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Trump Administration Actions Will Affect Health Insurance Markets

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Health Care

In a court filing this morning and an Executive Order issued yesterday, the Trump Administration announced major policy changes affecting health insurers and employers. The Administration intends to cease making cost-sharing reduction (CSR) payments to insurers, while also expanding the availability of Association Health Plans, short-term health plans, and Health Reimbursement Arrangements (HRAs). The end of CSR payments and the expansion of Association Health Plans are likely to substantially impact to the individual and small group health insurance markets and issuers. Each of these changes is discussed below.

CSR Payments

In a court filing this morning, the Trump Administration announced that it would cease making cost-sharing reduction (CSR) payments to insurers, effective immediately. That is, Qualified Health Plans (QHP) will not receive cost sharing reduction payments for September 2017, or for any future months. In a legal opinion issued by the Attorney General and attached to the court filing, the Trump Administration has taken the position that appropriations are not available for the CSRs, and thus the federal government cannot make those payments.

The Administration's decision will pose a financial hardship to plans for the remaining months of 2017, as 2017 premiums were likely priced on the assumption that the CSRs would continue. The Government's decision not to pay the subsidies does not eliminate the QHP's responsibility to "reduce cost-sharing under the plan" for people under 250% of the federal poverty level, ACA § 1402(a), (c), an obligation which is not addressed in the Attorney General's opinion. Therefore, plans will continue to incur the costs of reducing cost-sharing but will not receive reimbursement from the Government.

Although an issuer can offset the loss of the CSRs by increasing premiums, at this point there is little ability to adjust premiums for 2018, because premiums have been finalized and approved, and open enrollment will begin on November 1st. Therefore, the effect on issuers in 2018 will depend on the extent to which ongoing receipt of the subsidies was factored into premium pricing approved by state regulators for the coming year.

Because the Government also subsidizes the price of premiums (through advance premium tax credit) for all those eligible for cost sharing reductions, it is estimated that the cost of increased premiums will result in substantially higher federal outlays than would be the case if the CSRs were funded.

QHP issuers are not without legal recourse. Health plans may be able to recover for unpaid CSR payments in the Court of Federal Claims. The ACA provides that "the Secretary shall make periodic and timely" CSR payments to QHP issuers, ACA § 1402(c)(3), and there is longstanding Court of Federal Claims and Federal Circuit case law indicating that the federal government is liable for breaching an obligation in a money-mandating statute, even if Congress failed to appropriate sufficient funds for the agency to meet that obligation. A similar issue was presented by the Government's failure to make risk corridor payments; that issue is now before the Federal Circuit.

Association Health Plans

The ACA imposes minimum requirements on individual and small group health insurance plans, including, for example, required coverage of essential health benefits and limits on the factors that insurers can use to set premiums. The ACA places (comparatively) fewer requirements on large group plans.

The basic aim of the Trump Administration policy announced yesterday is to allow more small businesses to offer their employees health insurance through associations, which would be subject only to the federal large group plan regulations, instead of the small group plan regulations imposed by the ACA. To accomplish this, the Executive Order states that the Department of Labor (DOL) will "consider proposing regulations or revising guidance," "[t]o the extent permitted by law and supported by sound policy," to re-interpret the definition of "employer" in the Employee Retirement Income Security Act (ERISA). The current DOL interpretation requires a "bona fide" "commonality of interest" among small groups in order to be treated as a single "employer" and thus a single large group. *See, e.g.*, Advisory Opinions 2017-02AC and 2003-17A. In a separate statement, the Trump Administration suggested that employers "in the same line of business" forming an association "for the express purpose of offering group insurance" could be considered to satisfy the commonality of interest requirement.

It is important to note that the Executive Order does not itself change any regulation or guidance; it only requires DOL to "consider" changing regulations or guidance to facilitate Association Health Plans. Assuming DOL will in fact propose such a change, that change could segment the group insurance markets. Small businesses with relatively young and/or healthy employees may be more likely to join associations which provide skinnier benefit packages at a lower price, which could skew the risk pool for small businesses remaining in the ACA small group market. Similarly, the availability of Association Health Plans to young and/or healthy employees of both small and large employers could adversely affect an employer's risk pool and increase employers' costs of insuring their populations outside of an Association Health Plan.

The impact on health insurance markets will depend on the details and timing of the DOL action. If DOL does not act before 2018 premiums are finalized and approved, health plans will have to take into account the uncertainty of possible federal action which would change the risk characteristics of the QHP small group market.

Short-Term, Limited-Duration Insurance

Short-term insurance plans need not satisfy any of the minimum requirements and benefits that the ACA put in place for regular health insurance plans, and as such, short-term plans are

generally cheaper and have skinnier benefits packages than QHPs. Short-term insurance plans do not satisfy the ACA's individual mandate, which penalizes anyone who goes more than three months without ACA-compliant health insurance. By regulation, the Obama Administration limited to three months the allowable coverage period for short-term insurance plans.

The Trump Administration appears prepared to allow individuals to once again purchase short-term insurance policies for longer periods (perhaps for the full year). Specifically, the Executive Order instructs the Secretaries of Treasury, Labor, and Health and Human Services to "consider proposing regulations or revising guidance, consistent with law, to expand the availability of [short-term, limited duration insurance]" and to "consider allowing such insurance to cover longer periods and be renewed by the consumer."

Health Reimbursement Arrangements

Under the Internal Revenue Code, employers are allowed to contribute amounts to employees' HRAs that are excluded from employees' taxable income and can be used to pay for employee medical expenses. During the Obama administration, the Secretaries of Treasury, Labor, and Health and Human Services issued guidance that generally prohibits employers from allowing employees to use HRAs to purchase health insurance policies in the individual market.

The Executive Order instructs relevant agencies "to allow HRAs to be used in conjunction with nongroup coverage." Although it is remains to be seen how exactly the agencies will implement this instruction, this instruction could potentially permit employers to allow employees to use their HRAs to purchase health insurance in the individual market.

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
Kendra Roberson	+1 202 662 5044	kroberson@cov.com
Will Hudson*	+1 202 662 5757	whudson@cov.com

*Law Clerk - not yet admitted to the bar of the District of Columbia; supervised by senior lawyers at the firm.