<u>Talking Points - Executive Order Promoting Healthcare Choice and Competition Across the United States</u>

Introduction

On October 12, 2017, the President issued his "Executive Order Promoting Healthcare Choice and Competition Across the United States" (EO) that provided, in relevant part, as follows:

- Section 1 of the EO sets forth policy rationale:
  - Section 1(b)(i) supports expanding access to Association Health Plans (AHPs).
  - Section 1(b)(ii) supports the use of "short-term, limited-duration insurance" (STLDI) plans as an alternative to exchange plans.
  - Section 1(b)(iii) supports expanding the flexibility of Health Reimbursement arrangements (HRAs).
- Section 2 of the EO directs the Secretary of Labor to, within 60 days, consider proposing regulations or revising guidance to allow more employers to form AHPs.
- Section 3 of the EO directs the Secretaries of Treasury; Labor; and Health and Human Services to, within 60 days, to consider proposing regulations or revising guidance to expand the availability of STLDI.
- Section 4 of the EO directs the Secretaries of Treasury; Labor; and Health and Human Services to, within 120 days, consider proposing regulations or revising guidance to expand the use of HRAs and allow HRAs to be used with non-group coverage.
- Section 5 of the EO directs the secretaries to consider public comments on new regulations.
- Section 6 of the EO directs the Secretary of Health and Human Services to provide the President regular reports on state and federal laws that are not consistent with the policies in Section 1 of the EO and identifying actions that states and the federal government could take to further the policies in Section 1 of the EO.
- Section 7 is a statement of provisions regarding construction and implementation of the EO.

Talking Points

1. The October 12 Executive Order directs the Secretaries of Treasury, Labor, and Health and Human Services, to consider revising guidance and regulations to allow more employers to expand the availability of Short-Term, Limited-Duration Insurance (STLDI) and Health Reimbursement Arrangements (HRAs). The Executive Order

also directs the Secretary of Labor to consider revising guidance and regulations to allow more employers to enter Association Health Plans (AHPs).[1]

2. The expanded use of AHPs poses the following concerns:
   - Use of AHPs would fragment and destabilize the small group market by encouraging employers with younger, healthier workforces to move their employees from the group health insurance market to AHPs, likely resulting in higher premiums for many small businesses outside an AHP. Removing those younger, healthier employees from the group insurance risk pool would likely cause premium increases for small businesses – with employees who may be older or have higher healthcare costs – that must remain in the small group market.
   - AHPs may be exempt from consumer protections such as state solvency requirements, patient protections, and state regulatory oversight, potentially exposing consumers to significant harm. Without such consumer protections, consumer plans issued by AHPs may be more likely to fail.
   - Small businesses joining an association will not qualify for the Prepaid Health Care Act (PHCA) Premium Supplementation Trust Fund subsidy available to businesses with less than eight employees.[2]

3. AHPs may be used as a vehicle to attempt to sell insurance across state lines, this is a concern for the following reasons:
   - AHPs that can be marketed across state lines have the potential of eroding or displacing Hawaii's PHCA and its comprehensive benefit package by employers seeking lower premiums.
   - AHPs may be used to circumvent compliance with the PHCA. Depending on the details of the proposal, enforcement of the PHCA on out-of-state plans may be difficult or disallowed.
   - Professional Employer Organizations are already a growing factor in Hawaii, and some may qualify as associations under some definitions. Currently, all who market small and large group health insurance in Hawaii are required to use approved PHCA Plans.
   - AHPs may be used to undermine state insurance laws, hold insurers less accountable, and prevent state regulators from providing assistance to consumers in their states.

[1] *Presidential Executive Order Promoting Health Choice and Competition Across the United States*, October 12, 2017; available at: https://www.whitehouse.gov/the-press-office/2017/10/12/presidential-executive-order-promoting-healthcare-choice-and-competition.

[2] "Pass-through" funds received from the federal government pursuant to Hawaii's waiver under section 1332 of the Affordable Care Act, approved December 30, 2016, are to be deposited into the Prepaid Premium Supplementation Trust.

- Insurance carriers may utilize AHPs to shop for jurisdictions with regulations that allow them to most aggressively pick the healthiest risk pool, resulting in sharper rate hikes for the remaining risk pool.

4. Increased use of Short-Term, Limited-Duration Insurance (STLDI), generally defined by states and the federal government as a policy of less than 12 months,[3] is a concern for the following reasons:
    - STLDI plans may not provide an adequate level of financial protection for consumers by offering skimpier plans with less comprehensive coverage.
    - Public health may be eroded as STLDI may exclude coverage for services such as preventive services, maternity care, mental health and substance abuse services.
    - Purchasing STLDI plans rather than a more comprehensive plan meeting Minimum Essential Coverage limits may subject consumers to tax penalties.
    - STLDI almost always excludes coverage for pre-existing conditions and if a consumer developed a new condition while under the first policy, the condition may be denied as a pre-existing condition under the next coverage period. As a result, STLDI may only provide coverage to healthy consumers.

5. Health Reimbursement Arrangements (HRAs) are employer-funded group health plans from which employees are reimbursed tax-free for qualified medical expenses up to a fixed dollar amount per year. Unused amounts may be rolled over to be used in subsequent years. The employer funds and owns the account. Health Reimbursement Arrangements are sometimes called Health Reimbursement Accounts. HRAs raise the following concerns:
    - HRAs seem similar to Health Savings Accounts (HSAs), which are paired with high-deductible plans that we have found do not comply with the PHCA.
    - HRAs are more restrictive than the HSAs (e.g. reimbursement arrangement are applicable to medical costs only, are not portable, and rolling over of unused funds is at the discretion of the employer.)

---

[3] 45 C.F.R. § 144.103 currently states:

> Short-term, limited-duration insurance means health insurance coverage provided pursuant to a contract with an issuer that:
>
> (1) Has an expiration date specified in the contract (taking into account any extensions that may be elected by the policyholder with or without the issuer's consent) that is less than 3 months after the original effective date of the contract; and
>
> (2) Displays prominently in the contract and in any application materials provided in connection with enrollment in such coverage in at least 14 point type the following: "THIS IS NOT QUALIFYING HEALTH COVERAGE ("MINIMUM ESSENTIAL COVERAGE") THAT SATISFIES THE HEALTH COVERAGE REQUIREMENT OF THE AFFORDABLE CARE ACT. IF YOU DON'T HAVE MINIMUM ESSENTIAL COVERAGE, YOU MAY OWE AN ADDITIONAL PAYMENT WITH YOUR TAXES."

- HRAs may be allowable, provided that HRAs are required to be used in conjunction with a PHCA approved plan.

6. The reports to the President required under section 6 of the EO raise the following concerns:
    - Hawaii's unique status under the PHCA may present difficulties in complying with the policies outlined in the EO, which would be highlighted and threatened by the directive to agencies to report on existing State and Federal laws, regulations, etc. that fail to conform to the policies of the EO.
    - More concerning is the directive that agencies identify actions that could be taken to ensure compliance with the EO policies, which may foreseeably include a rescinding of the PHCA ERISA waiver.