On October 12th, President Trump signed an executive order to amend certain provisions of the Affordable Care Act (ACA). Immediately following the order, the President instructed the Department of Health and Human Services (HHS) to end the ACA’s cost sharing reduction payments (CSRs), which are subsidies to insurance companies to lower the cost of coverage for qualifying individuals on the health insurance exchange (healthcare.gov).

While significant, the executive order is simply an instruction to the regulatory agencies to reinterpret, clarify and develop new regulations to align with the current market and does not immediately change existing rules.

**What to Expect Now?** The next step will be a formal rule-making process with comment windows for stakeholders to review the new draft regulations. The executive order instructs agencies to respond within 60 days, yet the complete rulemaking process often takes several months. Also, insurance companies will require time to develop health plans and services to comply; therefore, there are no immediate action steps for individuals or employers following the initial executive order.

Ending the monthly CSR payment creates a more immediate marketplace impact since the next payment is due on October 21st. The 2018 sign-up window for coverage on healthcare.gov begins November 1, 2017, and recently, uncertainty as to the continuation of the month-to-month payments created a challenge for insurance companies in estimating upcoming enrollment and setting rates.

**Takeaways for Employers:** The executive order does not impact premium tax credits (subsidies) or eligibility and there is no impact to the employer coverage mandate and penalty exposure “shared responsibility” requirements. “Pay-or-play” penalties and the ACA reporting requirements are unchanged.

**In the News – CSR Payments May Continue**

On October 16th, President Trump suggested he is open to a short-term ACA fix and referenced a recent bipartisan effort by Senators Lamar Alexander (R., TN.) and Patty Murray (D., WA.). In the proposal, the CSR payments would be reinstated yet include assurances the funds will assist in lowering out-of-pocket costs and not assist insurance companies. Senator Alexander said, “We want whatever agreement we have to benefit people in 2018 by holding down the increased premiums and by continuing to lower them in 2019.” Additionally, Senator Bill Cassidy (R.,LA.), who cosponsored the recently unsuccessful Graham-Cassidy legislation, said that President Trump’s decision to eliminate CSRs “broke a logjam holding up a bipartisan fix to health care in the Senate.” Both President Trump and Senator Cassidy recently added they are confident that repeal and replace will succeed in the spring of 2018.
Impact of Ending the CSR Payments

CSR payments subsidize insurance companies in order to lower costs for individuals with household incomes below 250 percent of the Federal Poverty Level (FPL) if enrolled in silver plans on the exchange. Currently, CSR payments cost $7B annually.

CSRs are one of two types of exchange subsidies. The executive order does not impact premium tax credits (the second type of subsidy) so this change may simply shift the source of taxpayer funding to additional premium tax credits. Under the ACA, premium tax credits are available on an income-based scale for households earning between 133 – 400 percent of the FPL. The rise in premiums will primarily impact those earning more than 400% of the FPL since ineligible for subsidies.

The National Association of Insurance Commissioners estimates the impact to be a 12-15 percent premium increase, and the Congressional Budget Office (CBO) estimates a 20 percent increase in the individual and small employer exchange. This increase is in addition to trending rising health care costs. However, the Trump administration notes that next year, approximately half of U.S. counties will have only one insurer on the exchange, and action was necessary.

Legal Challenges to the CSR Payments

In 2014, the House of Representatives sued the Department of HHS, arguing the CSR payments are illegal and were never appropriated by Congress. The House won the case in the district court; however, payment appropriation has remained in limbo pending appeal.

Since last week, attorneys general in 18 states have filed a lawsuit to reinstate the CSR payments as critics and legislative experts continue to warn of ongoing court battles.

Executive Order – Details

New Options for Association Health Plans. The most significant impact of the executive order will be President Trump’s direction to rewrite the federal rules allowing small businesses to band together into association health plans. Following the upcoming regulatory process, if the revised regulations follow a less strict interpretation of ERISA, additional plan options will become available for consumers.

- The 1975 ERISA law, which permits larger employers to self-insure health benefits, often results in greater cost effectiveness due to increased flexibility. Association health plans may no longer face state-by-state licensing requirements and a special approval process under potentially more flexible guidelines. Association health plans may be able to offer “skinny” benefits that do not meet current group insurance rules, and possibly be more selective regarding enrollment.

- In question is, who will be able to sponsor association health plans? Will this option be limited to trade associations or other existing groups? Or will it be relatively easy to form an association simply for the purpose of offering benefits? These detailed are to be determined.
As a result of our experience operating numerous other association and cooperative programs, Oswald believes that if permitted, the expanded flexibility of association programs has potential to deliver meaningful value for employers and enhanced service to members.

**New Options for HRAs.** The executive order includes the expansion of the Health Reimbursement Accounts (HRAs). It specifically mentions the possibility of permitting the use of HRAs for the purchase of individual health insurance policies. Current HRA rules do not allow this practice unless it is offered by a small employer using a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA).

**New Options for Short-Term Medical Plans.** The executive order opens the potential for short-term medical plan options. Under current rules, short-term medical plans typically do not cover pre-existing conditions and coverage is limited. If expanded, this change will reverse limits on the sale of short-term insurance policies to bridge coverage in between jobs or after losing eligibility under a parents’ health plan.

**Takeaways**

The upcoming regulatory changes may have a significant impact. The availability of new plan options providing limited coverage may lead to lower-cost options. However, many industry experts are concerned that if these arrangements attract healthier and younger individuals away from the exchange, the exchange rates will increase through adverse selection. If insurance companies continue to leave the exchange, the rising cost spiral will continue with potentially unsustainable premium increases.

As the revised regulations are written, we recommend that employers continue current compliance steps and wait for clarity before considering substantial changes to current strategies. We will remain vigilant in monitoring all regulatory actions, and through our relationships with industry experts in Washington, DC, we will continue to anticipate change and keep you informed.

Oswald Companies | Health Care Reform Implementation
Andrea Esselstein, J.D. | aesselstein@oswaldcompanies.com; 216.658.5012
Disclaimer: Materials are solely for informational purposes as an educational resource. Please contact counsel to obtain advice with respect to any specific issue.