

MEMORANDUM

To: ATRA

From: Peter Thomas and Leif Brierley

Date: August 7, 2017

Re: Health Policy Update as Congress Leaves Washington for August Break

Summary

As we enter August, at nearly all levels of the federal government, there are significant health policy debates occurring. In the Senate, the chamber debated and ultimately failed to pass health care reform legislation, leading the chamber to now turn to other pressing priorities and possible bipartisan fixes to certain aspects of the Affordable Care Act (ACA). In the House, a group of about 40 Members of Congress have offered a bipartisan health reform legislative proposal. The White House continues to pressure Congress for action to repeal the ACA, while simultaneously facing significant decisions about continuing legal action on the ACA and whether to continue funding cost sharing subsidy payments under ACA insurance plans.

Despite the abrupt legislative stall on health reform, the Department of Health and Human Services (HHS) is weighing how to impact the implementation of the ACA, including whether to modify waiver requirements regarding essential health benefits (EHBs) for states. Finally, several major programs and Medicare “extenders” face impending reauthorization deadlines, including the Children’s Health Insurance Program (CHIP) and the National Health Service Corps (NHSC).

This memorandum includes an overview of the current state of play in federal health care policy and highlights a number of the following issues:

- Senate action to temporarily stabilize the individual health insurance markets;
- A decision by the President on the continued funding of cost-sharing reduction (CSR) payments;
- A deal on federal appropriations for Fiscal Year 2018, whether that is accomplished through a continuing resolution (CR) or through the completion of a federal budget and appropriations bills; and
- Reauthorization of CHIP, the NHSC, and extension of current Medicare extenders such as the therapy caps exemptions legislation.

Senate

The Senate’s effort to repeal and replace the ACA did not receive the required number of votes for passage, and Republican leadership pulled the underlying legislation from floor consideration. The chamber debated whether to repeal and replace the ACA at length, voting on several versions of legislation and amendments. Other than the “motion to proceed” with debate

on the overall subject (which passed 51 to 50), all amendments did not attain a majority of votes needed to pass.

However, the effort to reform American health care will no doubt continue given the fragile condition of the private insurance market. Senate Health, Education, Labor and Pensions (HELP) Committee Chairman Lamar Alexander (R-TN) announced hearings on stabilizing the U.S. health insurance market, slated to begin the first week of September. The committee is aiming to finalize bipartisan legislation by the end of September, when health insurers face a deadline to file plans to participate in the ACA's insurance exchanges for plan year 2018.

Meanwhile, other Republican Senators continue to press for legislative action on health care reform. Senators Lindsey Graham (R-SC), Bill Cassidy (R-LA), and Dean Heller (R-NV) have authored legislation that would give states a block grant for health programs, and while their proposal has reportedly garnered an enthusiastic response from the President, it has not received significant attention in the Senate.

Overall, the Senate health care reform debate appears to be on hold for at least the remainder of August, as the chamber finished work on several nominations before breaking for a scheduled Congressional recess. The legislative calendar through the end of September is full of other competing priorities, which may preclude large-scale action on health care reform in the interim. However, the Senate still can pass health reform legislation with just a majority vote, as the budget reconciliation procedures are still in place.

House

The House narrowly passed its own health care reform legislation, the American Health Care Act (AHCA) (H.R. 1628), in May, but since the collapse of the Senate effort, certain House members have been pursuing a new wave of health care reform. A bipartisan group of over 40 lawmakers has [proposed](#) several ACA changes. Those proposals are aimed at stabilizing the individual health insurance market and include:

- Formal legislative authority to appropriate cost-sharing reduction (CSR) payments, which help health plans cover the co-payments and deductibles associated with low-income households that have individual market plans. Currently, the House is involved in a lawsuit against the Administration over the legality of the Administration issuing CSR payments without Congress having appropriated funds;
- Create a state stability fund that can be used to offset high cost individuals;
- Modify the employer mandate that requires employers to provide health insurance, changing the minimum number of full time workers from 50 to 500; and
- Repeal the medical device tax.

The proposals have garnered some attention but currently have not kick-started any significant policy-making processes. Whether the Senate considers addressing similar policy priorities in its September HELP Committee hearings will be worth watching.

White House

Despite the Senate's failure to pass health care legislation, President Trump has kept pressing Senate Republicans on the issue. The President has called on Republican Senators to "demand another vote before voting on any other bill," threatened to let the ACA "implode," and blamed Democrats for obstructing the passage of the bill. While the President has called for Republican Senators to not give up, his efforts do not appear to be significantly changing the legislative agenda in the Senate at this time.

President Trump is also facing a decision regarding the continuation of cost-sharing reduction (CSR) payments. In a federal lawsuit brought against the Obama Administration by the House of Representatives, *House v. Price*, the House claimed the Obama Administration overstepped into legislative powers by allocating CSR payments without a formal authorization to do so. While the House won this case in the lower court last year, the case, appealed by the Obama Administration, was put in abeyance in January through a motion filed by the Trump Administration. Both parties are required to submit status reports every three months, starting May 22. Earlier last week, a federal appeals court in Washington issued a ruling that permitted 17 states to join the Administration's appeal, effectively allowing them to defend the CSR payments against the House's lawsuit. It remains to be seen what the next step will be for the Trump Administration in this case. CSR payments are seen as a critical funding source to stabilize the individual insurance market. President Trump has recently threatened to stop making the payments.

While he has not issued a health care related executive order in some time, President Trump could issue additional health reform policies through executive orders. In January, the Trump Administration issued an executive order which required agencies to ease the administrative burdens that the ACA imposes on consumers, industry and other stakeholders. In response to this action, the Internal Revenue Service (IRS) reversed a plan under the Obama Administration to reject tax filings that lacked health coverage information, essentially relaxing enforcement of compliance with the individual mandate. Similar measures could be taken if President Trump is serious about pursuing his threat to let the ACA "implode."

The Trump Administration may take further administrative actions that would impact the implementation of the ACA. The Administration has set precedent for such action, using an April 2017 [final rule](#) on market stabilization to shorten open enrollment, make changes around state accreditation for network adequacy, and relax actuarial value requirements of health plans, among other items. Department of Health and Human Services (HHS) Secretary Tom Price could also use his administrative authority to change significant parts of the ACA, such as essential health benefits (EHBs). The ACA required health insurance plans to cover ten categories of EHBs, but the Obama Administration's HHS issued a regulation that gave states the ability to designate a benchmark plan on which each state's specific EHB standards are derived. The Trump Administration could engage in a new rule-making procedure governing state benchmark plans, essentially allowing states to relax their standards, weakening EHB requirements. Some news outlets have reported that the Administration is considering what types of changes it can make in this space. We will be closely monitoring any related developments.

Additional Health Care and Other Policy Priorities Facing the 115th Congress

Congress will need to address several significant health care legislative issues in the coming two months. First and foremost is continued federal funding for fiscal year 2018, which begins on October 1. This year's FY 2018 federal budget and appropriations process has been unusual. Typically, the Administration will release the President's budget in early February, followed by the Congressional budget which is supposed to be legislated by April 15th, with appropriations legislation coming throughout the spring and summer months. However, Congress has yet to pass a FY 2018 budget resolution. As a result, the two chambers' appropriations efforts do not correspond to an approved budget resolution. With limited time remaining for Congress to act on a budget and the outstanding appropriations bills, a continuing resolution (CR) – which effectively funds the government at preexisting levels – may have to be put in place, at least temporarily.

Other key issues include the reauthorization of the Children's Health Insurance Program (CHIP), reauthorization of Medicare "extenders," including the exceptions process to the outpatient therapy caps, the reauthorization of the National Health Service Corps (NHSC), and the need to address funding for Medicaid in Puerto Rico and other U.S. territories. CHIP, Medicare extenders, and the NHSC all expire on September 30, and need to be addressed in order to prevent disruptions to those programs. Many of them include associated costs to the federal government, and in total, some analysts [expect](#) that the combined cost of reauthorizing these additional priorities to be over \$20 billion. The expected package of these reauthorization bills could also serve as a potential "vehicle" for other pieces of health care legislation that Congress needs to pass. Overall, these additional priorities complicate Congress's ability to further address the ACA, and shorten the available time for Congress to continue exploring comprehensive options to repeal and replace the ACA. We will be monitoring and reporting the latest developments surrounding these issues as they break in this Congress.