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## Does the Trump Administration Control the Fate of the ACA?

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On August 16th, the U.S. Department of Health and Human Services ("HHS") announced that it would make September cost-sharing reduction payments ("CSR Payments") to health insurance carriers that offer eligible plans on the public insurance exchanges. CSR Payments are a key component of the Patient Protection and Affordable Care Act ("ACA"), which seeks to make individual health insurance coverage not only available but also affordable. Under the ACA, insurers that participate in the exchanges are required to reduce cost-sharing (e.g., deductibles and coinsurance) for certain low-income individuals who are enrolled in those insurers' middle-tier (silver) exchange plans. Those insurers subsequently receive from the U.S. Treasury (via HHS) CSR Payments as reimbursements for the cost-sharing reductions they provided on their exchange plans.

It remains unclear whether HHS will cease making these CSR Payments after September, a move that would have major ramifications for insurance markets as well as the federal deficit, according to a forecast from the Congressional Budget Office ("CBO"). This uncertainty stems from a federal court ruling (*House v. Price*) that the ACA does not permanently appropriate federal funds for CSR Payments, in which case money cannot be drawn from the Treasury to make those payments. (In contrast, the ACA explicitly included such an appropriation for its premium subsidies.) Although the court's ruling is currently held in abeyance (i.e., has not taken effect), the Trump administration has suggested on several occasions that it nonetheless might cease making CSR Payments — and instead let the ACA "implode."

### CSR Payments

For health insurers that participate on the exchanges, the ACA requires that the silver-level plans they offer must include an option that reduces patient cost-sharing provisions for individuals with incomes of 100-250% of the federal

poverty level. Cost-sharing subsidies work by reducing a person's out-of-pocket costs, such as deductibles, co-payments, and coinsurance. The cost-sharing subsidies are only provided to those individuals who: (1) are eligible for the premium tax credit and (2) enroll in silver-level plans on an exchange.

Cost-sharing reductions and premium tax credits are two different subsidy types provided on the exchanges. An eligible individual can use a premium tax credit to assist with the premium cost for any metal-tier level plan on the exchange — this is what makes it affordable for the person to purchase the coverage on the exchange. The premium tax credit ensures that an eligible individual only pays a certain percentage of her income for health insurance premiums. That person may also qualify for extra savings if she enrolls in a silver-level exchange plan and qualifies for the cost-sharing reductions — which lowers the out-of-pocket costs in the plan. The premiums for the silver-level exchange plans that have the cost-sharing reduction provisions are the same as the premiums charged for the standard silver-level exchange plans. The insurance carriers recoup the expenses associated with providing these enhanced, lower out-of-pocket cost plans by receiving CSR Payments from HHS.

There are two parts to the CSR Payment provision. First, the insurance carrier is required to reduce the out-of-pocket costs for certain individuals enrolled in a silver-level exchange plan and not charge those individuals more to enroll in a plan with that enhanced benefit. Second, HHS is required to reimburse the insurance carrier for that expense.

## CBO Report

On August 15, 2017, the CBO released a report that estimated the effects if HHS ceased providing CSR Payments to insurance carriers. It stated that stopping the CSR payments "would increase the federal deficit, on net, by \$194 billion from 2017 through 2026..." The reason is because if the insurance carriers were still required to provide the reduced out-of-pocket costs to certain individuals enrolled in silver-level exchange plans, but the insurance carriers could not receive a reimbursement from the federal government for those costs, then the insurance carriers would be forced to increase the premiums for those plans. If the costs of the silver-level exchange plans were increased, it is likely that more individuals would

be eligible for the premium tax credit (because the plans would become unaffordable for more people) and the amount of that premium tax credit would be higher. As stated above, an eligible individual is only required to pay a certain percentage of her income for the cost of health insurance coverage — the remaining amount of the premium is paid by the federal government in the form of a premium tax credit. So if the cost of the health insurance premiums go up, the individual may be paying a similar amount for that coverage but the federal government will be paying a lot more. Therefore, the CBO believes that the failure to make CSR Payments would increase the deficit by \$194 billion.

There are some assumptions made in the CBO report. For example, it is not clear that the states will allow the insurance carriers to front-load the cost of the lost CSR Payments on all silver-level plan premiums. Second, it assumes that the ACA individual mandate will remain in place and be enforced by the Trump administration. In any event, this CBO report is another basis for certain people to pressure the Trump administration not to stop the CSR Payments.

## Stopping the CSR Payments — *House v. Price*

*House v. Price*, a lawsuit pending in federal court, was brought by the House of Representatives in July of 2014 against the Obama administration and claims that the CSR Payments violate Article I, Section 9, Clause 7 of the United States Constitution (referred to as the "Appropriations Clause"). According to the House, the ACA does not provide a permanent appropriation of federal funds for the CSR Payments to the insurance carriers (in contrast to the ACA's appropriation for premium tax credit). In other words, the House claimed that it was illegal for HHS to make CSR Payments to the insurance carriers. A district court in Washington, D.C. ruled in favor of the House and enjoined the future CSR Payments, but the ruling was held in abeyance (i.e., placed on hold) pending an appeal by the Trump administration. (In 2014, the House was controlled by the Republicans, but the head of HHS was in the Obama administration. The case represented two different viewpoints on the legality of CSR Payments — one representing the Republicans' view and one representing the Democrats' view. After the election, the House remained controlled by the Republicans, but the head of HHS changed to a person appointed by the Trump administration.)

In July 2017, when the “repeal and replace ACA” efforts did not pass the Senate, President Trump stated that the government should just “let ObamaCare fail.” Many thought that meant, in part, to stop the CSR Payments so that the exchanges would fail.

On August 1, 2017, the United States Court of Appeals for the District of Columbia allowed the attorney generals of 15 states and the District of Columbia (the “States”) to intervene in the case. The order held that the States showed that there was a substantial risk that an injunction requiring the termination of CSR Payments could lead “directly and imminently” to an increase in health insurance costs, which in turn could increase the number of uninsured individuals for whom the States will have to provide health care. Under the lower court’s ruling, arguably HHS had the unilateral authority to stop the CSR Payments. The appellate court held that the States raised sufficient doubt concerning the adequacy of HHS to represent their interests. The court held its decision in abeyance, however, and directed the parties to file status reports at 90-day intervals.

Allowing for the States to intervene in the case is a major development. It means that if the Trump administration tries to stop the CSR Payments, the States would be able to sue to require that those payments be made until the court determined whether it was legal for the government to make CSR Payments. On August 16, 2017, the Trump administration said it would make CSR Payments for September.

### Why This Matters to Employers

Should employers care if the exchanges collapse or if exchange coverage becomes very expensive? Yes. First, over the past several years, employers have been terminating traditional, pre-65 retiree health plans (“Retiree Plans”) and replacing them with health reimbursement arrangements

(“HRA”). Retirees use the money in the HRA to purchase individual coverage on the exchange. Many retirees did not sue employers for this change in coverage for a variety of reasons, one being that the retirees were often able to purchase exchange coverage that provided adequate health coverage. If the CSR Payments stop, there is a chance that will destroy the exchanges or make exchange coverage very expensive. (Having an HRA causes the retirees to be ineligible for the premium tax credit.) Retirees may then demand that employers once again adopt Retiree Plans or increase the amounts allocated to HRAs. Second, some employers have seen fewer former employees elect COBRA coverage, instead electing coverage under less expensive exchange plans. In some cases, these former employees would have been high users of the employer-sponsored plan. If the exchange coverage becomes too expensive or if the exchanges collapse, more former employees will go back to electing COBRA coverage. Lastly, since the creation of the exchanges, some employers have received less pressure from part-time employees to provide them with employer-sponsored coverage because they were able to obtain affordable coverage on the exchanges. If the exchanges collapse, part-time employees may once again seek coverage from their employer.

### Conclusion

The battle around CSR Payments seems to be heating up. The Trump administration will not commit to making the payments for the remainder of 2017 or for 2018. The insurance carriers must provide exchanges with 2018 premium rates in September of 2017. The States have now been granted the right to intervene in *House v. Price*.

We anticipate that this fall will provide us with a better picture of the future of the exchanges.

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