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# Executive Sweet: Does the President's E.O. Offer a Treat or Tooth Decay for Health Care?

This is the eighth article in a series in which Ropes & Gray health-care partner Tom Bulleit will compare and contrast various aspects of the latest Affordable Care Act repeal and replace proposals.


By Tom Bulleit

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In the 1954 film, Executive Suite, Don Walling, the idealistic young VP for Design and Development of a furniture company (William Holden), struggles to maintain the company's growth and development of new high quality products following the unexpected death of its president. In a tense game of strategic boardroom chess, he competes for control of the company against CFO Loren Shaw (Fredrich March), who is focused only on pleasing the markets—by showing short-term profitability—and on his own advancement.

President Trump has just made the next move in the similar game that he has been playing, with the Affordable Care Act as the chess board. The game pits him against not only those in Congress (mostly Democrats) who favor retaining and improving the individual and small group health insurance provisions of the ACA but also those (mostly Republicans) who want to repeal it, but only if there is some viable replacement that will preserve coverage for some 23 million Americans who have coverage under its provisions.

**Potentially Profound Changes**

The President's strategy is exemplified in an executive order and what might be described as an executive statement issued on Oct. 12. The first orders the Departments of Labor, Health and Human Services, and Treasury to revisit their existing regulations around health insurance products that largely avoid any of the consumer protections in the ACA (for example, those requiring coverage of pre-existing conditions, essential health benefits, and community rating of premiums) with the goal of making those products more widely available. The second carries through on the president's longstanding threat to cease payment of the ACA's cost-sharing reductions (CSRs), payments to insurers that help lower income people pay for the cost sharing associated with their health care.

Although the CSR payment cessation will have more immediate effects, and the ends of the EO likely would not impact health insurance markets directly until 2019, both sets of changes are potentially profound. The EO directs the agencies to look for ways to expand the availability of:

- Association health plans (AHPs), which allow small businesses to combine into associations and offer their respective employees health coverage across state lines and unregulated by state insurance laws. Trump's changes would relax the rules on how closely those businesses must be aligned to form a qualifying “association.”

- Short-term health plans (STPs), which are ACA-permitted plans intended to bridge the gap for people in between jobs that do not have to meet ACA consumer protection requirements. The changes would increase the term to a year and

allow them to be renewed.

• Health reimbursement arrangements (HRAs), which are employer-paid benefits that can be used by employees to pay for certain health expenses. The order would allow employees to use those funds to pay premiums on a health plan including, presumably, these non-ACA compliant plans.

Cancellation of payment of the CSRs has long been a fear of health insurers, which price their premiums based on the expectation of such payments, and is widely believed to be a main reason that premiums have risen and insurers have abandoned some markets for 2018.

**Benefits, Legality Disputed**

Like the cinematic CFO Shaw's timely release of a new quarterly report showing favorable corporate profits to counteract the news of the president's death, President Trump's description of his actions casts them in the most positive public light. He promises that this plan will be a tasty sweet treat after the unpalatable fare that Americans have had to consume through Obamacare. In his view, freedom from the ACA mandates and increased competition will lead to plans with lower premiums, and everyone will have access to "great, great health care."

Critics predict instead that these confections will lead to results more analogous to cavities and tooth decay. They argue that AHPs and STPs are likely to be cheaper only because they will include fewer benefits. They further contend that such plans could be priced more expensively for individuals with pre-existing conditions, and for small groups that have a disproportionate number of older or sicker workers.

The legality of many of these ideas under existing law presents enough questions to be fertile ground for litigation. For example, the longstanding Labor Department interpretation of AHPs would allow groups of small employers to be treated as a single large group plan (substantially exempt from many ACA requirements) only when they have a commonality of interest (other than offering an insurance plan) that justifies treating them as a single employer. A legal challenge would argue that this is compelled by ERISA, and that changing the definition of group health plan in ERISA requires legislation. In addition, both the AHP and STP changes are likely to have the effect of siphoning off healthy individuals and groups from the ACA marketplaces, and legal arguments likely will be made that this represents a violation of the ACA. With respect to HRAs, Congress created a limited exception to the Labor Department's prohibition on use to pay premiums for small employers in the 21st Century Cures Act. Expanding this beyond the statutory exception arguably would require additional legislation.

The legal paths under the EO and the decree are different. By itself, the EO accomplishes none of these ends: it is just an instruction to the agencies to begin new rulemaking. Though it attempts to impose a timetable of 60 days to consider rules and guidance for AHPs and STPs (and 120 days for HRAs), agencies often exceed even statutory timelines to develop regulations, which then must be published for notice and comment before they can be issued. It is unlikely that new regulations could be finalized before next summer, which would be tight timing for an effective date early enough to affect enrollments for health plans in 2019. Moreover, it is highly likely that any final regulations would be challenged immediately in lawsuits from any number of possible stakeholders, including state insurance commissioners, state attorneys general, insurers, or health-care providers.

Stopping payment on the CSRs may have a more immediate effect, although the effects are harder to predict and could vary widely from state to state. Insurer contracts with the federal ACA exchange allow the insurers to terminate their plans if the CSRs are terminated, although there may be restrictions to doing so under some state laws. And insurers are likely to file for rate increases in a number of states. Either result likely would lead to fewer insurance options and higher premiums. On the other hand, payment of the CSRs remains the subject a lawsuit, House v. Price, in which a number of state attorneys general have intervened, and that (or another lawsuit announced last week by many of the same AGs) could be a further vehicle for forcing the continuation of the payments. There is also the possibility that the bipartisan negotiations of Senators Lamar Alexander (R-TN) and Patty Murray (D-WA) may yield a bill to continue funding the CSRs, a solution that President Trump seemed to encourage in an Oct. 16 press conference.

**Will There Be a Happy Ending?**

The happy resolution in Executive Suite is that the idealistic and passionate speech of Don Walling to the board about the need for progress and the pursuit of a high quality product results in his election as president of the company. President Trump contends that after his Oct. 12 actions, the chess board for Americans' health care is poised to lead to just such a

victory, and would claim for himself the Walling mantle. The game is far from over, however, and his opponents have several moves to make that could instead cast him in the role of the defeated Loren Shaw.