of 150% of the federal poverty line for purposes of calculating eligibility for reduced cost-sharing subsidies.

Further, the BBB Act would exclude up to \$3,500 of combined income of dependents under the age of 24 for purposes of calculating eligibility for the PTC and the cost-sharing reductions through 2025.

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## *2. Insulin Coverage*

The BBB Act would require certain group health plans and health insurance issuers offering group or individual coverage to provide certain in-network insulin products on a pre-deductible basis and limits cost sharing for a 30-day supply to the lesser of (1) \$35 or (2) generally 25% of the negotiated price. Such cost-sharing amounts would have to count towards the plan's deductible and out-of-pocket maximum.

## *3. Expansion of Open Enrollment*

The BBB Act would expand open enrollment from 2022 through 2025 for individuals with household income less than 138% of the poverty line who are not eligible for minimum essential coverage under certain government programs.

## *4. Expansion of the Health Coverage Tax Credit*

The BBB Act would make the health coverage tax credit permanent and increase the qualified health insurance premium covered by the tax credit to 80% from 72.5% beginning in 2022.

## *5. Expansion of Non-Emergency Services*

The availability of certain family planning services and non-emergency medical transportation services for silver qualified health plans to individuals who have household income of less than 138% of the poverty line would be extended for 2024 and 2025. The BBB Act also would provide government funds to issuers to pay for such services

## *6. Expansion of Non-ACA Compliant Health Insurance Coverage*

The BBB Act would expand the list of "non-ACA compliant health insurance coverage" to include association health plans and short-term limited duration insurance.

## *7. Mental Health Parity Penalties*

The BBB Act would expand the Department of Labor's ability to impose civil monetary penalties for violations of the Mental Health Parity and Addiction Equity Act (MHPAEA) by group health plan sponsors, plan administrators, and issuers. It would apply civil monetary penalties available under the Genetic Information Nondiscrimination Act to such violations.

## **B. Prescription Drug Pricing**

Under the BBB Act, the federal government would have the authority to negotiate the prices of a limited number of high-cost drugs lacking generic or biosimilar competitors covered under Medicare Parts B and D. The new negotiation process would apply to up to 10 of such drugs in 2025, 15 in 2026 and 2027, and 20 in 2028 and later years. The drugs would be selected from the 50 drugs with the highest total Medicare Part D spending, and the 50 drugs with the highest total Medicare Part B spending for 2027 and later years. The negotiation process would also apply to all insulin products.

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The BBB Act also would set an upper limit for the negotiated price of between 40-75 percent of the non-federal average manufacturer price, with the limit scaling down depending on how far the drug is past its approval or licensure. Unlike H.R. 3, the House-passed Elijah E. Cummings Lower Drug Costs Now Act, the negotiated prices would not be apply to private health care plans. Excise taxes would apply for periods when a drug manufacturer does not comply with the negotiated prices.

The BBB Act also includes:

- out-of-pocket caps on insulin payments under Medicare Part D,
- a cap of \$2,000 for out-of-pocket prescription drug costs for seniors enrolled in Medicare Part D,
- a requirement that drug manufacturers pay rebates to the federal government if prices for certain drugs and biologicals covered under Medicare Parts B and D increase faster than the rate of inflation, and
- a full repeal of the Trump administration drug rebate rule.

## C. Medicare Expansion

The BBB Act would expand Medicare Part B to cover certain hearing services and hearing aids beginning in 2023. Required coverage would include rehabilitation and treatment services by qualified audiologists and hearing aids once per ear every 5 years for individuals diagnosed with moderately severe, severe, or profound hearing loss.

## D. Medicaid

The BBB Act does not include a proposal from a prior version under which individuals living in the 12 states that did not expand Medicaid as part of the ACA would be eligible for coverage under a new federal Medicaid program. The BBB Act, however, does expand existing ACA PTC subsidies to allow these individuals to purchase affordable coverage on the ACA Exchanges for 2022-2024.

Specifically, the BBB Act would expand the availability of cost-sharing subsidies in 2023, 2024, and 2025 to families whose household income is less than 138% of the federal poverty line. Further, the BBB Act would allow individuals with a household income of less than 100% to be eligible for cost-sharing subsidies for 2023, 2024, and 2025 and would treat individuals with household income of more than 100% but less than 138% of the federal poverty line as having a household income equal to 100% of the federal poverty line (and thus make the individuals eligible for more generous subsidies). The BBB Act would amend the cost-sharing provisions for 2023, 2024, and 2025 so that the qualified plan's share of cost sharing would be 99% of such costs for individuals with a household income below 138% of the poverty line. It also would provide government funds to issuers to pay the issuer's 12% of such costs.

The BBB Act would require states to offer continued eligibility for Medicaid coverage for pregnant women for twelve months following the birth of a child, regardless of the basis for the individual's eligibility for medical assistance.

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## E. Expansion of Funding for Health Insurance Consumer Information

The BBB Act would significantly increase the amount of funding available for the provision of health insurance consumer information under Section 2793(e) of the Public Health Service Act for 2022 through 2025.

## F. Health Insurance Affordability Fund

The BBB Act would create a new health insurance affordability fund for states to permit them to provide reinsurance payments to: (i) health insurance issuers for individuals enrolled in most types of individual health insurance coverage (except for grandfathered plans, transitional plans, student health plans, and excepted benefits); or (ii) reduce out-of-pocket costs for individuals enrolled in qualified health plans through an Exchange and for individuals enrolled under standard health plans offered through a basic health program.

## G. Expansion of the Oversight of Pharmacy Benefit Manager Services

For plan years beginning on or after January 1, 2023, health insurance issuers offering group health plan coverage or other entities providing pharmacy benefit management services of behalf of a group health plan ("PBM") must, at least every 6 months, provide reports to the plan sponsor of the plan that include, among other things:

- amounts of copayment assistance dollars paid, or copayment assistance cards applied, that were funded by a drug manufacturer;
- a list of each drug covered by the plan or PBM that was dispensed during the reporting period (along with detailed information about the plan's coverage of the drug);
- a list of each therapeutic category or class of drugs dispensed under the plan (along with detailed information about the plan's coverage of the drugs);
- gross spending on prescription drugs by the plan, before rebates or other manufacturer fees or remuneration;
- amounts received, or expected to be received, by the plan or issuer in drug manufacturer rebates, fees, alternative discounts, and other remuneration received from the manufacturer or third party;
- total spending on prescription drugs by the plan or health insurance coverage; and
- amounts paid directly or indirectly in rebates, fees, or other remuneration to brokers, consultants, advisors, or other individuals or firms who referred the plan's or health insurance issuer's business to the PBM.

Further, group health plans, health insurance issuers offering group health insurance coverage and PBMs would be prohibited from entering into contracts with a drug manufacturer, distributor, wholesaler, subcontractor, rebate aggregator, or other associated third-party that limit the disclosure of information to plan sponsors in a manner that prevents the plan, or entity providing PBM services on behalf of the plan, from making these mandated reports. In addition, the issuers and PBMs must

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provide the information above in accordance with HIPAA. The penalties for non-compliance would be \$10,000/day.

## II. Federal Paid Family Leave Program

The BBB Act would create a new federal paid family and medical leave program providing for up to 4 weeks of paid leave per year to all workers in the U.S. who need time off work to welcome a new child, recover from a serious illness, or care for a seriously ill family member. A prior version of the legislation would have provided for up to 12 weeks of paid leave. Like the prior version, the BBB Act retains federal grants to legacy states – i.e., the 9 states and the District of Columbia that already have passed paid leave laws – and to “eligible employers” that provide paid leave programs that meet certain requirements.

It is not clear, however, whether the paid leave provisions will be included in the version of the bill to be considered by the Senate as Senator Joe Manchin (D-WV) has objected to creating a new paid leave program.

## III. Retirement Provisions

The BBB Act slims down the retirement provisions from a prior version of the legislation approved by the House Ways and Means Committee in September. Unlike that version, the House-passed version does not include a mandate for employers to offer an automatic retirement plan nor does it make changes to greatly expand the Saver’s credit. The House-passed version also does not include language prohibiting certain IRA investments (*e.g.*, private placements) requesting investors to have certain income or education levels. But it does include several significant proposals, highlighted below.

### A. Limitations on High-Income Taxpayers with Large Account Balances

Earlier this year, Ways and Means Committee Chairman Richard Neal (D-MA) and Senate Finance Committee Chairman Ron Wyden (D-OR) expressed interest in limiting so-called “mega IRAs.” The BBB Act again includes a provision limiting high-income taxpayers with very large IRA and/or defined contribution account balances (except with a delayed effective date and other changes).

Specifically, the BBB Act would limit contributions to Roth or traditional IRAs for years in which a taxpayer’s income is over \$400,000 per year (\$450,000 for married filing jointly (“MFJ”) and \$425,000 for head of household (“HH”)) if that individual has more than \$10 million combined in aggregate IRA and defined contribution retirement accounts. Any IRA contributions exceeding the limit would be subject to an annual 6% excise tax.

For individuals who meet the taxable income thresholds and whose account balances exceed \$10 million, the BBB Act would create a new Minimum Required Distribution of 50% of the amount in excess of \$10 million. If an individual’s aggregate account balances exceed \$20 million, the BBB Act would require the individual to first withdraw Roth account balances in either the amount necessary to reach \$20 million or the balance of the Roth accounts, whichever is less. After the Roth withdrawals,

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the individual could choose how to reduce their balances to \$10 million. Special increased withholding rules also apply. These amounts would be eligible for distribution – notably, the bill would clarify that distributions of excess amounts are not taxable (e.g., are treated as a “qualified distribution” under the Roth rules).

The BBB Act also requires plan administrators to report to the IRS and the employee information on such vested accounts with balances in excess of \$2.5 million.

These provisions would be effective for tax years (plan years for the reporting provision) beginning after December 31, 2028.

## **B. Elimination of “Back-Door” Roth IRA Conversions and In-Plan Roth Conversions of After-Tax Amounts**

Identical to the previous version, the BBB Act would prohibit taxpayers with taxable income above \$400,000 (\$450,000 MFJ, \$425,000 HH) from executing a Roth conversion from a traditional IRA or employer-sponsored plan, effective after December 31, 2031.

The BBB Act would also prohibit all Roth conversions of after-tax contributions within qualified plans or IRAs, effective after December 31, 2021. This means, regardless of income level, (i) in-plan Roth conversions of after-tax contributions, and (ii) Roth IRA conversions of any non-taxable amounts, would not be allowed.

## **C. Statute of Limitations with respect to IRA Non-Compliance**

The BBB Act would extend the statute of limitations for IRA noncompliance regarding valuation-related misreporting (substantial errors that are willful or otherwise) and prohibited transactions from 3 to 6 years after the return was filed. The provision would be effective for taxes to which the current 3-year period ends after December 31, 2021.

## **D. IRA Owners Treated as Disqualified Persons for Purposes of Prohibited Transaction Rules**

The BBB Act would “clarify” that an IRA owner (including the owner of an inherited IRA) is always a “disqualified person” for purposes of applying prohibited transaction rules, effective for transactions occurring after December 31, 2021.

## **E. Prohibited Transactions Relating to Holding DISC or FSC in IRAs**

The BBB Act would make it a prohibited transaction to hold an interest in a Foreign-Sales Corporation (“FSC”) or a Domestic International Sales Corporation (“DISC”) that receives a commission or payment from an entity owned by the IRA holder. This appears to be in response to a series of cases the IRS brought against IRA owners that concluded that the issuance of DISC/FISC stock to an IRA was not a sale or exchange of property between a plan and disqualified person within the meaning of section 4975(c)(1)(A) because the issuing company was not a disqualified person. This was due to the fact,

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according to courts, that the issued stock was not owned by anyone at the time of sale. This change would be effective for stock and other interests acquired or held on or after December 31, 2021.

## F. Corporate Minimum Tax – Possible Impact on Companies Sponsoring Defined Benefit Pension Plans

The BBB Act would establish a 15% corporate alternative minimum tax (AMT) on adjusted financial statement income for corporations with annual income in excess of \$1 billion over the preceding 3 years. Some companies that sponsor single-employer defined benefit pension plans have expressed concerns that this proposal could have a negative impact on them, including by subjecting them to taxes on pension plan assumed rates of returns on assets that the company cannot access and through the loss of deductions on plan contributions. It remains to be seen whether these concerns will be addressed when the Senate considers the legislation.

## IV. Executive Compensation

Under current law, publicly-traded employers are prohibited from taking a deduction for executive compensation in excess of \$1 million paid in any taxable year to the chief executive officer, chief financial officer, and the next three highest compensated employees. In addition, under current law, each of these employees is subject to a rule colloquially expressed as “once a Covered Employee, always a Covered Employee.” Earlier this year, the ARPA expanded this list to include the next five highest compensated employees beginning after December 31, 2026, although these employees are not subject to the “once in, always in” rule.

The BBB Act would close a perceived loophole identified in the preamble to the Final Regulations under Code section 162(m) and seek to limit planning techniques used to avoid the deduction limitation under Code section 162(m). Essentially, taxpayers previously argued that compensation received from a partnership in which the publicly traded company was a partner was excludable from the deduction limitation under Code section 162(m). Although the IRS rejected this argument, it noted that if a partnership is respected for Federal income tax purposes, Code section 162(m) would not apply to compensation paid to a publicly-traded employer’s covered employee by a corporate subsidiary of a partnership, because the corporate subsidiary would not be a member of the publicly traded employer’s affiliated group.

The following proposed changes appear to work in tandem to limit planning techniques (*e.g.*, paying compensation with the corporate subsidiary of a partnership) to avoid the deduction limitation under Code section 162(m).

- New Aggregation Rule. The BBB Act would create an “aggregation rule,” analogous to the rule presently in place for health insurance providers (Code sec. 162(m)(6)), that would broaden the scope of when related entities are treated as a “single employer.”
- Expanded Scope of Applicable Employee Remuneration. The BBB Act would broaden the scope of applicable employee remuneration to include any remuneration “whether or not such

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remuneration is paid directly by the publicly held corporation.” Further, the definition of applicable employee remuneration was clarified to include performance-based compensation, commissions, post-termination compensation, and beneficiary payments.

Finally, the bill would direct the IRS to prescribe additional regulations or other guidance to “prevent the avoidance” of the deduction limitation under Code section 162(m).

Notably however, the House-passed version of the BBB Act does not include a provision included in a prior version that would have accelerated (to years after December 31, 2021) the ARPA expansion of Code section 162(m) to include the next five highest compensated employees beginning after December 31, 2026.

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If you have any questions, please do not hesitate to contact your regular Groom attorney or the authors listed below:

[Kathryn Bjornstad Amin](#), [David Block](#), [Elizabeth Thomas Dold](#), [Sarah Mysiewicz Gill](#), [Michael Kreps](#), [Jeffrey Kroh](#), [Louis Mazawey](#), [Brigen Winters](#)

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