COVINGTON

Bipartisan Proposal in the Senate Would Fund Cost-Sharing Reduction Payments and Make Other Changes to the Affordable Care Act

October 20, 2017

Health Care

On Tuesday, Senators Lamar Alexander (R-TN) and Patty Murray (D-WA) announced a bipartisan proposal that would fund cost-sharing reduction (CSR) payments under the Affordable Care Act (ACA) through 2019. The bill would also make other changes to the ACA, including: allowing consumers over age 30 to buy catastrophic plans; making it easier for States to obtain innovation waivers under Section 1332; and funding outreach and education for open enrollment on the Exchanges. The proposal follows President Trump's announcement last week that the federal government would cease making CSR payments to insurers, effective immediately, which we described in an advisory circulated last Friday.

Funding for Cost-Sharing Reduction Payments

Under Section 1402 of the ACA, insurers are required to reduce cost-sharing for individuals with household incomes at or below 250 percent of the federal poverty level (FPL), and the federal government is required to make CSR payments to insurers to pay for the cost of those cost-sharing reductions. The legality of the federal government's CSR payments has been in question since 2014, when House Republicans sued President Obama for making CSR payments without explicit appropriations from Congress to do so. The lawsuit is pending in the United State Court of Appeals for the District of Columbia. *See House of Representatives v. Price*, No. 16-5202. The Trump administration had been continuing CSR payments on a month-to-month basis until last Thursday, when President Trump announced that he would cease future CSR payments. President Trump cited the lack of congressional appropriations for such payments as justification for ending the CSR payments.

The Alexander-Murray bill would appropriate funding for CSR payments for plan years 2018 and 2019, as well as any remaining portion of plan year 2017 following enactment of the bill.

The Alexander-Murray bill includes a number of provisions to ensure that the benefits of the CSR payments are passed on to the consumer in 2018, since many issuers have already increased their 2018 premiums to reflect the fact that the Trump Administration would not be making CSR payments. In order to receive CSR payments in plan year 2018, States must submit a certification and a "State plan" to the Department of Health and Human Services (HHS) within 60 days of the bill's enactment, with assurances that the benefits of the CSR payments would be passed on to the consumer. In the state plan, States would be required to establish a system for making direct payments to consumers. The bill proposes a "rebate" system where States would provide monthly, one-time, or after-the-year rebates to consumers directly, to offset increased premium costs. States have the flexibility to propose other methods of providing a direct financial benefit to consumers, so long as the benefit does not increases costs for applicable taxpayers under the premium assistance credit provisions set forth in Section 36B of the Internal Revenue Code. The bill does not require States to provide a certification or State plan for plan year 2019, presumably because insurers will set 2019 premium rates with the knowledge that CSR payments will be appropriated and available.

Rebates or other direct financial assistance provided to consumers will not be deducted from the premium for purposes of calculating the amount of a consumer's premium assistance credit under Section 36B(b)(2) of the Internal Revenue Code. This provision would ensure that consumers would receive premium assistance tax credits based on the higher premiums set by insurers when there was still uncertainty about continued payment of CSR subsidies, instead of the lower premiums that incorporate a CSR rebate.

On the other hand, rebates or other direct financial assistance to consumers *will* be considered a part of the premium when calculating risk adjustment payments, and when reconciling any other relevant downstream financial calculations.

The bill also allows State insurance regulators to opt out of CSR payments for the 2018 plan year by issuing a formal notice instructing QHPs in that State to decline CSR payments. This authority only exists for the 2018 plan year, not the 2019 plan year.

Other Changes Proposed in the Alexander-Murray Bill

The bill proposes several other changes to the ACA to help stabilize exchange markets:

- Section 1332 Waivers. The bill would provide greater State flexibility in seeking innovation waiver programs under Section 1332 of the ACA, by, for example: 1) allowing waivers programs to provide cost-sharing protections that have "comparable affordability" to current plans, rather than requiring that the protections be "at least as affordable" as current plans; 2) allowing States to pursue Section 1332 waivers so long as the State's Governor issues a certification that he or she has the authority to implement the proposed State program, instead of requiring that the State legislature pass a law to that effect; and 3) shortening the expedited review period for Section 1332 waiver applications from 180 days to 90 days.

  Several States have used these waivers to establish state-based reinsurance programs or high risk pools, and there are several pending Section 1332 waivers waiting approval for the 2018 plan year.

- Catastrophic "Copper" Plans. The bill would allow individuals over the age of 30 to purchase catastrophic health plans in the individual market, often referred to as "copper" plans. Under the ACA currently, only individuals under the age of 30 are eligible to purchase catastrophic plans and still be considered a "qualified individual" eligible for benefits and protections under the ACA.

- Funding for Exchange Enrollment. The bill would provide $105.8 million in funding for outreach and enrollment activities in both the 2018 and 2019 plan years, to assist in boosting enrollment in ACA exchanges during the open enrollment period. The bill also requires HHS to collect data and issue reports on "the performance of the Federal Exchange and the Small Business Health Operations Program (SHOP)" during the enrollment period on a bi-weekly basis, as well as a summary of the report within 3 months after the completing of the open enrollment period. Reported data would include the number of unique website visits and the number of consumers enrolled in the Exchanges at the end of the enrollment period.

Prospects for Passage

The Alexander-Murray bill has significant bipartisan support in the Senate; 24 Senators in both parties have publicly endorsed the legislation. However, the White House and important Republican leaders in Congress have expressed opposition to the bill. A statement from White House spokeswoman Sarah Sanders rejected the bill, stating that the White House "want[s] something that just doesn't bail out the insurance companies but actually provides relief for all Americans," and that this bill was "not a full approach" at addressing the broader issues in the ACA. These latest statements from the White House came after President Trump initially appeared to endorse the bipartisan deal. Alexander-Murray has also been publicly opposed by House Speaker Paul Ryan, who believes that "the Senate should keep its focus on repeal and replace of Obamacare." Thus, even if this version of the bill passes through the Senate, it is likely to face difficulty garnering the votes necessary to pass through the House.

In addition, the outcome of pending litigation may impact the prospects that Alexander-Murray will pass. Nineteen States sued the Trump administration last week, alleging that the federal government's failure to make CSR payments violates the text of the ACA, its implementing regulations, and the U.S. Constitution. The lawsuit seeks an emergency temporary restraining order to restore CSR payments during the pendency of the lawsuit. A hearing on this request will be held in San Francisco on Monday, October 23. If the States prevail in convincing the Court to order the federal government to make the CSR payments, that may decrease the pressure on Congress to pass legislation to fund those payments.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Health Care practice:

Caroline Brown	+1 202 662 5219	cbrown@cov.com
Philip Peisch	+1 202 662 5225	ppeisch@cov.com
Shruti Barker	+1 202 662 5031	sbarker@cov.com