# Trump's First Executive Order Addresses the ACA

Steven Brett | 631-414-4020 | steven.brett@marcumfs.com

Issued date: 01/25/17

On January 20, 2017, President Trump issued an Executive Order to minimize the economic burden of the Affordable Care Act ("ACA"). This Order identifies the new administration's policy for addressing and enforcing the ACA while Congressional Republicans craft legislation to repeal and replace it.

The Order directs the agencies responsible for administration and enforcement of the ACA to exercise the authority and discretion available to them:

> To the maximum extent permitted by law…waive, defer, grant exemptions from, or delay the implementation of any provision or requirement that would impose a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.

This Order serves as a policy statement and the applicable agencies are not likely to take immediate action on this directive. However, once the Department heads for Health and Human Services, the Treasury, and Labor are confirmed and in place, we may see guidance as to how they intend to enforce (or not enforce) certain provisions of the law.

## What Should Employers Do?

For now, employers should continue to follow the requirements of the ACA until (and unless) further guidance from the applicable administrative agency is issued.

Specifically, employers should:

- Continue to prepare and provide 2016 Forms 1094-C and 1095-C. The Form 1095-C is due to ACA full-time employees and, for self-insured plans all covered individuals, by March 2, 2017. Form 1094-C and all Forms 1095-Cs are due to the IRS by March 31, 2017 (unless filing by paper, then February 28, 2017).
- Continue to correct incorrect 2015 1094-C and 1095-C returns.

- If applicable (generally employers that file at least 250 Forms W-2 in the prior calendar year), report the value of health insurance coverage on the Form W-2 (box 12, code DD).

- Prepare for enforcement of the employer mandate penalties, if applicable, for the 2015 and 2016 calendar years. As last announced through FAQs, the IRS intends to issue notices for 2015 penalty assessments in the first part of 2017. If the administration decides not to enforce these penalties (to the extent permissible by law), the IRS will provide direction in future guidance.

- Prepare for calendar year 2017 reporting on Forms 1094-C and 1095-C.

- Continue to comply with the following mandates as to group health plans:
  - No lifetime or annual dollar limits on Essential Health Benefits (“EHBs”).
  - Cover children to age 26.
  - No retroactive cancellation of health plan coverage, except due to fraud or intentional misrepresentation of a material fact.
  - No preexisting condition exclusion clauses.
  - No waiting periods in excess of 90 days.

- Continue to comply with the following additional mandates for non-grandfathered plans:
  - Cover preventive items and services without cost-sharing.
  - Treat emergency services as covered in-network even if received out of network; no prior authorization requirements on such services.
  - If a primary care provider must be designated, allow for any available in-network physician to be designated and no authorization or referral requirements on OBGYN care.
  - Follow enhanced claims, appeal and external review procedures.
  - Cover routine costs associated with certain approved clinical trials.
  - Out-of-pocket cost sharing cannot exceed prescribed levels (for 2017, $7,150 for individual coverage and $14,300 for family coverage).
  - The small group non-grandfathered insured market must offer EHBs and provide at least a Bronze level of coverage.

- Provide ACA-related notices, including the SBC and Notice of Coverage Options. Remember, a new (and shorter) version of the SBC should be used in connection with enrollment for plan years that begin on or after April 1, 2017.

- Pay fees, as applicable. Specifically, self-insured group health plans should have paid the reinsurance fee for 2016 on January 17, 2017. If paying in two installments, the second payment remains due November 15, 2017. Additionally, employers with self-insured health plans or Health Reimbursement Arrangements (HRAs) should be prepared to pay the PCORI fee by July 31, 2017.

- Keep health FSA maximum employee contributions to no more than $2,600 for 2017 and continue to exclude over-the-counter medicines and drugs unless prescribed.

## What is the Impact to Employees?

Individuals should still continue to act as though the individual mandate will be enforced (have minimum essential coverage, qualify for an exemption, or pay a penalty). For the immediate future, it appears subsidies remain available to assist certain low and middle income individuals to purchase coverage in the Marketplace if coverage is not available elsewhere (e.g., employer-sponsored, Medicare, or Medicaid).

There is a significant question as to whether the Trump administration will continue to enforce the individual mandate. It is a crucial component of the ACA in that it operates to keep the risk pool large enough to reduce adverse selection. Not enforcing the coverage requirement could lead to an exodus of healthy individuals from Marketplace insurance and creating an unstable risk pool.

There is also question around the continued availability of subsidies during this transition period. As of right now, they remain available. However, this will be an area to be closely monitored as the leadership at HHS takes shape.

We will continue to monitor and report developments.