

# Next Steps in Health Reform 2017

## The Impact of Legal Uncertainty in the Health Insurance Marketplace

Joel L. Michaels,

Partner, McDermott, Will and Emery

# Major Themes Contributing to Legal Uncertainty

- Will the Affordable Care Act be repealed and replaced and what is the short term vs. long term strategy?
- What is the process employed to effect changes in current requirements (Executive Order, CMS Policy Change, Rulemaking, or Statutory Amendments)?
- What impact will court decisions have on the legal environment, particularly if there are conflicting court decisions?
- What will health insurers communicate to their consumers and how will consumers interpret their coverage options and obligations in an uncertain legal environment?
- What impact does legal uncertainty have on marketplace exits by health insurers?

# Premium Stabilization Factors In An Environment of Legal Challenges

- There is an issue as to risk corridor payments with court decisions that conflict with each other which leaves significant amounts potentially due to health insurers outstanding from the three year program.
- A potential cloud surrounded allocation priorities regarding reinsurance payments vs. payments to the Treasury, although reinsurance payments were made to health insurers for 2016 and this program did not seem to be hampered by legal challenges related to its implementation over the three year period.
- Legal questions and challenges arose as to the implementation of the risk adjustment process and its impact on smaller health insurers and new entrants and some adjustments have been made for 2018 given the permanent nature of this premium stabilization feature.
- In view of the above, and in connection with the Administration's recent cessation of CSR payments, health insurers may not view the Federal Government as a reliable partner for any shared financial obligation arising under the statute

# Risk Adjustment's Impact

- For the COOPs who challenged the risk adjustment formula in Federal District Court, those challenges were unsuccessful and two of the three health plans went into receivership.
- For health system sponsored health plans, the recent withdrawal of Northwell's CareConnect Plan from the New York exchange is noteworthy as the issue seemed to be the ability to capture health status for new members in a rapidly growing plan.

# The Limited Scope of the Market Stabilization Rule

- Notice of the proposed rule was published on February 17, 2017 and the final rule was released on April 18, 2017 with an effective date of June 19, 2017.
- The 2018 open enrollment period was shortened from November 1, 2017 to December 15, 2017 (instead of January 31, 2018) in Healthcare.gov states.
- Clarification was made of the guaranteed availability rule in providing consumers with stronger incentives to pay past due premiums to the issuer.
- Changes were made to the special enrollment period procedures including expanding pre-enrollment verification process, limiting the ability of enrollees to change types of coverage, and narrowing the avenues for special enrollment.
- Other provisions included in the rule do not have as direct an impact on the issue of adverse selection as the above provisions may have.

# The Status of the Mandate- Is It To Be Enforced or Not?

- Executive Order issued on January 20, 2017 orders the Executive Branch pending repeal of the Affordable Care Act to “waive, defer, grant exemptions from, or delay the provision of any provision or requirement....”
- Confusion existed as to whether this would impact IRS reporting requirements and the penalty for failure to maintain minimum essential coverage for 2017.
- IRS recent statements confirm that information regarding minimum essential coverage must be reported as part of the 2017 tax filing process.
- In a rising premium environment, and in light of the above uncertainty, what is the effect of the individual mandate on consumer health insurance purchasing conduct?

# Expanded Consumer Purchase Choices and their Adverse Selection Impact

- The existing transitional plan exception (established by the prior Administration) will continue through 2018.
- October 12, 2017 Executive Order requires Federal Agencies to consider within 60 days regulations to expand the maximum length of short-term limited duration coverage and to make it renewable by the consumer.
- The same Executive Order provides the Department of Labor with 60 days to provide regulations that expand the availability of Association Health Plans as a coverage option for employers.
- Question remains as to the impact of these coverage options on the Exchange health plan risk pools.

# Principles in Recent Bipartisan Efforts to Amend Affordable Care Act

- Remove current legal ambiguity surrounding CSRs and actions taken by the Administration by authorizing these payments for the rest of 2017, 2018 and 2019.
- Create definitive funding amounts for enrollment outreach in 2018 and 2019 in contrast to recent CMS actions that reduced outreach funding.
- Expand access to include catastrophic coverage options.
- Reform State waiver process under Section 1332 to streamline and expedite the review process and facilitate the reintroduction of reinsurance as an effective premium stabilizing factor.