

Congress Continues to Consider ACA-Related Legislation

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Health Care

While Congressional Republicans' efforts to repeal and replace the Affordable Care Act ("ACA") stalled at the end of July when the Senate was unable to pass repeal-and-replace legislation, a number of Senators are continuing to work on legislation to make changes to the ACA. Most notably:

1. The Senate Health, Education, Labor and Pensions (HELP) Committee is considering, on a bipartisan basis, legislation to help stabilize the individual health insurance markets.
2. Senator Bill Cassidy (R-LA) and Senator Lindsey Graham (R-SC) are working on a new version of ACA repeal-and-replace.

We analyze these parallel legislative efforts below.

Senate Help Committee Effort to Stabilize Individual Health Insurance Markets

Senate HELP Committee Chairman Lamar Alexander (R-TN) and Ranking Member Patty Murray (D-WA) announced four hearings on legislation to stabilize premiums and the individual insurance markets. The goal is to pass a narrow stabilization bill by the end of September, which is when insurers must commit to participate in the exchanges for 2018. Senator Alexander described the purpose of the hearings as creating a short-term solution to generate certainty in the markets before turning to discussions on long-term solutions.

The Senate HELP Committee does not have jurisdiction over Medicaid, and none of the changes under consideration are expected to impact the ACA's Medicaid provisions.

Last Week's Hearings

Last week, the Senate HELP committee held two of the four scheduled hearings. In these hearings, Committee heard testimony from state insurance commissioners John Doak (OK), Mike Kreidler (WA), Julie Mix McPeak (TN), Teresa Miller (PA), and Lori K. Wing-Heier (AK). It also heard testimony from Governors Charlie Baker (R-MA), Steve Bullock (D-MT), Bill Haslam (R-TN), Gary Herbert (R-UT), and John W. Hickenlooper (D-CO).

There was significant agreement among the insurance commissioners and governors regarding several ways in which to stabilize the markets. Specifically, in both hearings, there seemed to be consensus among the witnesses with respect to three policy proposals:

1. Funding and continuing cost sharing reduction (CSR) payments. Under the ACA, the federal government is required to reimburse insurers for providing CSRs to individuals under 250% of the federal poverty level (FPL). There is disagreement (and pending litigation) about whether Congress has appropriated funding to make these CSR payments to insurers, and the Trump Administration has not yet made clear whether it will continue to make these payments in the future (though it has made the payments thus far).

All of the insurance commissioners and governors agreed that the federal government should fund and make CSR payments in the short-term, in order to promote certainty in the markets. They provided various suggestions regarding how long the funding should continue: through 2018, through 2019, or permanently.

2. Creating flexibility for States in filing Section 1332 waivers. The insurance commissioners and governors also testified that giving states more flexibility in filing for Section 1332 waivers would help market stabilization. Under Section 1332 of the ACA, States may request a waiver of ACA provisions relating to qualified health plans, consumer choices and insurance competition, premium tax credits and CSRs, and the individual and employer mandates. Under the statute, the federal government may grant a waiver only if a State's proposed replacement waiver program meets four criteria: (a) provides "coverage that is at least as comprehensive as the [essential health benefits] defined in Section 1302(b) and offered through Exchanges" as determined by CMS; (b) provides "coverage and cost sharing protections against excessive out-of-pocket spending that are at least as affordable as the" ACA would provide; (c) provides coverage to "at least a comparable number of its residents" as the ACA would; and (d) will not add to the federal deficit.

Proposals discussed at the hearing included: eliminating the six-month waiting period for final federal approval; allowing the application to proceed with approval by the governor or insurance commissioner, without waiting for the legislature to pass a law; and allowing automatic approval for waivers previously approved for other states.

3. Funding reinsurance programs. Several witnesses recommended funding for reinsurance programs by the federal government and by the states. Senator Alexander expressed interest in programs like those in Alaska, Maine, and Minnesota. He made clear that he thought the States, and not the federal government, should have the chief role in creating reinsurance programs.

Next Steps

This week, the Senate HELP Committee will hold two additional hearings. Today, the Committee will hear testimony on state flexibility from the following health care experts: Michael O. Leavitt, former Secretary of Health and Human Services and former Governor of Utah; Bernard J. Tyson, President and CEO of Kaiser Foundation Hospitals and Health Plan, Inc.; Allison Leigh O'Toole, CEO of MNSure; Tammy Tomczyk, Senior Principal, Oliver Wyman Actuarial Consulting, Inc.; and Tarren Bragdon, CEO of Foundation for Government Accountability. On Thursday, September 14, the Committee will hear from other health care stakeholders: Manny Sethi, President of Healthy Tennessee and an orthopedic trauma surgeon; Christina Postolowski, Rocky Mountain Regional Director of Young Invincibles; Susan L. Turney, CEO of Marshfield Clinic Health System; Raymond G. Farmer, Director of the South Carolina Department of Insurance and NAIC Secretary-Treasurer; and Robert Ruiz-Moss, Vice President of the Individual Market Segment of Anthem.

It remains to be seen whether the Senate HELP Committee can come to a bipartisan agreement on legislation. It will be particularly challenging to get something done on the timetable urged by Senator Alexander (i.e., by the end of September). While there is clear bipartisan support for acting, it is unclear whether the Republicans and Democrats will be able to agree on the breadth of any stabilization plan. For example, the Democrats are opposed to any weakening of the essential health benefits requirements through a Section 1332 waiver, and the Republicans have made clear that several reforms to the Section 1332 waiver process would have to be included in any stabilization plan for the bill to pass the House.

It is also not clear whether President Trump would sign legislation funding CSR payments. While the Trump Administration has continued to make CSR payments, President Trump has used the funding for CSR payments as leverage in ACA repeal-and-replace discussions.

The Trump Administration appears amenable to streamlining the Section 1332 process and using federal funding for state-specific reinsurance programs. In July, the Trump Administration approved a Section 1332 waiver to provide federal funding for Alaska's reinsurance program, which Alaska estimates would lower premiums such that it will save the federal Government over \$50 million in premium tax credits. The Trump Administration not only approved Alaska's Section 1332 waiver, but issued a [bulletin](#) encouraging other States to pursue state-specific health insurance programs under Section 1332 to help stabilize insurance markets in the State. (Alaska's application can be found [here](#), and CMS has published a checklist, available [here](#), to further assist states in preparing Section 1332 applications.)

Cassidy-Graham

Senators Cassidy and Graham have been working for the last two months on a new ACA repeal-and-replace bill. It is not entirely clear what is in the legislation, as the text has yet to be released. However, according to [summaries](#) provided by Senators Cassidy and Graham, it appears the bill would include the following, among other things:

1. Elimination of premium tax credits, CSRs, the increased federal medical assistance percentage for the Medicaid expansion, and funding for the Basic Health Program.
2. A block grant program providing money to States to replace the Medicaid expansion, premium tax credits, CSRs and the Basic Health Program.
 - a. Approximately \$136 billion in annual funding nationally starting in 2020, increased by 2 percent annually until 2026, at which time it is eliminated (or presumably could be re-authorized).
 - b. Funds could be used to subsidize the purchase of private health insurance and high-risk pools, among other things.
 - c. Allocation of nationwide funding calculated by a formula based on ACA spending in the State from 2014 through 2017 and the State's percentage of the nationwide beneficiaries between 50 percent and 138 percent of the FPL.
 - d. According to [an analysis from the Center for Budget and Policy Priorities \(CBPP\)](#), this block grant funding would amount to an \$83 billion cut in federal funding for health coverage, compared to the ACA.
3. Repeal individual and employer mandates.

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4. Provide \$2 billion to States to prepare Section 1332 waiver applications, and give automatic approval of Section 1332 waiver applications 45 days after submitted by a State.
5. A Medicaid per capita cap and block grant option similar to those included in [the Senate's Better Care Reconciliation Act \("BCRA"\)](#).
6. A Medicaid and CHIP Quality Performance Bonus Payment program.
7. Optional Medicaid work requirements for non-disabled, non-elderly, non-pregnant individuals.
8. Elimination of the payment exclusion for individuals in Institutions for Mental Diseases ("IMD") for Medicaid enrollees with an IMD stay that does not exceed (1) 30 consecutive days and (2) 90 days in any calendar year.
9. Repeal the medical device tax; the over-the-counter medication tax; and taxes on health savings accounts.

It seems unlikely that Cassidy-Graham will pass the Senate. Democrats will oppose the bill, and thus it can only pass the Senate through the reconciliation process (which requires only 50 to pass, as opposed to the standard 60 votes to overcome a filibuster). Last week, the Senate Parliamentarian announced that Senate Republicans' ability to use this year's reconciliation process expires on September 30, 2017, which means that Senate Republicans would have less than three weeks to finish drafting and pass Cassidy-Graham out of the Senate.

If and when legislative text of Cassidy-Graham is released, we will circulate a more in-depth analysis of the bill.

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