

Healthcare Reform Progress or More Fits and Starts?

By: Kevin Cottone, Luke Repici, Lori Smith and Andrew Ralston

Healthcare Alert

10.19.17

Trump's Executive Order

On October 11, 2017, President Donald Trump signed an Executive Order which loosens the Affordable Care Act's (ACA) coverage requirements. Trump's Executive Order:

- directs the departments of Health and Human Services, Labor and Treasury to "take steps" to allow consumers who are employees of small businesses that do not offer health insurance to their employees, and who make too much to receive subsidies, to purchase "association health plans" – allowing consumers to purchase less comprehensive, less expensive insurance, including across state lines;
- authorizes less restrictions on the purchase of short-term insurance than is permitted under the ACA; and
- expands the use of Health Savings Accounts.

Trump Ends Cost-Sharing Reductions

Cost-Sharing Reductions (CSRs) are payments made by the federal government to insurance companies covering about seven million individuals. CSRs help to lower premiums, deductibles, and co-payments. CSRs particularly assist lower and middle income consumers, including over two million adults aged 50-64, who purchase insurance coverage through health insurance marketplaces.

On October 12, 2017, the Trump Administration announced that all CSRs would cease. President Trump characterizes CSRs as a "bailout to insurance companies". Speaking at the Value Voters Summit this past weekend, Trump maligned Congress for doing nothing about repealing the ACA, and contended that his "little different route" will be "just as effective, and maybe it will even be better".

The Trump Administration now contends that CSRs are not permitted by law and that it ended them at the recommendation of the Justice Department.

On October 13, 2017, President Trump claimed that insurance companies have "made a fortune" because of CSRs, and that Democrats in Congress need to "get smart & deal" with the Trump Administration. Later, Trump contended that CSRs were "not going to [the] people" - only to "making insurance companies rich" - and that they do nothing but "prop up" insurance companies' "stock prices".

Effect of Eliminating CSRs

The National Association of Insurance Commissioners estimates that the elimination of CSRs will produce a 12 to 15% increase in premiums starting in 2018.

This estimate appears like it may be low. Already, Pennsylvania's Insurance Department has announced that premiums will rise an average of 30.6% next year (compared with an average increase of 7.6% if Trump had not ended the CSRs).

Ironically, nearly 70% of the people who benefited from CSRs before President Trump eliminated them live in states that voted for Trump in 2016.

Responses to Trump's Actions

The Trump Administration's executive decisions reforming the ACA are hailed by conservative groups like Heritage Action for America and Freedom Partners, backed by Charles and David Koch.

On the other hand, negative responses to Trump's actions have come from throughout the healthcare and business worlds. Following the Trump Administration's October 12, 2017 decision to stop CSRs, the American Medical Association, the American Academy of Family Physicians, the American Hospital Association, the Federation of American Hospitals, America's Health Insurance Plans (AHIP), the Blue Cross Blue Shield Association (BCBSA), the American Benefits Council, and the United States Chamber of Commerce, issued a joint letter to the Majority and Minority Leaders of Congress, urging them to fund CSRs "immediately." This group contends that "[t]he Administration's decision to end this essential support for millions of Americans will have harmful consequences for patients, families, businesses and taxpayers".

This joint letter reiterated that the Congressional Budget Office (CBO) predicts that ending CSR benefits will: (a) drive up premiums by 20% in 2017 and 25% in 2020; (b) deny coverage for many consumers; (c) greatly increase the risk that some places in the country will have no Obamacare coverage options at all; and (d) increase the federal budget deficit by \$194 billion dollars over the next ten years.

Regarding Trump's October 11 Executive Order, many healthcare industry organizations have expressed great concern that it will further destabilize the Obamacare exchanges. The worry is that the Executive Order's allowing "association health plans" will siphon off younger, healthier consumers - who will choose to purchase less comprehensive, less expensive, insurance plans - while leaving the traditional exchanges populated by a sicker, older population that will be charged so much for their insurance that they will be unable to afford it, and thus be forced to forego purchasing health insurance altogether.

On another front, the Democratic Attorneys General of 19 states have each sued the Trump Administration over the October 12 decision to end CSRs. The states that have brought suit include Pennsylvania, New York, Massachusetts, California, Kentucky, Minnesota, and Connecticut. These states are seeking both a temporary restraining order blocking the Trump Administration from implementing its order to cease making CSR payments effective as of the next scheduled CSR payment - due on October 18, 2017, as well as declaratory relief and a permanent injunction related to all future CSR payments. They contend that stopping CSR payments violates the ACA, as well as provisions of the Administrative Procedure Act.

It bears noting that some Republican legislators have criticized Trump's halting CSRs. Congressman Charlie Dent (R-PA) has said that he "doesn't understand" the President's motivation for ending the CSRs, and that the decision is "ill-advised". Dent went on to state that he is concerned that Trump's decision to end CSRs will mean that, paradoxically, Republicans will now have to "own" the upheavals in the insurance marketplace that are to come. Congressman Brian Fitzpatrick (R-PA) joined in Dent's concern about ending CSRs. Congresswoman Ileana Ros-Lehtinen (R-FL) has stated that the cuts will mean "more uninsured in [her] district." Senator Susan Collins (R-ME) noted that halting CSRs will make insurance "unaffordable for some people".

Ongoing Discussions in Congress

Senate Minority Leader Chuck Schumer (D-NY) has indicated that he believes that there is a "good chance" that money for CSRs could be included in a spending bill that Congress is expected to approve later this year. Both Senate Majority Leader Mitch McConnell (R-KY), as well as House Ways and Means Chairman Kevin Brady (R-TX), have, in the past, claimed that they are open to continuing CSRs.

Other Republicans in Congress, however, including members of the House Freedom Caucus, claim that Alexander's efforts do not go anywhere near far enough. Representatives Mark Meadows (R-NC) and Mark Walker (R-NC) have previously commented on Alexander's proposal stating that CSRs should not "under any circumstances" be brought back.

Where Are We Now?

There remains a great deal of uncertainty about what will happen next, and whether a solution can be brought to bear in time to ensure that 2018 premiums do not skyrocket.

On October 17, 2017, Senators Lamar Alexander (R-TN) and Patty Murray (D-WA) reached a bipartisan deal to fund Cost Sharing Reductions to insurers and make other changes to the Affordable Care Act - a move made in response to the Trump Administration's announcement that it will cease all CSRs starting October 18, 2017, and Executive Order reforming certain important aspects of the ACA.

Although President Trump initially voiced his support for the Alexander-Murray deal when it was announced, he did so while also insisting that he would try again to repeal the ACA. Then, on October 18, 2017, President Trump reversed course and tweeted, "I am supportive of Lamar as a person [and] also of the process, but I can never support bailing out ins[urance] co[mpanies] who have made a fortune w[ith] O[bama]care."

Alexander-Murray has been applauded by Andy Slavitt, the former Acting Administrator of the Centers for Medicare and Medicaid Services during the Obama Administration, as a deal which preserves the ACA, while accomplishing three things – restoring CSR payments for the next two years, providing greater state flexibility, and representing a "down payment" on additional bipartisan healthcare reform.

There remains a strong GOP contingent in the House for whom Alexander-Murray is a non-starter. Many House Republicans have derided CSRs as a bailout for the insurance industry and believe the GOP should remain focused on repealing and replacing the ACA rather than trying to save it.

The only thing that can be said for certain is, even if the bipartisan deal moves forward, the fate of the ACA under the Trump Administration remains unclear.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.