HEALTH CARE PROVIDER ALERT

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ACA Dealt Setback by another Federal District Court

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On October 25, 2017, District Court Judge Vince Chhabria of the United States District Court for the Northern District of California denied a request by California, along with 17 other states and the District of Columbia, for a preliminary injunction requiring the Trump Administration to make cost-sharing reduction payments to insurance companies. This follows a 2016 decision by the United States District Court for the District of Columbia that held that the government could not make such payments absent an appropriation made by law.

Background. Section 1402 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA") requires insurance companies to subsidize the cost of co-payments and deductibles for people with lower incomes (which deductibles and co-payments are referred to as "cost-sharing") by reducing those costs to such persons (a "cost-sharing reduction"). Section 1402 of the ACA requires the government to reimburse insurance companies for these cost-sharing reductions by means of cost-sharing reduction payments ("CSR payments"). Notwithstanding the fact that the ACA requires the government to make the CSR payments, it does not explicitly address whether Congress must annually appropriate the funds to do so or whether there is an implicit continuing appropriation for such payments. Congress has not made an annual appropriation for CSR payments in fiscal year budgets 2014 or thereafter. The Obama Administration took the position that the ACA implicitly contains continuing appropriations for CSR payments and made them without an annual appropriation. The U.S. House of Representatives ("House"), on the other hand, and the Trump Administration take the position that the U.S. Constitution requires that there must be an annual Congressional appropriation to make the CSR payments.

In 2014, the House of Representatives filed suit in the United States District Court for the District of Columbia against then acting Secretary of the United States Department of Health and Human Services, Sylvia Matthews Burwell, seeking to stop the CSR payments on the basis that such payments violated U.S. Constitution Article. I, Section 9, Clause 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." On May 12, 2016 District Judge Rosemary M. Collyer in House v. Burwell, 185 F. Supp. 3d 165 (D.D.C. 2016) concurred with the House's position stating in her decision that, "Congress authorized reduced cost sharing but did not appropriate monies for it, in the FY 2014 budget or since. Congress is the only source for such an appropriation, and no public money can be spent without one. See U.S. Constitution, Art. I, § 9, cl. 7." Judge Collyer enjoined the government from making CSR payments until there is a valid appropriation for them. However, she stayed the injunction pending an appeal of her decision.

On October 12, 2017, and consistent with Judge Collyer's ruling, President Trump announced that his administration was going to stop making the CSR payments absent an appropriation for them.

On October 13, 2017, the State of California, along with 17 other states and the District of Columbia, filed suit (Case No. 17-cv-05895-VC) in the United States District Court for the Northern District of California alleging that the federal government is required under the ACA to make the CSR payments to the insurance companies, and filed a petition for a preliminary injunction seeking an order requiring the government to make such payments during the pendency of their suit. In denying their request for a

preliminary injunction, Judge Chhabria considered the harm to the petitioners if the injunction was not granted and likelihood of their success on the merits and mentioned that the alleged harm relating to a cessation of CSR payments had been greatly reduced by actions taken by the States to increase insurance premiums (pointing out that as the cost of premiums increase for lower-income persons so do their premium credits under Section 1401 of the ACA) and that it was not clear whether the States would prevail in their argument that the ACA could be read to provide implicitly for continuing appropriations based on an analysis of the text of the ACA and Judge Collyer's prior decision holding that the CSR payments required a lawful appropriation.

Current Status. Judge Collyer's decision is currently on appeal and 17 states (including most of those bringing the California lawsuit) and the District of Columbia have been granted a motion to intervene in such appeal.

On October 24, 2017, Senator Orrin Hatch (R-Utah), the Chairman of the Senate Finance Committee, issued a press release stating that he and House Ways and Means Committee Chairman Kevin Brady (R-Texas) had reached an agreement to fund the CSR payments for two-years subject to certain structural changes to the ACA. According to the press release, that agreement includes:

- Funding for CSR payments through 2019, with pro-life protections. For 2018, carriers must meet certain conditions to receive CSR payments, to be determined in consultation with the Secretaries of Treasury and Health and Human Services.
- Relief from the individual mandate from 2017-2021.
- Relief from the employer mandate from 2015-2017. Employers would be exempt from penalties if they did not provide coverage based on requirements of the mandate.
- Expansion of health-savings accounts (HSAs) to increase the maximum contribution limit.

The press release states that full legislative language will be released in coming days.

If you have any questions about this topic, please contact one of the listed Roetzel attorneys.

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