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Trump Administration's Conflicting ACA Actions

While the Trump administration continues to wrestle with a "repeal and replace" plan for the Affordable Care Act ("ACA"), the IRS and the Department of Health and Human Services ("HHS") each recently made announcements that seem to signal a conflict in the direction the ACA (or parts of the ACA) may be heading.

On February 15, in accordance with the President's January 20, 2017 Executive Order for executive departments and agencies to "exercise all authority and discretion available to them to…reduce potential ACA burdens to individuals and businesses", the IRS announced that it would not automatically reject a taxpayer's return for failure to have health coverage for all of 2016 in accordance with the ACA individual mandate (as indicated on Line 61 of Form 1040). While the agency indicated it will process these non-compliant tax returns, (presumably not holding up taxpayer refunds), taxpayers may still be liable for payment of the individual mandate penalty. The IRS will send follow up questions and correspondence in an effort to collect the required payment, seemingly a much more difficult path for the IRS to collect currently lawful tax payments.

That same day, the Department of Health and Human Services ("HHS") issued a proposed rule to help stabilize the fragile ACA Marketplaces for individual and small group insurance for 2018, signaling this ACA feature will remain at least through 2018. The proposed rule recommends some of the following actions:

- Modify the guaranteed availability provision to allow insurers, prior to effectuating new coverage, to apply new premium payments to any outstanding debt owed for non-payment of premiums within the prior twelve months. Prior to this proposed ruling insurers were required to issue a new policy to an individual even when outstanding payments were due on the prior year's policy. This provision is to help prevent gaming of the system when individuals would cease premium payment toward the end of one policy year and pick up coverage in the succeeding policy year.
- Shorten the 2018 open enrollment period to be November 1, 2017 – December 15, 2017 to coincide with the timeframe set for the 2019 open enrollment period ensuring individuals have coverage for a full year.
- Along with tightening restrictions on special enrollments, require more documentation and pre-enrollment verification (for consumers in Healthcare.gov) when individuals request coverage due to a special enrollment event. Currently, individuals oftentimes only need to self-attest to the right to enroll in coverage other than during the annual open enrollment period. Insurers have noted that this lack of enforcement endangered the stability of the risk pool as individuals would enroll in coverage only when needed.
- Seek comment on ways to help promote a continuous coverage requirement to help prevent adverse selection and discourage individuals from enrolling in coverage only when care is required. For example, prior to the ACA, HIPAA would require individuals in the group health market to show continuous coverage (or have a break in coverage not greater than 63 days) or be subject to the plan's pre-existing condition restrictions for a period of time at initial enrollment in the group health plan. In order to maintain the ability to offer coverage without a pre-existing condition restriction, some form of financial penalty such as the ACA individual mandate or continuous coverage requirement would be necessary to avoid the types of problems the individual ACA marketplaces have been experiencing.
- Relax certain underwriting restrictions to allow insurers more product design flexibility within each of the metal-tier product lines (bronze, silver, gold and platinum) sold on the exchanges.
- Allow states to have more control to review and determine if an insurer's network meets adequacy standards.

On February 17, HHS announced it is giving health insurance issuers more time to review and prepare rate filings for the ACA Marketplace plans in an attempt to entice more insurers to participate and offer plans for 2018. The deadline to file applications for 2018 is generally delayed from May 3, 2017 to June 21, 2017. This is another signal that the Trump administration is concerned about providing coverage without interruption to millions of individuals who get coverage through the individual healthcare marketplace in this time of uncertainty.

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