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ATTORNEYS AT LAW

MEMORANDUM

To: ASTS

From: Peter Thomas, Peggy Tighe, Steve Postal, Leif Brierley, and Jill O'Brien

Date: October 24, 2017

Re: President Trump Takes Executive Action Impacting Individual Marketplace: Association Health Plans, Ending Cost-Sharing Reduction Payments

Last week, President Trump took executive action on health care reform to expand access to Association Health Plans (AHPs) and end the cost-sharing reduction (CSR) payments which subsidize insurance plans on the individual market.

On October 12, President Trump signed an executive order directing the Secretary of Labor to consider proposing regulations or revising guidance within 60 days, consistent with law, to allow more employers to form AHPs. AHPs allow groups of small business owners or trade groups to purchase health insurance outside of the Affordable Care Act's (ACA's) individual market, bypassing federal ACA insurance regulations.

Also on October 12, the President announced the Administration would no longer pay cost-sharing reduction (CSR) subsidies to insurance plans. President Trump has threatened to withhold the payments, which his Administration calls a "bailout to insurance companies," since he came into office. President Trump said that this action was intended to force Democrats in Congress to negotiate on an ACA replacement. Since President Trump's decision to end the payments, Senate HELP Committee Chairman Lamar Alexander (R-TN) and Ranking Member Patty Murray (D-WA) announced a bipartisan agreement to fund the cost-sharing reduction payments for an additional two years to stabilize the individual markets.

This memorandum details the content of the executive order and presents the response of key legislative actors.

Executive Order on Association Health Plans

The Executive Order on Association Health Plans (AHPs) directs the Secretary of Labor to consider expanding access to insurance via AHPs in an effort to give American employers more choice in health insurance and possibly lower insurance rates in the large group market. The order authorizes the Secretary of Labor to consider allowing organizations to form groups across State lines, potentially "allowing employers in the same line of business anywhere in the country to join together to offer healthcare coverage to their employees." The Secretary could allow employers to form AHPs through existing organizations or through new organizations created to offer group insurance. AHPs are not subject to the same regulations as plans on the individual market. AHPs are not subject to the essential health benefits (EHB) provision of the ACA which requires plans on the individual market to cover care in ten benefit areas. Nor would they be governed by the ACA's laws regarding non-discrimination and pre-existing conditions, community rating and lifetime or annual caps in benefits.

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AHPs are not a new concept; they have been discussed for decades in health policy circles. Proponents believe they offer more choice and affordable coverage options for businesses in the large group market. House Ways and Means Committee Chairman Kevin Brady (R-TX) applauded President Trump's executive action, stating that the expansion of AHPs will help millions of Americans "access the care that's right for them at a cost they can afford." Chairman Brady and other proponents hope the executive action will also create more flexibility for small businesses.

Opponents believe AHPs "cherry pick" the healthiest groups of patients and segregate them from the broader insurance pool, weakening the risk pool of the ACA's individual marketplace and undermining the patient protections established by the ACA. In a statement responding to the executive order, House Democratic Leader Nancy Pelosi (D-CA) expressed concern that individuals with pre-existing could face higher premiums on the individual market as the least healthy patients would likely remain in the individual markets, driving up premiums. Pelosi also echoed concerns from other opponents that individuals who opt to join AHPs "will find they've been paying for coverage that doesn't cover much at all" and may be met with higher medical bills if faced with a serious illness or injury.

STLDI and HRA Plans

Additionally, the executive order directs the Secretaries of the Departments of the Treasury, Labor, and Health and Human Services (the Secretaries), within 60 days from the executive order, to consider expanding coverage through low cost, short-term, limited duration insurance (STLDI) plans sold outside the marketplace. These plans would not be subject to the ACA mandates and therefore may be less expensive than plans offered through the ACA. The White House summary of the order notes, "the main groups who benefit from STLDI are people between jobs, people in counties with only a single insurer offering exchange plans, people with limited coverage networks, and people who missed the open enrollment period but still want insurance."

The executive order directs the Secretaries to consider allowing such insurance to cover longer periods and be renewed by the consumer. In October 2016, the Obama Administration issued a rule that the duration of such plans must be less than three months. Previously, the rule stated that the duration of such plans must be less than twelve months.

The executive order also directs the Secretaries, within 120 days of the executive order, to increase the usability of Health Reimbursement Arrangements (HRAs) to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with non-group coverage. HRAs allow employers to use pre-tax dollars to reimburse employees for healthcare expenses, including deductibles and copayments. The ACA had placed significant restrictions on such plans.

Cost-Sharing Reduction Payments

Cost-Sharing Reductions (CSR) are federal payments to insurers in the individual markets to offset the cost consumers would have paid for their co-pays and deductibles. The payments were established to assist insurers in covering about 7 million Americans earning up to 250 percent of the federal poverty level who enrolled in health insurance through the individual market through the ACA. CSRs are estimated to be worth about $7 billion.

On October 12, the Trump Administration announced that it is not within the bounds of executive power to continue making CSR payments to insurers. In a statement, the Justice Department stated that the agencies that would normally pay the cost-sharing reduction payments "have decided not to spend money to fund those payments," and issued a legal opinion on October 11 to the Departments of the Treasury and Health and Human Services stating that the permanent appropriation for "refunding internal revenue collections" under 31 U.S.C. § 1324 was not available to fund the CSR payments authorized by the ACA.

Congress did not appropriate funds for CSR payments. In 2014, the House of Representatives, led by former House Speak John Boehner (R-OH), filed a law-suit against the Obama Administration arguing that such payments were beyond the scope of executive power and required Congressional approval. In 2016, a U.S. District Court Judge ruled in favor of the House of Representatives, determining that the Obama Administration illegally funded the CSR payments. The Obama Administration appealed the decision and continued to fund the CSRs. On August 1, a federal appeals court in Washington issued a ruling that permitted 17 states to join the Obama Administration's appeal, effectively allowing them to defend the CSR payments against the House's lawsuit.

In response to President Trump's announcement, Senators Lamar Alexander (R-TN) and Patty Murray (D-WA) announced a bipartisan agreement to fund the CSR payments. In a statement, Senator Alexander expressed willingness to fund the CSR payments as: "without these cost-sharing reduction payments, premiums will rise, the debt will increase by $194 billion over ten years, and up to 16 million Americans may find themselves living in counties where no company sells insurance in the individual market." This agreement builds on recommendations identified in the HELP Committee hearings held in September to stabilize the individual markets.

On October 17, Trump commended Alexander's and Murray's bipartisan efforts, but continued to express reproach towards CSR payments: "While I commend the bipartisan work done by Senators Alexander and Murray - and I do commend it - I continue to believe Congress must find a solution to the Obamacare mess instead of providing bailouts to insurance companies." Murray and Alexander may also face significant opposition from Republicans in the House. Last week, prior to the executive order, Speaker Paul Ryan told reporters that CSRs would not be included in an appropriations bill. Additionally, on October 18, White House Press Secretary Sarah Sanders indicated that the President no longer supports the legislation, saying, "We need something that goes a little further to get on board."

On October 20, the American Medical Association (AMA), the American Hospital Association (AHA), America's Health Insurance Plans (AHIP), the American Academy of Family Physicians, the American Benefits Council, the Blue Cross Blue Shield Association, the Federation of American Hospitals, and the U.S. Chamber of Commerce issued a joint statement urging Congress to enact Alexander's and Murray's proposed legislation to fund the CSR payments for at least another two years.

The situation remains fluid as the states and federal lawmakers react to the executive order and the Alexander-Murray proposed legislation.