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Developments in the Affordable Care Act

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After a brief lull in activity, recent developments are likely to involve all three branches of government in addressing issues under the Affordable Care Act.

The Legislature: It is often said that Congress rarely takes action until a crisis needs to be addressed. With the demise of this summer's repeal and replace effort, initiatives to modify the Affordable Care proceeded at a quieter, more deliberate pace. That changed when President Trump announced an immediate halt to the payment of cost-sharing reduction (CSR) subsidies designed to help low-income individuals meet certain expenses—such as deductibles and co-insurance—in coverage they obtain through an ACA Marketplace Exchange plan. The U.S. Senate Committee on Health, Education, Labor and Pensions moved quickly to release an early draft of a bill that would appropriate funds for those subsidies through the end of 2019 and take other measures that reflect the nascent bi-partisan efforts led by Senators Lamar Alexander (R-TN) and Patty Murray (D-WA).

Sponsors of the bill are likely to seek to move it through Congress quickly in view of the destabilizing effect that the end of the CSR program would have on the individual insurance market as the ACA Marketplace Exchanges head toward their newly shortened enrollment period of November 1-December 15, 2017.

Besides appropriating funds for the CSR program for a two-year period, the new bill would:

· create a new "copper" level plan for the Marketplace Exchange, essentially extending the availability of less expensive catastrophic coverage—which is now available only to adults under age 30—to all adults;

· provide states with greater flexibility to innovate, both in the design of their Medicaid plans and in the ACA health insurance coverage requirements for insurers within a state, streamlining the waiver approval process; and

· implement rules for states to enter into interstate health insurance compacts for the sale of insurance across state lines.

Although there appears to be support for this bill in the Senate, it is uncertain whether the same is true of the House of Representatives. Although President Trump has criticized the CSR program, the reasons for terminating the program formally rested on a legal interpretation that funding for CSRs required a Congressional appropriation. If Congress were to approve that appropriation, President Trump would be in a position to sign it into law.

The Executive Branch: On the same day that President Trump made his CSR announcement, he signed an Executive Order instructing the Departments of Treasury, Labor, and Health and Human Services, as applicable, to consider regulatory measures for three types of existing health plan options: association health plans, short-term, limited duration insurance plans, and health reimbursement arrangements.

· The Department of Labor is to consider rules that would allow employers to more easily band together to offer health insurance coverage to their employees through an Association Health Plan that would have some of the advantages available to large employers today.

· Certain health insurance offerings—called short-term, limited duration insurance plans—are not subject to ACA coverage requirements. This insurance may be offered for no more than a three-month period. Under the Executive Order, the Departments are to consider regulations that would extend the period for which it may be offered (perhaps to 12 months) and allow for that coverage to be renewed automatically.

· The Departments also are to consider rules that would expand the expenses that can be reimbursed through a health reimbursement arrangement (HRA) to include an employee’s payment of insurance premiums in the individual insurance market. Current regulations impose restrictions on this type of reimbursement, at least for larger employers. In December 2016, Congress passed legislation permitting small employers, with fewer than 50 full-time employees, to reimburse employees’ individual health insurance premiums through HRAs.

Further regulatory consideration by the agencies involved may produce new regulations, but also may run into limits set forth in the ACA itself. That may, in turn, lead to further efforts to modify the statutory provisions of the ACA.

The Judiciary: In much-publicized regulations published the day after the White House announcements, the Departments of Treasury, Labor, and Health and Human Services expanded the range of employers who could exclude expenses for female contraception under their plans. Employers who qualify for either a religious exemption or a moral exemption may claim an exemption from ACA preventive care rules that would otherwise require those expensed to be fully covered. The issuance of these regulations already has generated lawsuits that will work their way through the courts over time.

Under the new administration, changes are imminent for the Affordable Care Act and a range of other laws and regulations affecting health care and health benefits. Ballard Spahr attorneys established the Health Care Reform Initiative to monitor and analyze legislative and regulatory developments. We will continue to follow developments in this area as they emerge. Changes may come to the Health Care Reform Dashboard, but it will continue to serve as an online resource center for news and analysis on developments regarding the Affordable Care Act and health care reforms that follow.

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