SQUIRE PATTON BOGGS

Congress Stalls: Trump Administration Takes Command of Healthcare Reform

The Trump administration announced several changes to the healthcare landscape during the week of October 9, 2017. This article serves to provide the current state of play and suggested impacts of recent actions.

State of Play

Cost-Sharing Reduction Payments

The purpose of the Cost-Sharing Reduction (CSR) subsidies authorized by P.L. 111-148, the Patient Protection and Affordable Care Act (ACA), is to decrease out-of-pocket maximums and lower the amounts that qualified individuals pay for deductibles, copayments and coinsurance for marketplace enrollees with incomes below 250% of the poverty level.

In 2014, the US House of Representatives sued the Obama administration over funding by the administration of the CSR payments, as Congress did not provide an explicit funding mechanism, called an appropriation. Former US House of Representatives Speaker John Boehner, who is now a senior strategic advisor at our firm, led the charge to file this lawsuit. Additionally, Congressman Jack Kingston, who is now a principal at our firm, played an integral role in questioning the constitutionality of the CSR payments as Chair of the House Appropriations Subcommittee on Labor, Health, and Human Services, and Education (LHHS).

On May 12, 2016, the federal district court for the District of Columbia ruled that the Obama administration could not constitutionally reimburse health insurers for the CSR subsidies. Although the CSR program is authorized by Congress, members of Congress opted not to appropriate funds for this specific purpose. The decision reinforced the long-standing position that no federal agency may use public monies from the Treasury unless Congress has made the funds available through appropriations as provided in the US Constitution.

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Article 1, § 9

In 2016, the judge stayed the order enjoining the administration from reimbursing health insurers absent a specific appropriation pending appeal. The court decision was viewed as a victory for the US House of Representatives. Consequently, the Obama administration appealed the decision. The Trump administration continued the abeyance to conduct a legal review, as well as provide Congress a chance to correct the law.

On October 12, 2017, after its review and acknowledgement of the May 2016 court ruling, the Trump administration declared that it would immediately cease making CSR payments to health insurers.

White House Press Secretary Sarah Huckabee Sanders outlined the administration's perspective: "Based on guidance from the Department of Justice, the Department of Health and Human Services has concluded that there is no appropriation for cost-sharing reduction payments to insurance companies under Obamacare. In light of this analysis, the government cannot lawfully make the cost-sharing reduction payments."

Additionally, Acting US Department of Health and Human Services (HHS) Secretary Eric Hargan and Centers for Medicare and Medicaid Services (CMS) Administrator Seema Verma issued a joint statement, noting that, "It has been clear for many years that Obamacare is bad policy. It is also bad law. The Obama administration unfortunately went ahead and made CSR payments to insurance companies after requesting – but never ultimately receiving – an appropriation from Congress as required by law."

CSR Payments – What Happens Next?

- According to press reports, attorneys general from 18 states and the District of Columbia are joining to file a lawsuit against President Trump's decision to discontinue CSR payments to insurers.
- President Trump's adherence to the court's decision to halt CSR payments could result in additional negotiations between Congress and the White House to negotiate a short-term or long-term bill related to healthcare reform.

Executive Order

On October 12, 2017, President Trump signed an Executive Order (EO) to reform the US healthcare system. Specifically, the order directs:

- The Secretary of Labor to consider expanding access to Association Health Plans (AHPs), which could potentially allow American employers to form insurance-purchasing groups across state lines by broadening the interpretation of the Employee Retirement Income Security Act (ERISA)

- The Departments of the Treasury, Labor, and HHS to consider expanding coverage through low-cost, short-term limited duration insurance (STLDI), which is largely exempt from ACA mandates and rules
- The Departments of the Treasury, Labor, and HHS to consider changes to and expand the use of employer-funded Health Reimbursement Arrangements (HRAs) accounts, which reimburse employees for healthcare expenses, including deductibles and copayments

The tenants of the EO, especially in regard to providing more flexibility, align with past GOP healthcare reform efforts.

Impact of Both Healthcare-Related Actions

The Trump administration's acknowledgment of the court's decision to end CSR payments presents another challenge to the viability of the ACA, as it could cause further destabilization of the individual health insurance market. An August 2017 CBO report noted the impacted plans could increase by nearly 20 percent or insurers may exit ACA marketplaces.

CMS is permitting plans to compensate for the lost CSR payments by charging higher premiums across other levels of marketplace plans. However, most states accounted for the termination of CSR payments when submitting rates for the 2018 plan year in September. If states filed rates in anticipation of the continuance of the CSR subsidies, CMS will work with the states on a case-by-case basis.

Prior to President Trump's announcement, numerous Senate and House Republicans had expressed support for temporarily continuing the payments until the existence of a legislative solution, including Senate Health, Education, Labor, and Pensions (HELP) Chairman Lamar Alexander (R-TN), Senate Finance Chair Orrin Hatch (R-UT), Sen. John Thune (R-ND), Sen. John Cornyn (R-TX), Rep. Tom Reed (R-NY), and House Ways & Means Chairman Kevin Brady (R-TX).

Additionally, Republican and Democratic leaders have continued to discuss market stabilization negotiations. On October 17, 2017, Senate HELP Chairman Alexander and Ranking Member Patty Murray (D-WA) announced a bipartisan market stabilization package that includes a congressionally mandated two-year extension of federal CSR payments, as well as reforms to ACA Section 1332 state innovation waivers.

On October 18, 2017, President Trump expressed his opposition to the legislative proposal, classifying it as an effort to "bail out insurance companies."

The EO provides potential opportunities for small to mid-size employers with increased access to AHPs. Furthermore, the EO's expansion of STLDI is expected to assist individuals between jobs, people in counties with only a single insurer offering exchange plans, those with limited coverage networks and people who missed the open enrollment period but still want insurance.

The EO is not effective immediately – departments received time to issue proposed guidance and regulations to support its implementation. Therefore, stakeholders will have an opportunity to submit comments before the issuance of final rules.

In conclusion, the recent changes by the Trump administration could shift the political discussion surrounding healthcare reform, including the possibility for a short-term agreement on changes to the ACA. The details of rules pertaining to the implementation of the EO will better inform stakeholders of its impact.

Questions?

We recognize these changes may affect our clients from a legal or policy prospective. Our Public Policy Healthcare group works closely with our lawyers to help clients understand and address issues. Please feel free to reach out to any of these contacts or your firm lawyer with questions.

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