Health Capital Topics
Volume 10
Issue 3
March 2017
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Trump Executive Orders - Federal Agencies Begin Implementation

On January 20, 2017, President Trump issued an Executive Order that directed heads of government agencies responsible for implementing the *Patient Protection and Affordable Care Act* (ACA), including the *Department of Health and Human Services* (HHS) and the *Internal Revenue Service* (IRS), to lessen the economic and regulatory burdens of the ACA.[1] Since the issuance of this order, the impacted agencies have grappled with how to implement the Executive Order, as it did not formally amend the ACA, instead focusing on the authority of these agencies regarding the continued implementation of the law.[2] Two agencies in particular, HHS and the IRS, have responded in ways that intend to lessen the burden with regard to the insurance marketplaces and the individual mandate, respectively.[3] This *Health Capital Topics* article will examine the guidance put forth by these two agencies and consider their practical effects, as well as the likelihood of further changes to the ACA under the Trump Administration.

On February 15, 2017, CMS issued its first notice of proposed rulemaking intended to stabilize the individual and small group health insurance markets.[4] The proposed rule does not repeal or replace the ACA, but instead attempts to improve the marketplaces pending a possible repeal, and is the first step taken by HHS to comply with the January 20, 2017 Executive Order.[5] The viability of the marketplaces has been a topic of concern, particularly since insurers Humana and Aetna limited their participation, and criticized the value of participating, in the exchanges.[6] The notice of proposed rulemaking described a variety of policy and operational changes to stabilize the marketplaces, including:[7]

(1) *Special Enrollment Period Pre-Enrollment Verification:* Increasing pre-enrollment verification of eligibility for all categories of individual market special enrollment periods for all states from 50 percent, as originally pilot tested, to 100 percent, for all eligible special enrollees;

(2) *Guaranteed Availability:* Revising the guaranteed availability requirement to allow issuers to apply a premium payment to an individual's past debt owed for coverage from the same issuer enrolled within the prior twelve (12) months;

(3) *Determining the Level of Coverage:* Increasing the *de minimis* variation in the actuarial values used to determine metal (e.g., bronze, silver, gold, or platinum) levels of coverage for the 2018 plan year;

(4) *Network Adequacy:* Deferring to states' reviews in states with the authority and means to assess issuer network adequacy. This authority is based on the "*reasonable access standard*," but HHS would also recognize commercial authority through accreditation agencies;

(5) *Qualified Health Plan (QHP) Certification Calendar:* Providing issuers with additional time to implement QHP-related proposed changes before a separate finalized rule is released prior to the 2018 coverage year; and,

(6) *Open Enrollment Period:* Shorten the window for open enrollment by 15 days for the 2018 individual market, from November 2017 through January 2018, to November 2017 through December 15, 2017.

HHS has provided the public with only twenty (20) days to comment on the rule, which is shorter than the usual comment period of approximately thirty (30) days. HHS took comments until March 7, 2017, and received 3,954 total comments.[8] The agency has indicated that it wants to publish the final rule by March in order to allow insurers to take it into account before they finalize their forms and rates for 2018.[9] Most of the proposed rules are designed to help insurers who feel as though the rules were too flexible initially, allowing consumers to unfairly game the system by either only paying premiums if they ended up needing health insurance, or attempting to enter the marketplaces only when they became ill.[10] For example, the proposed rule contains a "*continuous coverage*" requirement, which would penalize those insureds that have gaps in medical coverage.[11] The proposed rule also sought to appease insurers through expanding the range of actuarial values within certain metal levels, in an effort to promote innovation within the market while "*mitigat[ing] the need for annual plan redesign*."[12]

On the same day that HHS issued its proposed rule, the IRS released a statement regarding the *Individual Shared Responsibility Payment* (ISRP) as it will apply to tax returns filed in 2017.[13] Originally, the IRS implemented protocols that would automatically reject tax returns during processing in instances where the taxpayer did not provide the required information relating to his or her

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own health coverage.[14] However, in response to the Executive Order, the IRS modified these protocols to permit acceptance of paper and electronic returns for processing in instances where a taxpayer does not indicate their health coverage status.[15] Despite this protocol change, the IRS noted that because the ACA's provisions relating to the ISRP remain in force, "*taxpayers remain required to follow the law and pay what they may owe*,"[16] which may range as high as $695 per adult and $347.50 per child under the age of eighteen.[17] Accordingly, if a taxpayer submits a "*silent return*," i.e., the taxpayer does not indicate that they possessed health coverage for the last year or meet an exemption, the person may be subject to future inquiries from the IRS regarding the status of their health insurance coverage during the 2016 tax year.[18]

Further regulatory modifications to the administrative implementation and oversight of ACA provisions, including the March 21, 2017, final rule released by HHS that delayed the effective date of the creation of new episode payment models similar to the *Comprehensive Care for Joint Replacement* (CJR) Model, are expected in the future.[19] Healthcare industry stakeholders and individuals alike may find it prudent to continue monitoring regulatory developments regarding the landmark 2010 legislation, in addition to tracking legislative action seeking to repeal the law.

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1 "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal" Executive Order: President Donald J. Trump, January 20, 2017, https://www.whitehouse.gov/the-press-office/2017/01/2/executive-order-minimizing-economic-burden-patient-protection-and (Accessed 1/26/17).

2 "Unpacking the Trump Administration's Market Stabilization Proposed Rule" By Timothy Jost, Health Affairs Blog, (February 16, 2017), http://healthaffairs.org/blog/2017/02/16/unpacking-the-trump-administrations-market-stabilization-proposed-rule/ (Accessed 3/1/17).

3 *Ibid.*

4 "CMS Issues Proposed Rule to Increase Patients' Health Insurance Choices for 2018" Centers for Medicare and Medicaid Services, February 15, 2017, http://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2017-Press-releases-items/2017-02-15.html (Accessed 3/2/17).

5 Timothy Jost, February 16, 2017.

6 *Ibid.*

7 "Patient Protection and Affordable Care Act; Market Stabilization" Federal Register Vol. 82, No. 32 (February 17, 2017) p. 10980-10981; "CMS Issues Proposed Rule to Increase Patients' Health Insurance Choices for 2018" Centers for Medicare and Medicaid Services, February 15, 2017.

8 Timothy Jost, February 16, 2017.

9 *Ibid.*

10 *Ibid.*

11 "Patient Protection and Affordable Care Act; Market Stabilization" Federal Register Vol. 82, No. 32 (February 17, 2017) p. 10988.

12 *Ibid*, p. 10989.

13 "Individual Shared Responsibility Provision" Internal Revenue Service, February 15, 2017, https://www.irs.gov/affordable-care-act/individuals-and-families/individual-shared-responsibility-provision (Accessed 3/2/17).

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 "Trump's IRS Stages a Stealth Attack on Obamacare" By Michael Hiltzik, LA Times, (February 15, 2017), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-irs-obamacare-20170215-story.html (Accessed 3/1/17).).

18 "Individual Shared Responsibility Provision" Internal Revenue Service, February 15, 2017.

19 "Medicare Program; Advancing Care Coordination Through Episode Payment Models (EPMs); Cardiac Rehabilitation Incentive Payment Model; and Changes to the Comprehensive Care for Joint Replacement Model; Delay of Effective Date" Federal Register, Vol. 82, No. 52 (March 21, 2017) p. 14465.

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