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Obamacare Fight Spurs Executive Actions and Legislative Proposal

By Jerry W. Taylor

The last 30 days have seen efforts by both the executive and legislative branches to improve conditions in the health care insurance markets with the goal of making health insurance more accessible and affordable.

Executive Order on Health Insurance Access

On October 12, 2017 President Trump signed Executive Order 13813 entitled "Promoting Healthcare Choice and Competition Across the United States" (the "Executive Order"). The Executive Order focuses on lowering regulatory barriers to, and increasing utilization of, three types of health insurance products:

- Association Health Plans ("AHP");
- Short-Term, Limited Duration Insurance ("STLDI"); and
- Health Reimbursement Arrangements ("HRA").

AHPs allow qualifying small businesses to band together to take advantage of lower premiums realized from greater purchasing power and economies of scale -- similar to the economic advantages realized by large employer group plans. The Executive Order directs the Secretary of Labor to consider promulgating regulations to expand the qualifications for AHP participation, with the goal of allowing access to groups such as hourly wage earners, farmers, employees of small businesses, and entrepreneurs.

STLDI polices are exempt from many of the coverage mandates and other regulatory restrictions under Obamacare. Participation in STLDI is currently limited to less than three months duration, and extensions are prohibited. The Executive Order directs the Secretaries of Treasury, Labor, and HHS to consider promulgating regulations to expand the availability of STLDI by extending the permissible eligibility periods and allowing renewals.

HRAs are tax-advantaged accounts that can be established by employers to give employees more choices and flexibility regarding their healthcare, such as by providing funds for payment of deductibles and co-pays. The Executive Order directs the Secretaries of Treasury, Labor, and HHS to consider promulgating regulations to increase the usability of HRAs, expand employers' ability to offer them to employees, and allow them to be used in conjunction with non-group coverage.

The Executive Order's directives set time parameters of between 60 and 120 days for action by the respective departments, and imposes various reporting requirements to the president on shortcomings of current regulations in the relevant areas, and recommendations for further improvements.

End of Obamacare Subsidies

In a separate but related development, President Trump has ended federal cost-sharing subsidies to heath care insurers under Obamacare. The subsidies are intended to off-set the increased cost to insurers of providing the expanded insurance coverage mandated under Obamacare, and making coverage affordable to low income individuals by reducing co-payments and other out-of-pocket costs. The federal subsidies, known as Cost Sharing Reduction ("CSR") payments, were expected to total approximately $9 billion in 2018.

Insurers contend without CSR payments they will be forced to drastically increase premiums or completely pull out of the market place exchanges. The Trump administration considers the subsidies as an unwarranted bail-out of the insurance companies.

The CSR payment cessation has already surfaced in at least two lawsuits. In 2014 the House of Representatives filed a federal lawsuit challenging the legality of the CSR payments, contending that Congress never appropriated funding for them. That litigation is now pending in the U.S. Circuit Court of Appeals for the D.C. Circuit. On October 13, the Trump administration filed notice in that proceeding that the payments will be immediately stopped. In a separate lawsuit filed in the U.S. District Court for the Northern District of California, 18 state attorneys general sought emergency injunctive relief to mandate continuance of the CSR payments pending a judicial ruling on the merits of the issue. The injunctive relief was denied.

Congressional Compromise Proposal

In a rare show of bi-partisan cooperation Sen. Lamar Alexander (R-TN) and Sen. Patty Murray (D-WA) unveiled a proposal they contend is necessary to stabilize the health insurance market, particularly in light of the president's stated intention to stop the CSR payments.

The key components of the proposed legislation are:

CSR payments by the federal government would continue to be made through at least 2019. This proposal could be impacted by a final judicial ruling in the pending litigation referenced above.

States would be given more flexibility to craft their state programs to avoid some of the cost and regulatory burdens under Obamacare. This would be accomplished by streamlining the process for receiving approvals of state "section 1332 waivers" and relaxing the standards for federal approval of the same. For example, a state would no longer have to demonstrate its proposed waiver plan results in coverage "as affordable as" Obamacare plans, only that it would have "comparable affordability" with the Obamacare plans.

As of the date of this writing, the Alexander-Murray proposal has not been formally introduced in the Senate, and faces an uncertain legislative future.

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