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CMS Aims to Stabilize Exchanges but Does Not Address Issuers' Biggest Questions

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CMS recently released a final rule with the goal of stabilizing Exchange markets for 2018. The agency also issued several significant guidance documents where CMS extended the deadlines for 2018 rate and Exchange qualified health plan application submissions, adopted a good faith compliance standard for 2018 and delegated additional plan certification responsibilities to states. While these steps may provide some comfort for issuers, the agency did not address the most significant areas of issuer concern when it comes to 2018 Exchange participation. Namely, the Final Rule and guidance documents do not resolve ongoing uncertainty regarding cost-sharing reduction funding, the enforcement of the individual mandate or ongoing efforts to repeal the Affordable Care Act.

In Depth

The Centers for Medicare and Medicaid Services (CMS) recently finalized its proposed "market stabilization rule" (Final Rule). The Final Rule is largely consistent with the February 17 proposed rule (Proposed Rule), which we summarized in a previous *On the Subject*. On the same day the Final Rule was released, the agency also issued several significant guidance documents in which CMS: (i) finalized an extension to the deadlines for 2018 rate and Qualified Health Plan (QHP) application submissions, (ii) adopted a good faith compliance standard for 2018 issuers on the Federally-Facilitated Marketplace (FFM) and (iii) delegated additional QHP certification responsibilities to states.

While these steps may provide some comfort for issuers, the agency did not address the most significant areas of issuer concern when it comes to 2018 Exchange participation. Namely, the Final Rule and guidance documents do not resolve ongoing uncertainty regarding cost-sharing reduction (CSR) funding, the enforcement of the individual mandate, or ongoing efforts to repeal the Affordable Care Act (ACA). With premium rates due soon in many states, there is a narrow window for these outstanding concerns to be addressed before issuers must decide whether to offer products in the Exchanges and at what price.

Summary of Final Rule

In the preamble to the Final Rule, CMS emphasized that the Final Rule is needed to address the recent exit of issuers from the market and increased premium rates in certain counties. The agency explained that "prompt regulatory action is necessary to stabilize the markets for the upcoming plan year, and [we] recognize the importance of clearly communicating these changes in light of confusion and uncertainty for consumers and providers." In the two months since CMS's Proposed Rule, several issuers have announced they are withdrawing from the Exchanges for 2018, underscoring the agency's concern.

The Final Rule addresses several issuer concerns about issuer regulatory burdens related to plan and product development and consumers gaming special enrollment periods and the 90-day grace period. Generally, CMS finalized its rule as proposed and as described in more detail in our summary of the Proposed Rule. One notable change between the Proposed Rule and Final Rule relates to the "guaranteed availability" standard. CMS had proposed to create an exception to guaranteed availability for individuals with unpaid premiums due to the issuer from which the individual is seeking to purchase new coverage. In the Final Rule, CMS extended the policy to all health plan issuers within a controlled group, as defined under sections 52(a), 52(b), 414(m), or 414(o) of the Internal Revenue Code. Thus, under the Final Rule, an applicant's unpaid premiums due to an issuer in a controlled group would permit another issuer in the same controlled group to refuse coverage to the applicant.

Additional Guidance Documents

CMS's guidance documents that were released on April 13 are also intended to address issuer uncertainty about 2018 by providing enforcement relief and extending certain federal filing deadlines:

- **Good Faith Compliance Standard**. CMS announced that for issuers participating in FFMs, CMS will apply a good faith policy for enforcement during payment year (PY) 2018. The guidance explains that "CMS will not use formal enforcement remedies for non-compliance with QHP certification standards when QHP issuers participating in the FFMs in PY 2018 act in good faith and make reasonable efforts to address concerns in an appropriate time frame." Issuers should note that the good faith policy is limited to compliance with QHP certification standards in FFM states and does not appear to extend to issuers participating in state-based Exchanges or to other federal requirements that are not QHP certification standards, such as Public Health Service Act insurance market reforms or state insurance market standards.

- **Filing Deadlines**. The agency finalized rate and QHP application filing deadlines for PY 2018 that were proposed on February 17, 2017. The agency extended the federal rate filing deadlines to the following dates:

    - **States without an Effective Rate Review Program**. QHP and non-QHP rate filings by the date set by the state, as long as the date is no later than June 1, 2017.

    - **States with an Effective Rate Review Program**. QHP and non-QHP rate filings are due by the date set by the state, as long as the date is no later than July 17, 2017.

Although the rate filing deadline was extended to as late as July 17, QHP applications are due by June 21, 2017 and these applications must include QHP Rates Table Templates. The agency will allow updates, corrections, and changes to the QHP Rates Table Template after the initial

submission.

Issuers must still comply with applicable state rate filing deadlines that are earlier than the federal deadline, so the extended federal deadlines only provide relief if states also extend their rate filing deadlines. While deadlines for rate filing vary by state, for PY 2017, 33 states required rate filings prior to June 1. Some states, including New Hampshire and Washington, have already delayed their 2018 rate filing deadlines given the uncertainty regarding CSRs.

- **QHP Application Review**. CMS announced that it will give additional responsibility to states during the QHP certification process in FFM states. For all FFM states, CMS will look to states to review licensure and good standing and network adequacy. In FFM states where the state performs plan management functions, the state will also review service area, prescription drug formulary outliers, and non-discrimination in cost-sharing.

Significant Questions Remain

Several significant areas of issuer uncertainty remain unaddressed in the Final Rule and related guidance, and this uncertainty will likely overshadow any stabilizing effect achieved by the Final Rule. Most importantly, CMS and the Trump Administration have not committed to providing CSRs for 2018, which appear to be caught in the middle of the ongoing negotiations over health care reform. Total CSR payments in 2016 were $7 billion. With rate filing deadlines fast approaching, issuers may face the difficult task of pricing 2018 products with no certainty regarding CSR funding.

In addition to the CSR uncertainty, one of President Trump's first acts was to issue an executive order that has created significant uncertainty regarding the continued enforcement of the requirement that most Americans purchase health insurance. More recently, the Internal Revenue Service revised its review of individual tax filings to accept the tax returns of individuals who fail to indicate whether they maintained health insurance for the previous year. Non-enforcement of the individual mandate penalty could lead to fewer healthy individuals in the individual market risk pool, so this uncertainty may affect 2018 Exchange pricing and participation decisions.

Finally, despite Republicans' initial failure to pass the American Health Care Act, House Republicans and President Trump continue to work towards agreement on ACA repeal and replace legislation. Continuing uncertainty regarding the fate of ACA's Exchanges and insurance market reforms will no doubt affect issuer decisions for 2018.

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