Client Update
Where Does Healthcare Reform Stand?

After the apparent collapse of congressional efforts to "repeal and replace" the Affordable Care Act ("ACA"), there has been a flurry of activity from both President Trump and members of Congress that could have a significant impact on the healthcare industry.

President Trump has taken action on two fronts: (i) he has issued an Executive Order that could facilitate the purchase of lower-cost health insurance plans that are exempt from many of the ACA's regulations and (ii) he has cut off Cost Sharing Reductions, which are subsidies paid to insurance companies that help lower-income Americans pay for healthcare. Meanwhile, a bipartisan group of Senators has developed a bill that would restore the Cost Sharing Reductions (a Democratic priority) while expanding the availability of low-cost "catastrophic" health insurance plans and facilitating the issuance of Section 1332 waivers that exempt states from some ACA requirements (Republican priorities). Additionally, Congress faces pressure to address the medical device tax because, without congressional action, the tax will go into effect on January 1, 2018.

PRESIDENT TRUMP'S EXECUTIVE ORDER

The Executive Order states that the policy of the executive branch is to "facilitate the purchase of insurance across State lines" and to revise existing regulations that limit "choice and competition" in the health insurance market. To that end, it instructs federal agencies to engage in rulemaking with respect to three issues:

Expanded Access to Association Health Plans

Association Health Plans are health insurance plans that can be offered by various types of associations. The Executive Order contemplates that small businesses could join together to establish associations that could purchase health insurance plans for their members. The Administration believes that such associations could be treated like large employers under the ACA and, as such, would likely be exempt from the ACA's requirement to provide minimum essential benefits. Association Health Plans thus would likely be cheaper and provide less coverage than ACA plans otherwise available to small businesses.

Expanded Availability of Short-Term, Limited Duration Insurance

Short-term insurance is not subject to many ACA terms, including the requirement to cover essential health benefits and the prohibition against charging more for people with preexisting medical conditions. For an individual who is healthy, short-term insurance is likely to be much cheaper than insurance offered on an ACA exchange. In October 2016, HHS under the Obama administration issued a regulation that provided that short-term insurance could only be sold with a three-month term. The Executive Order proposes that short-term insurance with longer—unspecified—terms should be deemed to qualify, and that individuals should have the ability to renew this type of short-term coverage. The Executive Order suggests that HHS may restore the pre-October 2016 rule that allowed short-term insurance for durations of up to one year.

Expanded Availability of Permitted Use of Health Reimbursement Accounts

Health Reimbursement Accounts allow employers to set aside money on a pre-tax basis to reimburse employees for healthcare expenses. The Executive Order states that the availability of such accounts should be expanded. However, it does not provide further details regarding what the expansion would look like.

The Executive Order also directs the Secretaries of Treasury and Labor and the Federal Trade Commission to issue a report within 180 days that (i) addresses the extent to which existing state and federal laws, regulations and policies fail to conform to the Executive Order's stated objectives of promoting the sale of insurance across state lines and the availability of low-cost insurance plans and (ii) identifies actions that the state or federal government could take to achieve these objectives. The inclusion of the Federal Trade Commission in this list and the statement that the Administration is concerned about "excessive consolidation throughout the healthcare system" suggest that the Administration will look carefully at the antitrust implications of mergers of large healthcare insurers and providers. These comments, issued several weeks ago, suggest that the Administration will give serious consideration to whether the recently-announced CVS/Anthem merger is anticompetitive.

Potential Impact: The Executive Order has no immediate substantive impact and is simply a directive to various agencies to engage in rulemaking. We do not know what (if any) rules will ultimately be issued by the agencies and whether any such rules will be as broad as what is contemplated by the Executive Order. Nonetheless, by facilitating the purchase of lower cost insurance plans that lack many protections provided by the ACA, the Executive Order may have a meaningful impact on the insurance market. Lower cost plans would be attractive to people who are young and healthy, which may present a business opportunity to insurers who can develop a profitable business model for selling such plans. In addition, currently, young/healthy individuals who purchase insurance on the ACA exchanges subsidize the cost of providing care to people who are older and sicker. If young, healthy people decide to purchase cheaper plans that are not ACA-compliant, the risk pool for individuals remaining on the ACA exchanges is

likely to become older and sicker. Insurers will therefore have to raise premiums to reflect the new risk pool in the ACA exchanges. In the worst case, that could trigger a "death spiral" in which more and more people drop out of the market for ACA-complaint plans as the cost of such plans increases.

PRESIDENT TRUMP'S DECISION TO END COST SHARING REDUCTIONS

Cost Sharing Reductions are available to individuals whose incomes are between 100% and 250% of the federal poverty level. If such individuals purchase "silver" plans on the exchanges, Cost Sharing Reductions subsidize a significant portion of their out-of-pocket costs. Last year, a district court held that Cost Sharing Reductions were unconstitutional because Congress had never appropriated funding for them. Shortly after issuing the Executive Order, President Trump announced that the federal government would no longer fund Cost Sharing Reductions.

Potential Impact: The impact of ending Cost Sharing Reductions is unclear. The Congressional Budget Office estimates that the cost of "silver" plans would rise by about 20% because health insurers are required to bear the cost of Cost Sharing Reductions even if the government does not provide funding. Given these increases, some lower-income individuals would purchase cheaper plans sold on the exchange (although there would be no Cost Sharing Reductions available for such plans either) and others would stop purchasing health insurance altogether. Others experts believe that the cutoff in Cost Sharing Reductions could cause some insurers to stop selling plans on the ACA exchanges altogether.

It remains to be seen whether the cutoff in Cost Sharing Reductions is permanent. President Trump may well have decided to use the Cost Sharing Reduction cutoff as a bargaining chip to extract concessions on other healthcare-related issues.

THE BIPARTISAN HEALTH CARE STABILIZATION ACT OF 2017

After President Trump's announcement that he was revoking funding for Cost Sharing Reductions, Senators Lamar Alexander and Patty Murray announced that they had developed a compromise bill aimed at stabilizing the market for insurance in the ACA exchanges. The bill contains the following provisions:

<u>First</u>, it would restore Cost Sharing Reductions for 2017, 2018 and 2019.

<u>Second</u>, it would revise the Section 1332 waiver requirements that, if enacted, should facilitate the application and approval of such waivers:

- It would change the provision that any plans contemplated by the waiver be "at least as affordable" as ACA plans to a provision that they be "of comparable affordability" to ACA plans. This revision would apparently give HHS the ability to approve waivers that would

result in plans that cost somewhat more than plans available under the ACA (potentially because of reduced subsidies).

- It would clarify that the requirement that waiver plans be budget neutral means neutral over the entire term of the waiver and the 10-year budget term instead of the first year or each year of the waiver. This revision would create greater flexibility because it is often easier to project long-term savings than to demonstrate savings on a year-by-year basis.
- It would allow governors to apply for Section 1332 waivers without requiring approval from state legislatures.
- It would shorten the period of HHS review from 180 days to 90 days. It would also allow for expedited 45-day approval if a state can establish that delay risks having counties with no ACA plans sold on the exchanges or excessive premium increases.

Third, it would allow anyone to purchase catastrophic insurance plans, which have been called "copper" plans. These plans have low premiums but very high deductibles. Currently, catastrophic insurance plans are available only to people who are under 30 or have experienced certain types of hardships. Unlike the low-cost health plans discussed in the Executive Order, the "copper" plans are ACA-compliant.

Potential Impact: This legislation has garnered support from across the healthcare industry, including America's Health Insurance Plans, the American Medical Association, the Blue Cross Blue Shield Association, the Federation of American Hospitals and the U.S. Chamber of Commerce. However, many conservative Republicans oppose the bill and President Trump has sent mixed signals as to whether he supports it.

If Congress appropriates funding for Cost Sharing Reductions, insurers will not need to implement the rate increases on "silver" plans that they said would be necessary if there were a funding cutoff. A congressional appropriation would also eliminate at least some of the uncertainty facing insurers who are deciding whether they want to offer plans on the ACA exchanges.

The impact of the provisions regarding the Section 1332 waivers will depend on the Administration's approach to such waivers. In March, the Administration previously encouraged states to apply for Section 1332 waivers. HHS subsequently approved waiver proposals from several states that proposed reinsurance plans that would address medical costs incurred by high-risk individuals. However, Iowa submitted a waiver proposal that would have resulted in significant changes to the health insurance that is available on the state's exchange, but recently withdrew its application because it determined that HHS was unlikely to approve it. Oklahoma similarly withdrew its Section 1332 waiver application. According to some reports, Iowa withdrew its application because HHS determined Iowa's waiver program would increase the deficit—but it would have taken HHS several weeks to determine by how much—and Oklahoma withdrew its application because HHS was moving too slowly. If so, this bill might

address those issues by putting HHS on shorter timelines and by providing greater flexibility in determining what counts as deficit neutral.

The provision allowing for "copper" plans may result in a decrease in the number of people who are uninsured because they may prove attractive options for people who are healthy and viewed other ACA-compliant plans as too expensive.

THE MEDICAL DEVICE TAX

The ACA included a 2.3% tax on the sale price of medical devices. In December 2015, however, then-President Obama signed a bill that suspended the tax for two years. If Congress does not take action, the medical device tax will go into force again on January 1, 2018.

Congress has faced significant pressure from the medical device industry to repeal the tax. Recently, 180 members of Congress (including more than 40 Democrats) signed a letter urging Congress to take action to prevent the tax from coming back into effect. It is not yet clear when Congress will take action on this issue.

Potential impact: The re-imposition of the medical device tax could cause significant harm to the medical device industry, which seems unlikely because it is strongly opposed by Republicans and many Democrats.

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Please do not hesitate to let us know if you have questions.

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