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BENEFITS BRIEF

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White House Takes Steps to Modify Healthcare Rules and Stop CSR Funding

On Thursday, October 12th, President Trump issued an executive order, entitled "Promoting Healthcare Choice and Competition Across the United States" (the "Executive Order"). The Executive Order directs the Departments of Treasury, Labor ("DOL") and Health and Human Services ("HHS") (collectively, the "Departments") to consider issuing sweeping new healthcare rules and regulations in the wake of Congress' inability to pass legislation to reform the Affordable Care Act ("ACA").

The issuance of the Executive Order was followed late in the evening by press reports, which have since been substantiated by the Administration, that funding for ACA cost-sharing reduction ("CSR") payments will cease. The stopping of CSR payments is expected to result in a spate of litigation by carriers, states, and other stakeholders that seek to keep CSR payments in place.

This alert addresses both of these important developments below.

The Executive Order

The Executive Order focuses on policy changes in three types of coverage: (1) broadening the ability of small employers to purchase association health plans ("AHPs") and the selling of insurance across state lines; (2) expanding the use and availability of health reimbursement arrangements ("HRAs"); and (3) lengthening the duration of, and allowing consumers to renew, short-term, limited-duration insurance ("STLDI").

The Executive Order directs the Departments to consider proposing regulations or revising guidance in relatively short time frames – within 60 days for AHP and STLDI rules, and within 120 days for HRA rules – with respect to these three types of coverage, as briefly summarized below. We will be providing further updates as the guidance is released.

Association Health Plans/Selling Insurance Across State Lines

AHPs and the sale of insurance across state lines have been highly publicized issues and have long been advocated for by many Republicans on Capitol Hill. The Executive Order directs the DOL, within 60 days, to consider proposing rules or revising guidance to permit more employers, including (but apparently not limited to) small businesses, to participate in AHPs. Pursuant to this Executive Order, DOL could expand certain conditions that satisfy the commonality-of-interest requirements under current DOL advisory opinions that address the definition of "employer" under ERISA section 3(5). The Executive Order notes that the DOL should consider ways to promote AHP formation on the basis of common geography or industry, which could further expand the breadth of AHPs and enable the sale of insurance

across state lines. A set of questions and answers accompanying the Executive Order notes that these changes could result in "employers in the same line of business anywhere in the country [being able] to join together to offer healthcare coverage to their employees and any employers within a single state or a multi-state metropolitan area [being able] to join together to offer healthcare coverage to their employees."

AHPs may be treated as large group coverage under federal law, and large group coverage is not required to comply with certain requirements under the ACA, including essential health benefits and community rating. Therefore, allowing more small employers to form AHPs could essentially exempt more groups from certain provisions of the ACA and would likely weaken the small group insurance market. Notably, the Executive Order also contemplates both fully-insured and self-insured AHPs, and mentions that expanding access to AHPs can help small businesses "by allowing them to group together to self-insure or to purchase large group health insurance."

> **GROOM Comment:** While the Executive Order hints at the possible paths the DOL might utilize to expand access to AHPs, there is a host of unanswered questions that will likely not be addressed until the DOL issues follow-on guidance. These questions include, among others: (i) will the AHP be treated as a "multiple employer welfare arrangement" ("MEWA") for purposes of federal law, or alternatively, a *single employer* plan; (ii) will sole proprietors be allowed to participate in the AHP (including those proprietors lacking a distinct, non-spouse, common law employee); (iii) could individual non-employees be permitted to participate in AHPs; and (iv) will DOL utilize its existing authority under ERISA section 514(b)(6)(B) to except certain self-funded plans from state regulation if the AHP is determined to constitute a MEWA.

Health Reimbursement Arrangements

The Executive Order also directs the Departments, within 120 days, to consider proposing rules or revising guidance to increase the usability of HRAs, expand employers' ability to offer HRAs to employees, and allow HRAs to be used in conjunction with non-group coverage.

The Departments' current position, as set forth in IRS Notice 2013-54 and subsequent guidance, is generally that HRAs for active employees that are not "integrated" with another group health plan (i.e., stand-alone HRAs) violate the ACA market reforms and may not be used to reimburse premiums for non-group coverage. Notably, the 21st Century Cures Act, which was enacted in late 2016, does permit certain small employers to offer their employees non-integrated HRAs to purchase non-group coverage in certain circumstances.

> **GROOM Comment:** The Executive Order appears likely to result in the Departments pulling back on their existing guidance related to the use of non-integrated HRAs. Depending on how the HRA is treated under any new guidance, the Departments will need to address a series of related questions, including whether or the extent to which (i) a stand-alone HRA constitutes minimum essential coverage for purposes of the employer and individual mandate requirements; (ii) how a stand-alone HRA can be used for the purchase of individual insurance; and (iii) whether stand-alone HRA coverage, even where such coverage is a low-dollar value, could firewall an individual from eligibility for federal tax credits and cost-sharing subsidies.

Short-Term, Limited-Duration Insurance

Lastly, the Executive Order directs the Departments, within 60 days, to consider proposing regulations or revising guidance to expand the availability of STLDI. While STLDI is not an excepted benefit, it is exempt from the ACA market reform requirements because it is not considered individual health insurance coverage.

Previously, the Departments defined STLDI as health insurance coverage that expires less than 12 months after the original effective date. However, last year, the Departments finalized rules shortening the permitted duration of STLDI to be less than three months, including any period for which the policy may be renewed. 81 Fed. Reg. 75316 (Oct. 31, 2016).

This Executive Order directs the Departments to consider allowing STLDI to cover "longer periods" and be renewed, but it is not clear whether the Departments will revive the original requirement that STLDI be offered for less than 12 months, or whether longer periods of coverage would be permitted by permitting renewals.

> **GROOM Comment:** Since the length of coverage for STLDI is not defined in statute, the Departments have broad latitude to define it. Indeed, it had been previously defined to be less than 12 months, and the Departments only recently shortened the permitted timeframe. Therefore, the Departments could expand this timeframe through regulation, which could have major implications for the individual market. Since STLDI is exempt from the ACA market reforms, the coverage might not necessarily be as comprehensive as individual market coverage that is subject to the ACA and the Public Health Service Act. Therefore, while STLDI coverage could have cheaper premiums, it could be less robust. STLDI could disproportionately attract younger, healthier individuals, which could ultimately result in a less favorable risk pool for the ACA-compliant individual market. Consequently, premiums for the individual market could increase. Nevertheless, at least under current law, STLDI is not considered minimum essential coverage, so having STLDI alone would not satisfy the individual mandate, potentially tempering the extent of individuals leaving the individual market to purchase STLDI.

CSR Developments

The Administration also announced that it would no longer make CSR reimbursement payments to health insurance issuers. The ACA directs HHS to reimburse health insurance issuers for the CSRs those issuers provide to certain eligible individuals (i.e., those who enroll in silver-level plans and meet income requirements). The Administration's position is that Congress has not appropriated funds for HHS to make those reimbursement payments.

On Friday, October 13th, the Department of Justice filed a status report in the ongoing litigation over whether there is an appropriation for CSR reimbursements. In the status report, the Department said that the Administration would not make the CSR reimbursement payments due in October. It also said that "The Executive Branch will confer with the other parties about this development and proposes that the parties make submissions to govern proceedings by the time of the status update presently scheduled for October 30." In response, late on Friday, October 13th, eighteen states and the District of Columbia sued the Administration, stating that this abrupt decision lacked explanation and disregarded mandatory spending.

Some states, anticipating that the Administration may stop making the reimbursement payments, have allowed issuers to include the cost of providing the CSRs in premiums for the 2018 plan year. However, not all states have permitted issuers to include these costs, and the financial impact of this decision will be particularly significant for those issuers if they remain in the Exchanges for 2018. More immediately, losing CSR payments for the few remaining months of 2017 could have a significant impact on issuers because they did not account for this loss when setting 2017 premiums.

> **GROOM Comment:** While the Administration's decision is sudden, and likely to create marketplace uncertainty with issuers and consumers alike, its legal position is consistent with last year's D.C. District Court opinion in *U.S. House of Representatives v. Burwell*, 185 F.Supp.3d 165 (May 12, 2016), which found

that Congress did not appropriate CSR funds, and further payments should be enjoined. The District Court stayed its decision pending appeal to the U.S. Court of Appeals (D.C. Circuit). The appeal has been on hold (in "abeyance") while the Trump Administration and House of Representatives purportedly worked on solutions. In August, the state Attorneys General ("AGs") successfully intervened in, and remain a party to, the D.C. Circuit appeal. Nevertheless, on Friday, the AGs filed suit seeking declaratory and injunctive relief in the Northern District of California. The selection of a different venue presumably is a strategic one, either because it may be a friendly venue, or the AGs may think they can get an order compelling payment more quickly than in the D.C. Circuit case, which could be dismissed on standing grounds. Still, it is worth noting that the AGs did not seek an injunction from the D.C. courts, and their complaint in the Northern District of California court does not mention the D.C. Circuit appeal. This could create some interesting jurisdictional issues and potential for different outcomes down the road.

Aside from, or in addition to, court activity, Congress could face enough political pressure to force action either to appropriate funds or to find other ways to stabilize the market.