TERMINATION OF THE AFFORDABLE CARE ACT'S COST SHARING REDUCTION SUBSIDIES

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Health Care Alert

There is a growing likelihood that the current administration will terminate funding for the Affordable Care Act's (ACA) cost sharing reduction (CSR) subsidies some time within the next two months. The administration has the discretion to terminate funding for these subsidies without congressional action.

The CSR subsidies help individuals enrolled in ACA exchange plans cover the cost of deductibles, coinsurances, and copayments through payments to health plans. Eliminating the subsidies would reduce federal payments to health plans by $7 to $8 billion in 2017 and $10 billion in 2018.

Many health plans may need to choose between:

- accepting large financial losses,
- leaving the individual and "exchange" market as quickly as possible,
- attempting to raise premiums, and (or)
- renegotiating contracts and other arrangements with providers.

Health plans and the heath plan associations are now exploring various options. Providers may want to review their agreements with health plans to understand when and how health plans may renegotiate payment and other arrangements. In particular, you may want to review any provision affording health plans the right to renegotiate the agreement if Congress or the administrative agency makes material amendments to law, regulation, or policy.

WHY WOULD THE ADMINISTRATION TERMINATE THE CSR SUBSIDIES?

The administration may terminate these CSR subsidies for several reasons.

First, eliminating the subsidies could create an immediate "crisis," and many in the administration believe that without a crisis, the Senate will delay acting on an ACA replacement bill.

Second, a crisis places the Democrats in the difficult position of either opposing a bill that extends the subsidies or accepting an otherwise "unacceptable" bill. If the Democrats oppose a bill extending the subsidies, the administration believes that the public will blame the Democrats for the crisis.

Third, many in the administration believe that current law does not give the administration the authority to use federal funds for subsidies that are not appropriated by Congress.

BACKGROUND

In brief, the ACA provides low and moderate income individuals and families tax credits to cover some of the cost of premiums and CSR subsidies to cover some of the cost of deductibles, coinsurance, and copayments.

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Approximately 80 to 85 percent of those with coverage through an ACA exchange plan receive the benefit of the CSR subsidies. This percentage is slightly higher in states that have not taken advantage of the "Medicaid expansion" option, and slightly lower in states that have taken advantage of this option.

The ACA created the premium tax credits as an amendment to the tax code. As a result, Congress does not need to appropriate funds each fiscal year to "cover" the premium tax credits. In contrast, Congress authorized the administration to make CSR payments to health plans. However, an authorization to make a payment is contingent upon Congress appropriating funds on an annual basis to carry out the purposes of the authorization. And each year, since the implementation of the ACA, the Republican controlled Congress has explicitly refused to appropriate funds for the CSR subsidy.

In contrast, the Obama administration argued that the ACA implicitly appropriated funds for this purpose, making an annual appropriation of funds to cover the subsidies unnecessary.

The House of Representatives brought suit challenging these payments to health plans. On May 12, 2016, a federal judge ruled in favor of the House, noting that "Congress is the only source for such an appropriation and no public money can be spent without one." The Obama administration appealed the ruling. The current administration has not yet decided if it will continue to pursue the appeal or simply "moot" the case by terminating the payments.[1]

The fate of the CSR payments is still uncertain. However, based on comments from administration officials, it is becoming increasingly likely that the federal government will terminate these payments to health plans.

Notes:

[1] United States House of Representatives v. Burwell, 185 F. Supp. 3d 165 (D.D.C. 2016). The court permitted the payments to continue pending appeal by the Obama Administration. Following the November election, the appeals court placed the case on hold allowing the incoming Trump Administration an opportunity to assess whether to continue the appeal. If the Administration decides to drop the appeal, the district court's decision finding the CSR payments unconstitutional would go into effect, potentially resulting in an immediate termination of these payments. The case has been renamed United States House of Representatives v. Price, Number 16-5202, in the U.S. Court of Appeals for the D.C. Circuit.

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