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It is Open Season on the ACA

Trump Signs Executive Order Targeting the Affordable Care Act, While Advisor Indicates Plans to Block Grant Medicaid; Meanwhile a Flurry of Republican Alternatives Begins with a Proposal from Moderate Congressional Republicans

Only three days into the Trump Administration, and the attacks on the Affordable Care Act (ACA) have come fast and furious. As his first executive order, President Trump directed his agencies to exploit discretion, loopholes, and waivers to undermine implementation of critical ACA programs. Kellyanne Conway, Trump's close adviser, a day later indicated that the Administration would seek to shift Medicaid funding from an entitlement structure to a block grant structure, a move that would reduce access to care and innovative services for almost 70 million Americans. Congressional Republicans were active as well, with moderate Republicans proposing an ACA replacement plan that would heighten regional health disparities and undermine consumer protections for millions of Americans.

Advocates Should:

1. **Understand the impact Trump's executive order will have on access to care, and respond accordingly, including monitoring the use of discretion and new rulemaking by the relevant federal agencies (particularly the Internal Revenue Service (IRS) and the Department of Health & Human Services (HHS)) and developing strategies for protecting access to care at the state level, including blocking any harmful state proposals for Medicaid from reaching the federal government.**

2. **Educate Congress on the devastating impact that shifting Medicaid funding to a block grant program will have on access to care for millions of Americans.**

3. **Review all ACA replacement plans proposed by Congressional Republicans, understand their impact on access to care, and inform their Senators and Representatives about concerns with each replacement plan.**

Trump Chips Away at the ACA In First Executive Order

On January 20, 2017, shortly after the inaugural parade, President Donald Trump issued an executive order, directing his agencies to undermine the ACA using all tools available until a "prompt repeal" can be achieved. As President, Trump does not have the power to immediately repeal the ACA, or even to direct his federal agencies to completely disregard it. He does have the power, however, to direct his agencies to exploit discretion, waivers, and loopholes to effectively undermine key provisions, such as the individual mandate. The executive order indicates that President Trump is intent on undoing the ACA as soon as is legally possible. Advocates should be aware that the fight over the ACA is now well underway, and understand what this executive order says about the Trump Administration's health care agenda.

Among the most alarming aspects of the executive order are the directions for agencies to:

- **Undermine the Individual Mandate.** The executive order directs federal agencies to use their authority to dismantle "any provision…that would impose a fiscal burden on any State, or a cost, fee, tax, penalty, or regulatory burden on an individual." Trump's IRS will likely use this directive to undermine the individual mandate by refusing to fine individuals who choose to forgo health insurance and granting hardship waivers to any who apply. Without an enforced individual mandate, many healthy people will pull out of the Marketplace, causing premiums to spike for those remaining enrolled and potentially triggering insurers to pull out of the Marketplaces altogether. This will especially burden people living with chronic illnesses and disabilities, who must have access to care and will be less likely to pull out of their coverage. According to the Congressional Budget Office, a law that eliminated the individual mandate, along with some other provisions, would cause 18 million Americans to lose their insurance in the first year of implementation. Advocates should begin to build relationships with new agency leadership and ask them to preserve the individual mandate as an important element of health insurance markets.

- **Allow Greater Flexibility for State Health care Waivers at the Cost of Consumer Protections.** The order states that federal agencies, including HHS, must "exercise all authority and discretion available to them to provide greater flexibility to States and cooperate with them in implementing healthcare programs." This language encourages HHS to grant states waivers to avoid the regulatory requirements of the ACA as well as the Medicaid Act. Under the Obama Administration, advocates could rely on HHS to deny state waivers that were problematic from an access to care perspective. The executive order indicates that Trump's HHS will be much more likely to approve most waivers submitted by states, even if they undermine access to care. In this new era, advocates must work to combat any state proposals that undermine access to care before they are submitted for federal approval. For example, advocates should be vigilant against work requirements in Medicaid, which disproportionately block people living with chronic illnesses and disabilities, such as those living with behavioral health challenges, from receiving access to care.

- **Encourage Sale of Health Insurance Across State Lines.** The order also states, however, that federal agencies should work to create a system to allow the sale of health insurance across state lines. This would create a "race to the bottom," in which the state with the least number of health care regulations would set consumer protections for everyone in the country. Advocates in states with strong consumer health care protections and regulations, such as Massachusetts, should begin to educate their political representatives on why selling health insurance across state lines would put meaningful health coverage at risk.

- **Use Discretion to Avoid Expanding the ACA.** The order also directs agencies to stop issuing regulations that would expand the ACA. This will prevent advocates from being able to achieve certain goals, such as obtaining cost sharing protections for high cost medications in Qualified Health Plans.

To combat the impact of the executive order, advocates should carefully monitor the actions of key federal agencies, such as the IRS and HHS. In particular, advocates should pay careful attention to waivers states submit for health care programs such as the ACA and Medicaid. Advocates can no longer rely on the federal government to block proposed waivers that would undermine access to care. Advocates should also understand the other priorities articulated in the executive order, such as formulating a plan to sell insurance across state lines, in order to better prepare to block attempts to undermine access to care.

Administration Indicates It Intends to Convert Medicaid into Block Grants, a Proposal That Would be Disastrous for Access to Care

On January 22, 2017, Kellyanne Conway, President Trump's former campaign adviser and current White House counselor,

indicated that the Administration will seek to convert Medicaid from an entitlement program to block granting. Conway, during her appearance on NBC's "Sunday Today" show praised block granting Medicaid as a way to provide additional flexibility to the states and to eliminate waste and fraud. Her statements are the first firm indication that the Trump Administration will push to change the funding structure of Medicaid. If they succeed, access to care as well as innovative care programs provided through Medicaid will be deeply threatened.

Medicaid has traditionally been an entitlement program, meaning that it is funded to reflect actual health care spending. Proposals to end Medicaid's entitlement status threaten the health of all of the 69 million individuals who rely on the program. Block grants provide a set amount of funds that do not allow states to respond to current need and increased demand for Medicaid coverage during tough economic times, unanticipated disease outbreaks or disasters, and when there are health innovations, such as the recent curative breakthrough treatments for hepatitis C.[1]

Although block granting is often presented as a way to provide greater flexibility to states, flexibility without funding does not result in better programs or care. Spending caps and block grants shift costs onto states and would likely result in states cutting critical optional services, such as prescription drugs, and further limiting already restrictive provider networks. The Urban Institute estimated that a previous block grant proposal would lead states to drop between 14.3 and 20.5 million people from Medicaid and cut reimbursement to health care providers by more than 30% by the tenth year of its implementation. Spending caps or block grants would also hinder states' ability to flexibly respond to public health emergencies (such as disease outbreaks) and provide access to new, effective cures or treatments for serious or chronic health conditions. Shifting Medicaid costs to states and/or modifying eligibility requirements will result in service cuts and cost-sharing levels that jeopardize access to lifesaving care and treatment.

Advocates should focus on preventing a block grant proposal from passing Congress. Although the President's position on this subject has a great deal of importance, it is ultimately up to Congress to pass the legislation needed to shift Medicaid funding to block granting. Advocates should focus on educating their Senators and Representatives on the importance of the Medicaid programs in their states, as well as the negative consequences that block granting would have on their lower income constituents.

Moderate Republicans Propose ACA Replacement Plan, Posing a Threat to Increase Regional Health Disparities and Signaling Republican Difficulties Agreeing on an ACA Replacement Plan

On January 23, 2017, Senators Bill Cassidy (R-LA) and Susan Collins (R-ME) unveiled the Patient Freedom Act of 2017, a plan to replace the ACA. This plan has much in common with previously proposed plans, such as promoting health savings accounts and eliminating the individual mandate. Their plan, however, is unusual in that it allows states to opt to keep ACA programs, receive a similar amount of federal funding for consumers to use to pay for medical care and health insurance, or reject any federal assistance altogether. States that opt out of the ACA but choose the replacement program could enroll otherwise uninsured individuals in high deductible health plans funded through state subsidized health savings accounts. States that opt out of the ACA, with or without the replacement plan, would forgo many of its consumer protections, except the requirement to allow children to remain on their parents' insurance until age 26 and the prohibition on annual or lifetime limits on benefits.

Although the Cassidy-Collins plan would allow some states to preserve the ACA, it still represents a threat to access to care for the majority of Americans. The Cassidy-Collins plan essentially block grants the ACA or its replacement, meaning

[1] To understand the impact that block granting can have on social services programs, advocates should look to the experience of shifting the Temporary Assistance for Needy Families (TANF) program to block granting. Once TANF was block granted, states redirected these funds to other purposes, including filling state budget holes. States were not able to redirect these funds back to the TANF program when the need for TANF exploded during the recession. At TANF's onset, 70% of funding went to basic assistance for the poor. By 2014, only 26% of TANF funding supported basic assistance. A similar diversion of funds from Medicaid would severely undermine access to care for people of lower income.

that funding would not increase as need increased. The Cassidy-Collins plan would only exacerbate regional health care disparities, as some states would choose to remain in the ACA while others would opt for a regulatory regime that would provide fewer consumer protections and promote health plans that do not provide sufficient coverage for many Americans. The replacement also promotes high deductible health plans that would be especially unsuitable for individuals living with chronic illnesses and disabilities because they would only cover generic versions of prescription drugs, require cost sharing for preventive services, and protect consumers only against catastrophic medical expenses. Advocates should make it clear to their Senators and Representatives that although this plan is more "moderate" than some, it still is a threat to access to care for the vulnerable.

The Cassidy-Collins plan also illustrates the challenges that Congressional Republicans are facing as they attempt to undo the ACA. Republicans are having difficulty coalescing around a replacement plan. For example, many Republicans will find the Cassidy-Collins plan objectionable because it preserves some ACA tax increases. Several other Senators, including Rand Paul (R-KY) are expected to unveil their own ACA replacement plans in the course of the next several weeks. Advocates should closely review all of the proposed plans circulating in Congress over the next several weeks and work to educate their Senators on the impact that these plans will have on access to care. CHLPI will post a comparison chart of the proposed ACA replacement plans in the near future.

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