

HHS Proposes Regulation Changing ACA Exchange Rules; IRS Weakens Individual Mandate Enforcement

February 20, 2017

On February 15, 2017, the Department of Health and Human Services (HHS) issued a [proposed regulation](#) (“Proposed Rules”) designed to stabilize the Affordable Care Act’s (ACA) individual and small group health insurance (SHOP) markets during the ACA repeal transition period.

The Proposed Rules, once finalized, would make changes to the ACA’s guaranteed-availability rules, Exchange annual open enrollment rules, Exchange special enrollment period rules and other Exchange standards. Below is a summary of the highlights of the Proposed Rules:

Guaranteed-Availability Rules: The Proposed Rules change the current HHS interpretation of the ACA’s guaranteed availability rules to remove an economic incentive for individuals to pay premiums only when they actually need coverage. This prevents individuals from gaming the system and enrolling in Exchange plans when they know they will need services. Under current HHS rules, individuals whose coverage was previously terminated for non-payment of premiums can apply for coverage under a different product from the same insurer, and the guaranteed-availability rules require the insurer to issue the new coverage (*i.e.*, the insurer cannot apply new premiums to past-due amounts).

Under the Proposed Rules, the insurer could refuse to enroll the individual in new coverage and instead apply new premium payments to outstanding debt associated with non-payment of premiums for up to the prior 12 months of coverage. This would effectively require an individual whose coverage was terminated for non-payment of premium in the individual or group market to pay past due premiums in order to resume coverage from that insurer. The new rules would not prevent late or delinquent payers from enrolling in coverage with a different insurer. Also, it should be noted, however, that state law could limit an insurer’s ability to apply this new rule, and it will not be available to insurers in the federally facilitated SHOP.

Exchange Annual Enrollment Rules: The Proposed Rules shorten the annual open enrollment period for obtaining Exchange coverage for the 2018 plan year so that it would begin on November 1, 2017, and end on December 15, 2017. Previously, HHS had set the open enrollment period from November 1, 2017, to January 31, 2018, for 2018 coverage. The shift to the earlier end date was already set to begin for 2019 coverage. While the goal of this rule change was likely to reduce adverse selection, the earlier end date for enrolling in health coverage on the Exchanges would also result in better alignment with calendar plan year employer and Medicare open enrollment periods, which should simplify administration where coordination is required.

Exchange Special Enrollment

Rules: In order to improve the risk pool, improve market stability, and promote continuous coverage, the Proposed Rules would increase the scope of pre-enrollment verification of eligibility for all categories of special enrollment periods, starting in June 2017. In short, this would require individuals to submit more supporting documentation to obtain Exchange coverage during a special enrollment period than was previously required. The new rule would be implemented in the federally facilitated Exchanges and state-based Exchanges using the federal platform. The

SYNOPSIS

- While the HHS Proposed Rules primarily affect individuals trying to obtain coverage on the Exchanges, they may be beneficial for employers concerned about facing penalties under Pay or Play.
- The IRS will not require individual tax filers to indicate whether they had health insurance coverage or paid a penalty under the ACA on their 2016 Form 1040.
- It is unlikely these rules will be included in ACA replacement legislation.

Proposed Rule would also add tighter restrictions on enrolling dependents during a special enrollment period and would require some consumers in special enrollment periods to demonstrate prior coverage. It should be noted that some of the proposed changes to special enrollment periods would apply in the individual market only. For example, the Proposed Rule's new restrictions on enrolling dependents would not apply to special enrollment periods in the SHOP.

How Does this Affect Employers?

While the Proposed Rules primarily affect individuals trying to obtain coverage on the Exchanges, the end result may be beneficial for employers concerned about facing penalties under the ACA's Employer Shared Responsibility provisions (commonly referred to as "Pay or Play" or "the Employer Mandate") for 2017, even though such penalties may be repealed. This is because the new Exchange rules make it harder for individuals to obtain and maintain coverage on the Exchanges and the ACA Pay or Play penalties, both under Code § 4980H(a) and (b), are only imposed on an employer if an employee qualifies for and receives a premium tax credit on an Exchange.

How Do These Rules Fit Into the ACA "Repeal and Replace" Initiative?

It is unlikely that these rules will be included in any ACA replacement legislation. While there is no question that there will be fundamental changes proposed in the coming weeks and months relating to the structure of the ACA, the Proposed Rules appear to be more of a temporary measure or interim relief effort by the new administration, designed primarily to ease insurer concerns about participation in the Exchanges in order to promote market stability while the ACA replacement plan is being debated.

IRS Weakens Enforcement of Individual Mandate

On February 14, 2017, IRS officials were quoted in a [report](#) on the website, Reason.com, that the IRS will not require individual tax filers to indicate whether they had health insurance coverage or paid a penalty under the ACA on their 2016 [Form 1040](#).

The ACA's Individual Shared Responsibility provisions (commonly referred to as "the Individual Mandate") generally require every American to either maintain qualifying health coverage or pay the Individual Mandate tax penalty. The IRS was set to require filers to indicate whether individuals had maintained coverage in 2016 or paid the penalty by filling out line 61 on the Form 1040. Alternatively, they could claim exemption from the mandate by filing a [Form 8965](#).

The change in this mandatory filing requirement is a direct result of the executive order President Donald Trump issued on January 20, 2017, (see our [eAlert](#) on the executive order), which directed the federal agencies that implement and oversee the

ACA to provide relief from the ACA's costs to states, individuals and other entities, within the boundaries of the law.

The IRS' statement given to Reason.com, provided: "The recent executive order directed federal agencies to exercise authority and discretion available to them to reduce potential burden. Consistent with that, the IRS has decided to make changes that would continue to allow electronic and paper returns to be accepted for processing in instances where a taxpayer doesn't indicate their coverage status."

This change in the rules means that the IRS will process individuals' returns, and will not systematically reject them, even if missing line 61 on the Form 1040. In other words, even though the government has not expressly repealed the ACA's Individual Mandate, it appears that filling out line 61 on the 2016 Form 1040 will now be optional.

How Does this Affect Employers?

Many employers with a large share of part-time or variable-hour employees, even if not exposed to ACA Pay or Play penalties, have offered basic minimum essential coverage (MEC) plans because they want to ensure that their workers are not exposed to the Individual Mandate penalties. Now, without such a mandate, some employers may decide not to offer such plans. However, employers should be mindful that currently the employer shared responsibility provisions under Pay or Play, or the employer mandate rules, still apply, and to avoid penalties, employers should offer MEC coverage that meets the Minimum Value standard and is affordable to their full-time employees.

Are These Rule Changes Part of the ACA Replacement Plan? What is the Status of the ACA "Repeal and Replace" Initiative?

The HHS and IRS rule changes described above are not a part of any of the ACA replacement plans that have been proposed as part of the ACA "Repeal and Replace" Initiative, and appear to both be temporary measures designed to make things easier during the transition period between the ACA and the replacement legislation.

Many employers with a large number of part-time or variable-hour employees, even if not exposed to ACA Pay or Play penalties, have offered basic minimum essential coverage plans to ensure workers are not exposed to the Individual Mandate penalties. Now, without such a mandate, some employers may decide not to offer MEC plans.

Additionally, as of the time of this writing, the government has not expressly repealed the Individual Mandate provisions of the ACA, and the IRS does not view its change in enforcement of the Individual Mandate as an express repeal of the ACA's Individual Mandate.

As for the current status of the ACA's "Repeal and Replace" Initiative, as of this writing, there are five plans that Republican lawmakers are considering to replace the ACA:

1. **The Paul Ryan Plan: "A Better Way."**
2. **The Tom Price Plan: "H.R. 2300 - Empowering Patients First Act of 2015."**
3. **The Orrin Hatch Plan: "The Patient Choice, Affordability, Responsibility, and Empowerment Act."**
4. **The Cassidy/Collins Plan: "Patient Freedom Act of 2017."**
5. **The Rand Paul Plan: "S. 222 - The Obamacare Replacement Act."**

In addition, while a "blueprint" of an ACA replacement plan incorporating many of the elements of the Paul Ryan and Tom Price plans was recently circulated in Congress, it's still unclear at this time which ACA changes will be included in the final ACA replacement legislation. We will continue to monitor these developments closely.

If you have any additional questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.

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