Issue Brief: The Impact of EO 13765 on the ACA

By: Mara Youdelman

On Friday January 20, the new president signed his first Executive Order, "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal." The six sections of this Executive Order (EO) outline how the new Administration intends to use its administrative authority to undermine the Affordable Care Act (ACA). The EO includes no specifics about which aspects of the law it was targeting. Thus the EO is more about messaging than action since the Administration is still bound by the requirements of the ACA itself. Further, any changes in regulations must comply with requirements of the Administrative Procedures Act (APA) and cannot be unilaterally adopted pursuant to EO or agency directive. For more information on a president's authority regarding Executive Orders, see NHeLP's fact sheet on the Executive Order Authority.

It is important to recognize that despite the rhetoric, this Executive Order cannot:

- repeal or reverse the ACA;
- undo ACA regulations or guidance;
- allow the Executive Branch to exceed the authority delegated to it by Congress or the Constitution; or
- override the ACA or the Constitution.

Overview of the Executive Order

The EO itself does not – and indeed cannot – change any provision, requirement, or aspect of the ACA. In itself, it is a messaging document and merely restates President Trump's campaign promises. The ACA is still valid law and any attempts to repeal or change the law must start with Congress. The Administration can only change its interpretation of the law. And even to do that, it cannot take a position contrary to the statutory language of the ACA and it must comply with the requirements of the Administrative Procedures Act (APA) when seeking to withdraw or amend regulations. The APA generally will require formal notice and comment periods before the Administration can change governing regulations. If the Administration fails

to comply with these requirements, they will leave themselves open to legal challenges in the courts.

A summary of the Executive Order may be found in Appendix A.

Questions and Answers

1. What agencies are affected by this EO?

The EO applies to the Department of Health and Human Services (HHS) and all executive departments and agencies with responsibilities under the Affordable Care Act (ACA). Thus, a number of agencies are swept into the EO. The majority of responsibility for implementing the ACA resides in HHS with regard to the marketplaces as well as Medicaid, Medicare and CHIP. The Department of Treasury's Internal Revenue Service (IRS) implements provisions including reconciliation of Advanced Premium Tax Credits, the individual penalty, and some hardship exemptions. The Department of Labor implements provisions related to employer sponsored plans and, with HHS and IRS, the Summary of Benefits and Coverage. Other federal agencies are also affected such as the Office of Personnel Management which oversees federal employee health insurance plans.

2. Can HHS stop implementing the individual mandate?

No. Section 1501 of the ACA requires individuals to have insurance (whether employer-based, marketplace, or public insurance such as Medicaid, Medicare, Tricare or through Veteran's Affairs) or pay a penalty. Unless and until the ACA is repealed by Congress, this requirement remains. Section 1501 also outlines the types of exemptions to the penalty. The Administration could broaden the hardship exemptions or interpret the hardship provision more broadly to exempt more individuals from the mandate and penalty. Any changes, however, must still meet the statutory requirements of the ACA and likely be implemented pursuant to the Administrative Procedures Act.

3. Can HHS stop paying Advanced Premium Tax Credits (APTCs) to issuers?

No. Section 1401 and 1411 of the ACA establishes Premium Tax Credits and APTCs. The ACA specifies who is eligible and the amounts of the tax credits. The Administration could change some of the policies implementing this provision by proposing new or amended regulations or guidance. But any changes must still meet the statutory requirements of the ACA.

4. Can HHS stop paying cost-sharing payments to issuers?

Maybe. However, this question may be controlled more by what a court decides than the EO itself. Members of the House of Representatives sued HHS arguing that Congress did not

provide specific funding to pay the cost-sharing payments and thus HHS violated federal law by paying issuers. The D.C. District Court agreed with the House, but the case was appealed by the Obama administration to the D.C. Court of Appeals. The lower court decision was delayed until the appeals process finishes. If the new Administration decides not to defend the court case, the lower court's decision could stand. (This concern about the position of the new Administration led individuals benefitting from the cost sharing reductions to try to intervene in the case. Although the request was denied, the individuals could go back to court and request intervention again, if it becomes clear that neither of the existing parties is going to protect their interests.) A change in position by the Administration and/or a court of appeals decision that upholds the decision of the lower court would likely cause a near-fatal blow to the marketplaces since consumers receiving cost-sharing assistance would likely cancel their coverage or be unable to pay the full costs of care. Also, issuers could cancel their plans pursuant to terms in their contracts allowing termination if the court case found cost-sharing payments illegal.

5. **Can HHS eliminate the Medicaid Expansion or stop using MAGI?**

No. Section 2001 of the ACA authorizes the Medicaid Expansion. Section 2002 requires states to use the MAGI (Modified Adjusted Gross Income) methodology for nonelderly individuals. The Administration could not reduce the amount states receive for the expansion population or require states to use pre-MAGI eligibility rules unless Congress and the President enact a law making those changes.

6. **What flexibility can HHS give states under section 3 of the EO?**

Section 3 of the EO could apply, for example, to state requests for Medicaid "waivers" pursuant to Section 1115 of the Social Security Act. This could include state requests for partial Medicaid expansion (e.g. to cover individuals up to 100% of the federal poverty level rather than the statutory requirement of 138% FPL), work requirements, premiums for individuals under 100% of the federal poverty levels, or other issues. But those waiver requests would be subject to the statutory requirements of Section 1115 and thus must be for an experimental, pilot or demonstration purpose and promote the objectives of the Medicaid Act.

Section 3 could also apply to the waiver authority enacted under Section 1332 of the ACA. This section allows states to seek "State Innovation Waivers" to provide access to quality health care that it at least as comprehensive and affordable as would be provided absent a waiver. Yet the ACA sets out specific "guardrails" for Section 1332 waivers and HHS issued regulations and guidance governing these waivers. Thus, any changes to the process or requirements for these waivers would first have to go through notice-and-comment.

7. **Can HHS eliminate the "maintenance of effort" (MOE) requirement or enhanced funding for CHIP?**

No. Section 2101 of the ACA authorized enhanced funding for states on the condition that states maintain the same eligibility standards for CHIP (the Children's Health Insurance Program) as in effect on March 23, 2010. The Administration could not stop the enhanced funding or the MOE requirement. That said, funding for CHIP currently ends September 30, 2017. Without congressional action to provide new funding, the program will expire and at that point, these provisions will no longer apply.

8. **Can HHS eliminate requirements for essential health benefits (EHBs)?**

No. Section 1302 of the ACA requires health plans offered through the marketplaces and certain other private market plans as well as coverage provided through the Medicaid Expansion to include EHBs. The 10 EHB categories are statutory and HHS has issued regulations and guidance to implement the statutory provisions. Thus, notice-and-comment would be required before HHS could change the requirements.

9. **What happens to requirements that issuers include women's preventive services, including contraceptive coverage?**

Section 1001 of the ACA enacted a new section 2713 of the Public Health Services Act. This section requires coverage of preventive services as part of the Essential Health Benefits. HHS' Health Resources and Services Administration commissioned the Institute of Medicine to provide evidence-based recommendations regarding what women's preventive services should be covered. The IOM included contraceptive services and counseling. HRSA adopted IOM's recommendations and issued guidelines to require that contraceptive services be covered without cost-sharing. Last year, HRSA commissioned ACOG to update the guidelines which it finalized late in 2016. Since the requirements related to women's preventive services and contraceptive coverage were issued through guidance and not regulations, the Administration could withdraw these specific requirements but must still comply with Section 1001.

10. **Can HHS let health insurance issuers offering "skimpy" plans participate in the marketplaces?**

No. Section 1301 of the ACA requires all plans participating in the marketplaces to provide EHBs. Further, all issuers participating in the marketplaces must offer at least one plan at the silver and gold levels and comply with HHS regulations. Other than the ACA-authorized "catastrophic" plans, issuers would not be able to offer plans through the marketplaces that do not provide all 10 EHB categories, including preventive services.

11. HHS recently finalized the 2018 Benefit and Payment Parameters rule. Does the EO affect it?

No, unless the Administration issues a proposed regulation with notice-and-comment to amend or withdraw these final regulations.[1] Further, the 2018 Letter to Issuers in the Federally-Facilitated Marketplaces would likely also remain in place. While the letter is sub-regulatory, since it was finalized pursuant to notice-and-comment, we believe the same process must apply to any attempts to change or withdraw the letter.

12. What happens if a federal agency decides not to enforce ACA requirements?

Separate from changing regulations and attempting to repeal the ACA, federal agencies may decide not to fully enforce ACA requirements. In this situation, a case-by-case evaluation will have to occur to ascertain whether the agency action would be legal. Certainly, a decision by an agency to abdicate ACA enforcement altogether would be legally suspect; this would include, for example, a decision by the Secretary of HHS to grant a blanket hardship waiver to the individual mandate.

13. So what new authority does the EO give HHS and other agencies?

None. The EO itself does nothing to change current law. The EO does not grant any agency any authority it did not already have to change or amend regulations as long as it still complies with the statutory language of the ACA and administrative procedures requirements. The EO does signify the intent of the Administration and likely will raise concerns with consumers, issuers, and providers about how it may be effectuated. And it may engender more fear or concern about whether the marketplaces will continue through 2017 and beyond, causing consumers to forego available coverage or issuers to withdraw from the marketplaces after current contracts expire.

14. What's next?

Since the EO itself cannot repeal or change the ACA or its implementing regulations and policies, we must continue to monitor the actions of the federal departments and agencies to ensure compliance with current law and challenge any attempts to ignore the ACA or administrative process requirements. We must also educate consumers about the continue availability of coverage and their rights to that coverage. And we must work to ensure that any attempts to repeal or replace the ACA do not leave any individuals worse off than they are

[1] This final rule is subject to the Congressional Review Act so Congress could act to withdraw the regulation. But the Administration itself could not withdraw or amend the rule without complying with the Administrative Procedures Act.

under current law and that any replacement provides the same scope of affordable, comprehensive coverage that the ACA currently does.

Appendix A

Section 1: States the policy of the Administration to seek the repeal of the ACA. Pending the repeal, the EO says it is imperative to ensure the law is being "efficiently implemented" and to take actions "consistent with the law to minimize the unwarranted economic and regulatory burdens of the Act".

Section 2: Authorizes HHS and other relevant executive agencies to "waive, defer, grant exemptions from, or delay the implementation of any provision". This applies to provisions that impose financial burdens on states as well as provisions that impose a "cost, fee, tax, penalty or regulatory burden".

Section 3: Authorizes HHS and other executive agencies to exercise "all authority and discretion available to them" to provide greater "flexibility" to states. This could include Medicaid waivers and "State Innovation Waivers" pursuant to the ACA.

Section 4: Authorizes each agency with responsibilities relating to health care or health insurance to "encourage the development" of a free and open market in interstate commerce. In addition to applying to HHS, this section could also apply to the Department of Labor with regards to employer-sponsored insurance and other departments/agencies.

Section 5: Recognizes that the Administrative Procedures Act applies to any revision of regulations. Thus, all regulatory requirements remain **unless and until** the Administration proposes changes or new regulations and proceeds with a formal notice-and comment process. Further, any guidance issued by a federal agency also cannot be changed by executive order although revoking or changing guidance is not generally subject to notice-and-comment requirements. Guidance, however, could not be used to alter regulations.

Section 6: Recognizes that the EO must be implemented consistent with applicable law and to the availability of appropriations. It also cannot impair or affect the legal authority of federal departments/agencies or the director of the Office Budget.