

Health Affairs **Blog**

Administration's Ending Of Cost-Sharing Reduction Payments Likely To Roil Individual Markets

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Yesterday, October 12, 2017, the White House press office announced that the administration will no longer be reimbursing insurers for the cost-sharing reductions they are legally required to make for low-income individuals. The Affordable Care Act requires insurers to reduce cost sharing for individuals who enroll in silver plans and have household incomes not exceeding 250 percent of the federal poverty level. These provisions reduce the out-of-pocket limit for these enrollees—particularly for those with incomes below 200 percent of poverty—and sharply reduce deductibles, coinsurance, and copayments. The reductions cost insurers around \$7 billion a year currently.

The press secretary's statement said:

Based on guidance from the Department of Justice, the Department of Health and Human Services has concluded that there is no appropriation for cost-sharing reduction payments to insurance companies under Obamacare. In light of this analysis, the Government cannot lawfully make the cost-sharing reduction payments. The United States House of Representatives sued the previous administration in Federal court for making these payments without such an appropriation, and the court agreed that the payments were not lawful. The bailout of insurance companies through these unlawful payments is yet another example of how the previous administration abused taxpayer dollars and skirted the law to prop up a broken system. Congress needs to repeal and replace the disastrous Obamacare law and provide real relief to the American people.

Acting HHS Secretary Hargan and CMS Administrator Verma issued a similar statement:

It has been clear for many years that Obamacare is bad policy. It is also bad law. The Obama Administration unfortunately went ahead and made CSR payments to insurance companies after requesting—but never ultimately receiving—an appropriation from Congress as required by law. In 2014, the House of Representatives was forced to sue the previous Administration to stop this unconstitutional executive action. In 2016, a federal court ruled that the Administration had circumvented the appropriations process, and was unlawfully using unappropriated money to fund reimbursements due to insurers. After a thorough legal review by HHS, Treasury, OMB, and an opinion from the Attorney General, we believe that the last Administration overstepped the legal boundaries drawn by our Constitution. Congress has not appropriated money for CSRs, and we will discontinue these payments immediately.

The Legal Background

In fact, the ACA requires the federal government to reimburse insurers for these reductions. This is not a bailout. It is rather a statutory obligation of the federal government to pay insurers for services they have provided as required by law. In 2014, the House of Representatives sued the Obama administration in *House v. Burwell* (now *House v. Price*) claiming that the cost-sharing reduction (CSR) payments to insurers had never been appropriated by Congress and were thus illegal. A district court judge accepted this argument in the spring of 2016 and enjoined their payment, as President Trump's statement says, but stayed her order pending appeal. The Obama administration appealed, arguing that there was in fact an appropriation. Until yesterday, the Trump administration had not taken a position on whether there was an appropriation or not.

The appeal is still pending, with the House and the Trump administration having agreed to stay the appeal several times. At the end of August, the D.C. Circuit Court of Appeals allowed 19 state attorneys general to intervene to protect their citizens. For more on the CSR backstory see [here](#) and [here](#); for more on the intervention, see [here](#); and for *Health Affairs* Blog posts on cost-sharing reduction payments, see [here](#).

The Consequences Of Ending The CSR Payments

The effect of terminating the payments has been well analyzed, including a report from the Congressional Budget Office. It will drive up premiums as insurers attempt to cover the cost of the reductions. As premiums go up, so will premium tax credits. Indeed, the government will probably pay more in premium tax credits than it saves in cost-sharing reduction payments. Individuals who earn too much to receive tax credits will be particularly hard hit by the premium increases. Some of these could decide to pursue new forms of coverage that might be made available under the measures announced in President Trump's October 12 executive order.

Ending the CSR payments could also drive some insurers out of the exchanges. Under their contract with the federal exchange, insurers may terminate participation if cost sharing reduction payments are terminated, but they are still subject to state laws on market withdrawal, which limit their ability to do so. They may not terminate their exchange enrollees unless they fail to pay their premiums, which many likely would do once an insurer left the exchange and premium tax credits were no longer available.

The effect of CSR payment termination, however, will depend heavily on how insurers deal with the change. In several states, including California, insurers have anticipated the termination and have already loaded the lost payments into their on-exchange silver plans. In other states, however, insurers have to date been instructed to assume that the payments will be made, or have been

given no instructions whatsoever. In these states, the change is likely to cause considerable confusion. Insurers will have to refile their rates and will likely not be able to do so before open enrollment begins in three weeks. For more on the different responses insurers may have take, see [here](#).

What Might Happen Now

It is possible that the states that have intervened in the *House v. Price* appeal will seek to block the withdrawal of the funds. It is also very possible that the state attorneys general or a consumer or insurer will sue to block the CSR withdrawal. New York Attorney General Eric Schneiderman issued a press release yesterday threatening legal action if President Trump withdraws the payments, and the California Attorney General has also threatened suit.

It is also possible that Congress will adopt a specific appropriation to fund the CSRs, putting to rest the question of whether such an appropriation exists. The Senate Health, Education, Labor, and Pension Committee held hearings on bipartisan solutions to health reform problems in September and virtually every witness, including insurance commissioners and governors supported removing the uncertainty around the payments and making it clear that they would continue. Support for continuing CSR funding has come from insurers, consumers, the National Association of Insurance Commissioners, and virtually all other stakeholders. The President's statement, and the likely consequent chaos in the individual marketplaces, may be enough to finally prompt action.

In any event, ending the CSR payments is another sign that President Trump is doing what he can to undermine the stability of the individual market under the ACA. This action will have a much more immediate impact than the measures Trump announced in yesterday's executive order.

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