Morgan Lewis

FAST BREAK: CONGRESS AND HEALTHCARE
WHAT JUST HAPPENED AND WHAT IT MEANS FOR 2018

Susan Feigin Harris, Kathy Rubinstein, and Jake Harper

January 17, 2018

AGENDA

- Tax reform legislation
- Issues punted and delayed by the stopgap spending package
- The GOP's evolving strategy to deregulate and deconstruct the Affordable Care Act
- Critical flashpoints ahead for government healthcare programs in 2018

TAX REFORM LEGISLATION

Morgan Lewis

One Hundred Fifteenth Congress
of the
United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the third day of January, two thousand and seventeen

An Act

To provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

SECTION 11000. SHORT TITLE, ETC.

(a) AMENDMENT OF 1986 CODE.—Except as otherwise expressly provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1986.

Subtitle A—Individual Tax Reform

PART I—TAX RATE REFORM

SEC. 11001. MODIFICATION OF RATES.

(a) IN GENERAL.—Section 1 is amended by adding at the end the following new subsection:

"(j) MODIFICATIONS FOR TAXABLE YEARS 2018 THROUGH 2025.—

"(1) IN GENERAL.—In the case of a taxable year beginning after December 31, 2017, and before January 1, 2026—

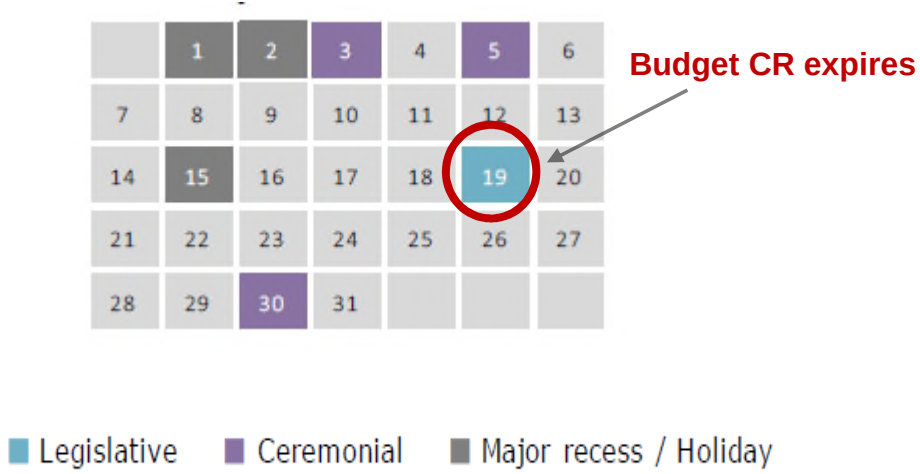
TAX REFORM LEGISLATION - HEALTHCARE

- Tax-exempt municipal bond financing
  - Retains exclusion from gross income on private activity bonds
  - Repeals the exclusion on advance refunding of bonds
- Charitable deductions
  - With the doubling of the standard deduction, fewer are expected to use this deduction
  - Increases limitation for cash contributions to tax-exempt orgs. to 60% of a donor's adjusted gross income (AGI)
- Medical expense deductions
  - Temporarily lowers threshold from 10% of AGI to 7.5% for tax years 2017 and 2018
- Individual mandate
  - Eliminated in 2019; still applies in 2017 and 2018
- Executive compensation
  - Imposes 21% excise tax on tax-exempt orgs. for compensation in excess of $1 M
- Medical and scientific education
  - Retains deduction for student loan interest
  - No longer includes provision that would have taxed as income tuition waivers received by graduate students for teaching / research
- Unrelated business income tax (UBIT)
  - Requires tax-exempt orgs. to calculate separately the net UBIT of each unrelated trade or business

THE STOPGAP SPENDING PACKAGE
UNFINISHED BUSINESS

To focus on tax reform, Congress put other priorities on the back burner that will need to be addressed in early 2018

2018 congressional calendar, January

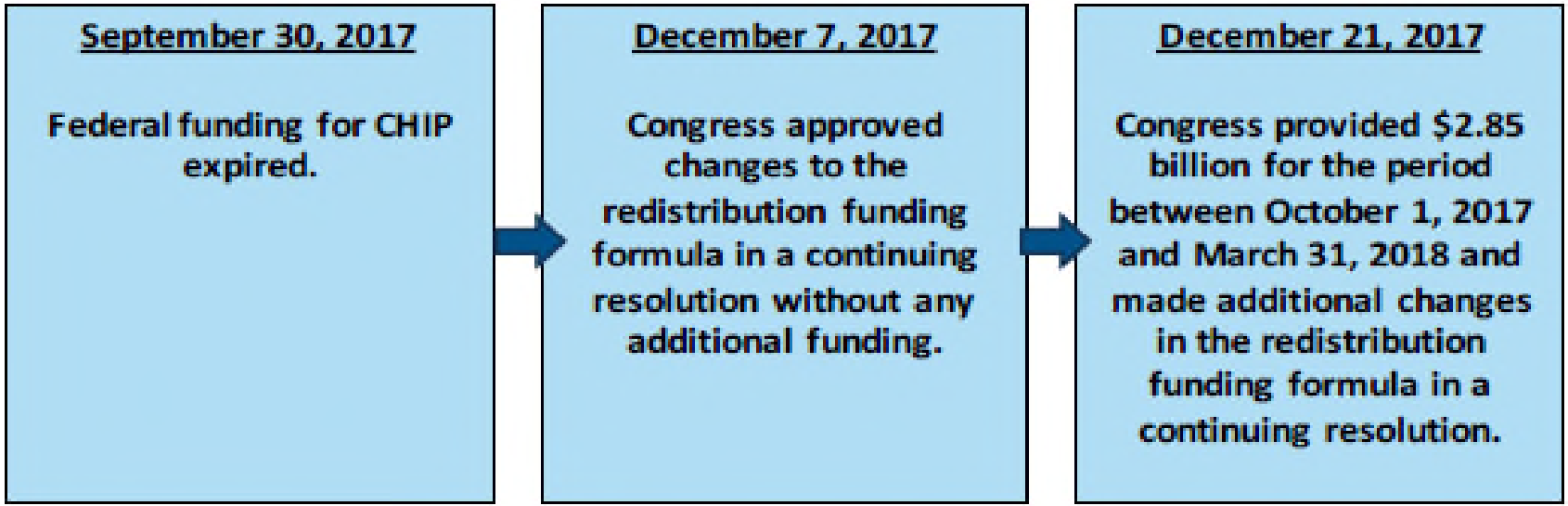


Immediate priorities for Jan. CR

- Children's Health Insurance Program (CHIP)
- Medicare extenders, including:
  - Medicare Dependent Hospital and Low-Volume Adjustment Programs
  - Outpatient therapy caps
  - Home Health rural and ground ambulance add-ons

CHILDREN'S HEALTH INSURANCE PROGRAM (CHIP)

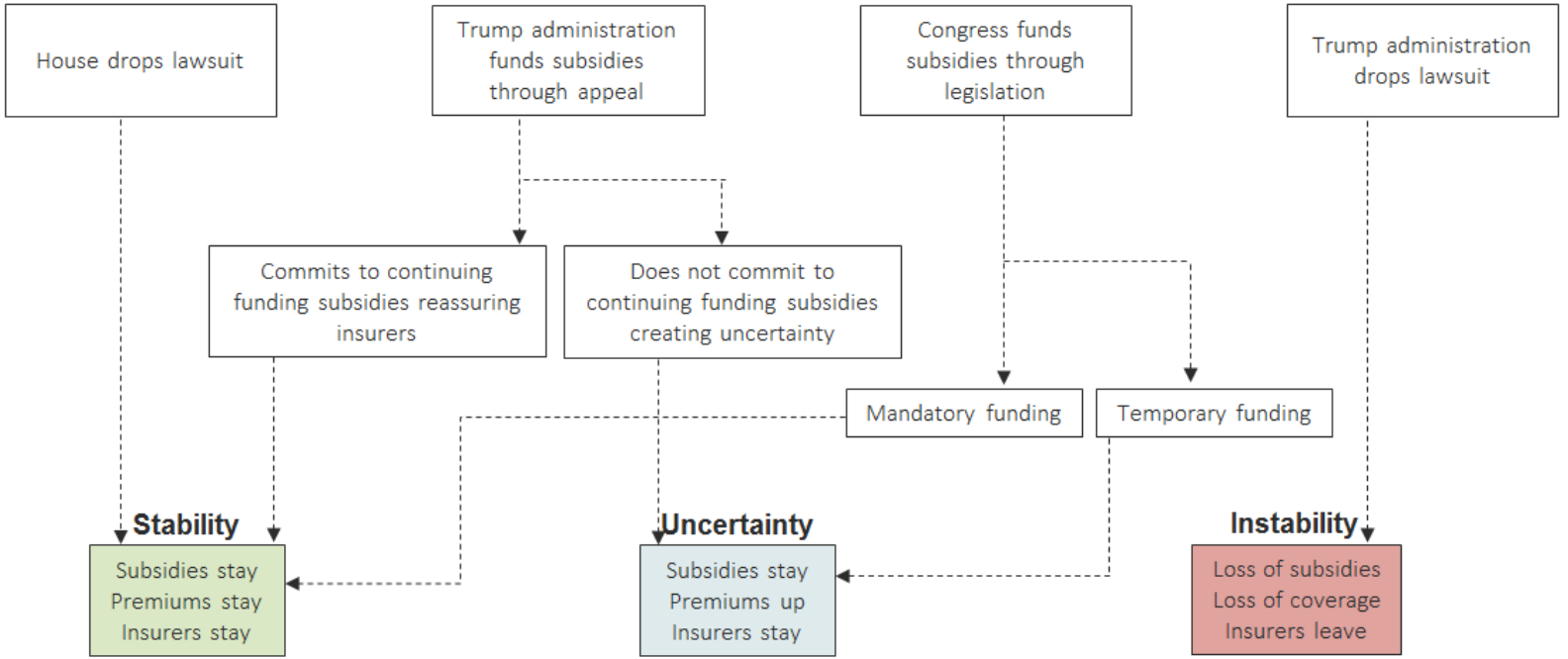
Timeline of recent changes in federal funding for CHIP



Source: Status of Federal Funding for CHIP and Implications for States and Families, Kaiser Family Foundation (Jan. 2018)

ACA MARKET STABILIZATION
THE CSR PAYMENT CONTROVERSY

Four scenarios for ACA subsidies, but most likely the uncertainty will persist



BIPARTISAN STABILIZATION LEGISLATION

Bipartisan Healthcare Stabilization Act – "Alexander Murray"

- Continues CSR payments for 2 years
- Authorizes sale of catastrophic "Copper" plans on Exchanges
- Amends 1332 waiver provisions
  - Flexibility for health plan design
  - Fast-track approval process
- Directs CMS to issue rules on interstate health insurance compacts
- Redirects existing user fee funding to states for consumer outreach

Lower Premiums Through Reinsurance Act – "Collins Nelson"

- Authorizes funding for state reinsurance programs and state high risk pools established under a 1332 waiver
- Provides $5 B / year for 2019 and 2020 to help states create a risk mitigation program
  - Includes $500 M for state administrative costs

DECONSTRUCTING THE ACA

President's Executive Order – Minimize the ACA's Economic Burden

Summary of the executive order on minimizing the ACA's economic burden

The executive order tells all relevant federal agencies to do all they can to:

1. *Eliminate any "fiscal burden on any State" or any "cost, fee, tax, penalty or regulatory burden" on individuals and providers*

   While the order does not specify the suspension of any particular part of the law, it could result in the weakening of the "individual mandate." Although the mandate cannot be eliminated entirely through executive order, the hardship exemption could be expanded and the IRS could cease harsh enforcement of the mandate. In addition, the order could settle some ACA-related lawsuits, such as those filed by employers seeking relief from having to cover contraceptives for female employees on religious grounds

2. *Give states more flexibility*

   The order might allow federal officials to be more receptive to state requests for Medicaid waivers, which allow states to design alternative coverage models. For example, waivers that allow insurers to charge higher premiums or co-payments than are now allowed, or that allow insurers to offer less generous, cheaper packages of benefits could be in the offing

3. *Encourage the interstate sale of health insurance*

   The order instructs agencies to work to create a system that allows the sale of health insurance across state lines, an idea that Republicans have been proposing as the centerpiece of an alternative to the ACA

Issued Jan. 20, 2017

Administration's Blueprint – Deconstruct the ACA

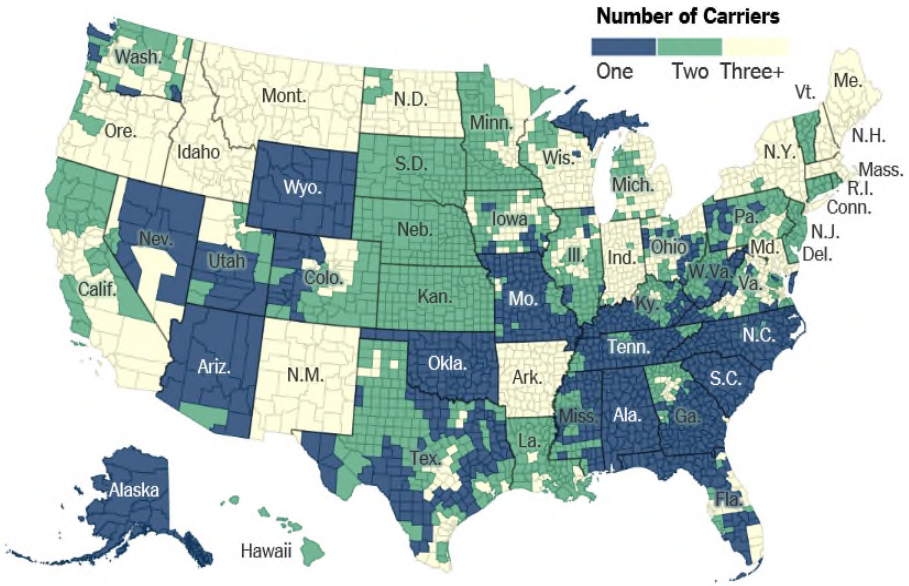
Potential Administrative Marketplace Reforms

The Secretary of Health and Human Services has significant authority to improve the individual and small group markets most harmed by Obamacare. This authority includes the ability to consider and implement changes in the following areas:

1. **Special Enrollment Periods***
   - Require 100% pre-enrollment verification of Special Enrollment Periods
2. **Grace Periods***
   - Tighten rules around grace periods such that an issuer could require an individual to pay unpaid back premiums when they attempt to re-enroll with the same insurer
3. **Open Enrollment Periods***
   - Shorten the open enrollment period to six weeks to prevent adverse selection and better align with employer sponsored insurance and Medicare
4. **Network Adequacy***
   - Return oversight authority for network adequacy to states
5. **Essential Health Benefits**
   - Give states the authority to select the EHB benchmark, and the primary jurisdiction to enforce EHB compliance and interpret EHB rules, including state EHB benchmarks
6. **Section 1332 waivers* (apply to the individual and small group markets)**
   - HHS issued a letter to states indicating that we will be providing technical assistance and expedited review for Alaska-style reinsurance 1332 waivers that reduce premiums
   - HHS and Treasury have the authority to set up an expedited review and approval pathway for these waivers
7. **Third Party Payment of Premiums**
   - Some health care providers have been counseling patients to bypass Medicaid and Medicare coverage and steer them to Affordable Care Act marketplace plans that are more lucrative to providers (as much as $200k a year for some providers)
   - This form of steering is not only detrimental to the patients in the individual market without access to public health programs who bear the cost, but it can be particularly harmful for ESRD patients because many of those plans didn't include coverage for transplant, and put patients at risk for mid-year disruptions in coverage
   - HHS has the authority to protect individual market enrollees by regulating this practice
8. **Permit lower cost direct enrollment pathways for issuers, brokers, and states**
   - Improve HHS operational capabilities to give more flexibility to states, issuers, and web brokers for direct enrollment
   - This would allow the free market to design better consumer tools, apps, and other technology to enroll more people, including the young and healthy
9. **Benefit Design Flexibility**
   - Return authority to states for review of benefit designs and formularies and eliminate federal outlier review
   - Permit more flexibility in innovative reference-based pricing benefit designs and reduce administrative burden on issuers
10. **Encourage states to build "skinny exchanges"**
    - Modify existing rules to allow more efficient, "skinny" state exchanges that cost less and rely more on private sector innovation

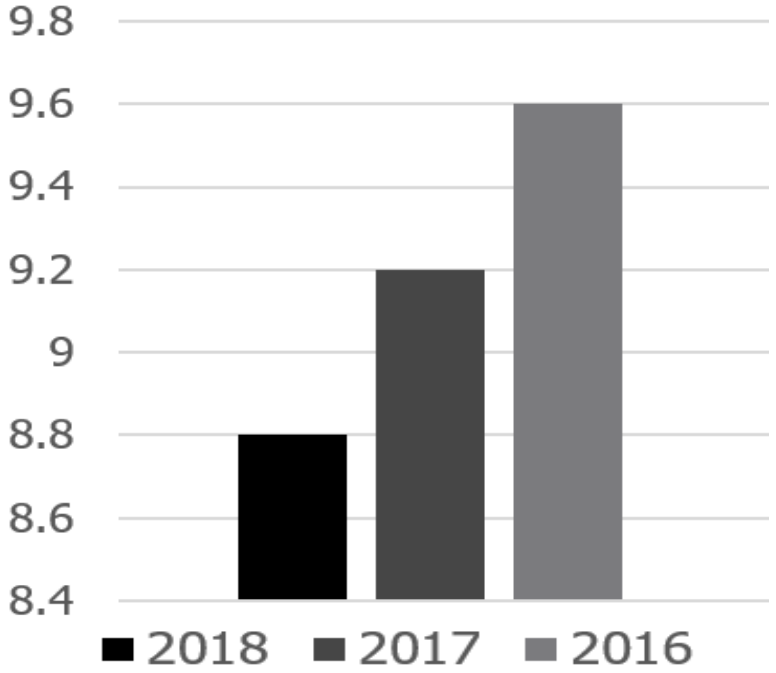
ACA MARKETPLACE - 2018

Number of Insurers



Source: McKinsey Center for U.S. Health System Reform

2018 Enrollment



Source: Centers for Medicare and Medicaid Services (Jan. 2018)

ASSOCIATION HEALTH PLANS (AHPs)

President's Executive Order – Promote Choice / Competition

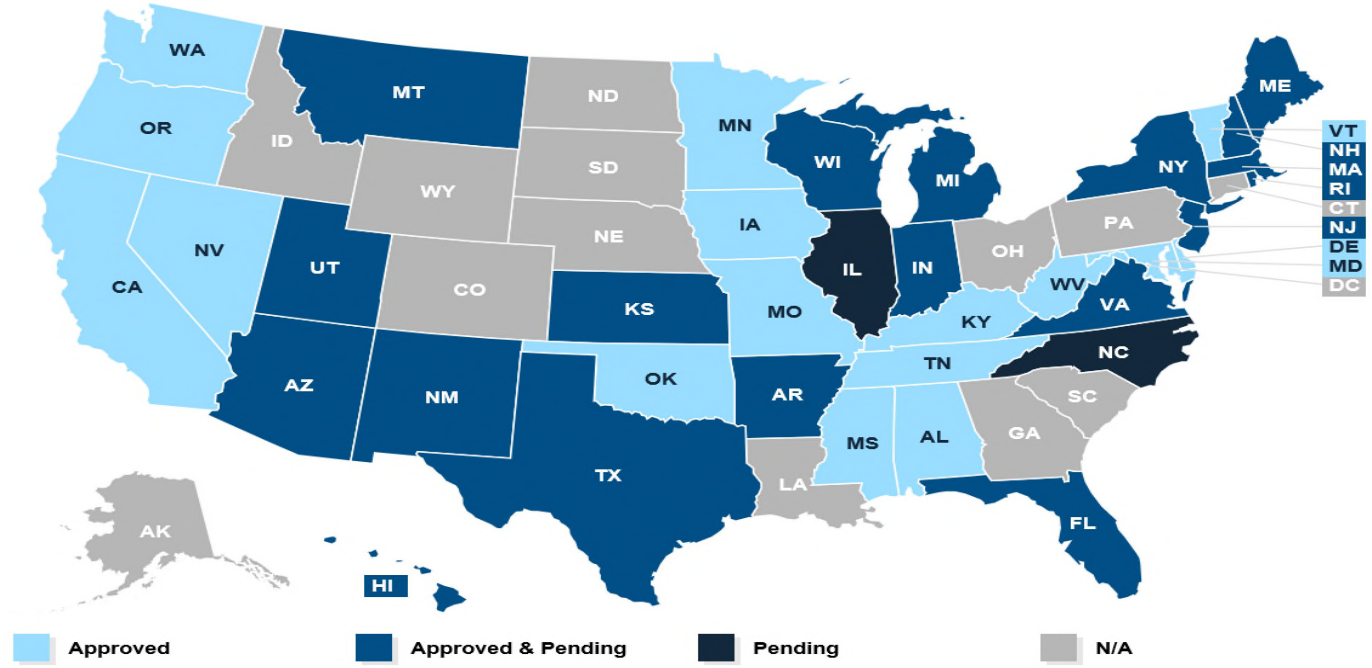
- Directs federal agencies to consider / draft new rules and guidance to:
  - **Expand access to AHPs**
  - Extend short-term plan coverage from (up to) 90 days to possibly as long as 1 year; make it renewable
    - *Expected to be the subject of another rulemaking that could exempt short-term plans from all ACA protections*
  - Increase "usability" of employer-funded Health Reimbursement Accounts (HRAs)
    - *Likely as a way to fund premiums for coverage through the individual market*

Issued Oct. 12, 2017

Proposed Rules – 83 Fed. Reg. 614 (Jan. 5, 2018)

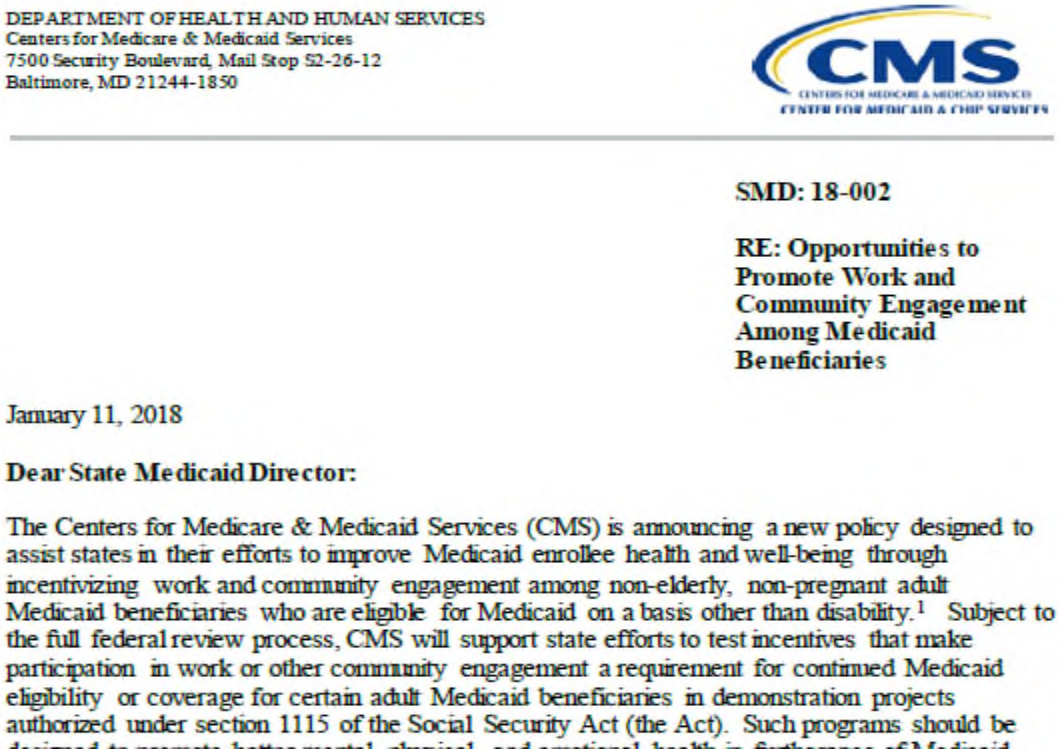
- Allows small employers to band together to purchase coverage in the large group market
  - Includes sole proprietors with no employees
- Expands who can join an AHP
  - Includes employers w/in an industry or that share geography (even if it crosses state lines)
- Requires AHPs to retain ACA protections against exclusion for pre-existing conditions and lifetime limits on benefits
- Allows AHPs to purchase cheaper plans that do not cover the 10 essential health benefits

MEDICAID 1115 WAIVERS



Source: Approved Section 1115 Medicaid Waivers and Pending Section 1115 Medicaid Waivers, Kaiser Family Foundation (Jan. 12, 2018)

MEDICAID WORK REQUIREMENTS



DEPARTMENT OF HEALTH AND HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, MD 21244-1850

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR MEDICAID & CHIP SERVICES

SMD: 18-002

RE: Opportunities to Promote Work and Community Engagement Among Medicaid Beneficiaries

January 11, 2018

Dear State Medicaid Director:

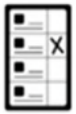
The Centers for Medicare & Medicaid Services (CMS) is announcing a new policy designed to assist states in their efforts to improve Medicaid enrollee health and well-being through incentivizing work and community engagement among non-elderly, non-pregnant adult Medicaid beneficiaries who are eligible for Medicaid on a basis other than disability.[1] Subject to the full federal review process, CMS will support state efforts to test incentives that make participation in work or other community engagement a requirement for continued Medicaid eligibility or coverage for certain adult Medicaid beneficiaries in demonstration projects authorized under section 1115 of the Social Security Act (the Act). Such programs should be

- States with pending waivers
  - Arizona
  - Arkansas
  - Indiana
  - Kansas
  - **Kentucky** (approved 1-12-18)
  - Main
  - New Hampshire
  - North Carolina
  - Utah
  - Wisconsin

ACA REPEAL / REPLACE

Key event 1: House passes the AHCA

- In May, the House voted to pass the American Health Care Act of 2017
- According to the CBO, the bill would increase the number of uninsured by 23 million, reduce the federal deficit by $119 billion and result in deep cuts to Medicaid



Key event 2: Senate fails to pass any version of BCRA

- The Senate unveiled the Better Care Reconciliation Act, which had deeper cuts to Medicaid and would see the number of uninsured rise by 21 million, per the CBO
- The Senate tried to pass the health care bills under budget reconciliation
- The different drafts voted on:
  - BCRA with $40 billion for opioid treatment
  - Full ACA repeal with no replace
  - Skinny repeal
- Key votes:
  - Susan Collins (R-ME)
  - Lisa Murkowski (R-AK)
  - John McCain (R-AZ)

Key event 3: Senate fails to pass Graham-Cassidy

- The Senate failed to pass the Graham-Cassidy, a last-ditch effort to pass a repeal and replace of the ACA
  - Graham-Cassidy would have turned Medicaid into block grants and phased out government spending on health care

Key event 4: Tax reform legislation repeals the individual mandate

HHS SECRETARY NOMINEE

Previous position: President of Lilly USA, LLC
Assumed position: 2012
Date of birth: June 17, 1967
Home: Johnstown, Pennsylvania
Education: B.A., Dartmouth University; J.D. Yale
Family: Married (Jennifer), 2 children
Political party: Republican

- Previously, Azar clerked under Supreme Court Justice Antonin Scalia and worked for two years on the Clinton Whitewater investigation
- From 2001 until Feb. 2007, Azar worked at HHS as the department's general counsel from 2001-2005 and then as deputy secretary from 2005-2007
- Azar joined Eli Lilly and Company as the senior vice president of corporate affairs and communications from 2007-2009, and then served as president of Lilly USA, LCC from 2012-2017

CRITICAL FLASHPOINTS AHEAD

- Medicaid reforms
  - Increased waiver activity
  - Substantial regulatory changes
  - Emphasis on "market-like" reforms
- ACA market coverage and stabilization
  - Deregulation to promote "competition and choice"
  - Fate of the CSR payments
- Medicare reforms
  - Payment model initiatives from CMMI

THANKS!

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Click Here for full bio

Susan assists a diverse group of healthcare clients on a variety of federal and state regulatory issues, including reimbursement issues and disputes including Medicare, Medicaid, and commercial payors. Susan's clients include hospitals, physician groups, trade associations, and government relations entities seeking strategic advice concerning policy advocacy. Susan negotiates numerous contracts on behalf of her clients and works with providers to ensure they are appropriately licensed, certified, and enrolled in government programs.

THANKS!

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Kathleen helps healthcare providers navigate the uncertainties of a shifting policy landscape. She has spent most of her career at the intersection of public policy and healthcare law, focusing on the regulation and financing of the Medicare and Medicaid programs, implementation of the Affordable Care Act, and government-led initiatives on healthcare reform. Colleagues turn to Kathleen for insight on healthcare policy and related issues and seek her out for collaboration in the development of articles and presentations of topical interest for healthcare clients.

Join us next month!

Please join us for next month's webinar:

"***Fast Break*: Handling Sensitive Patient Records**"

Featuring Lauren Groebe

- February 21 at 3:00 PM (EST)