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TO: The Council

FROM: Scott Sinder
Kate Jensen
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RE: 2018 ACA Stabilization Package

On March 19, 2018, Senators Lamar Alexander (R-TN) and Susan Collins (R-ME), along with Representatives Greg Walden (R-OR) and Ryan Costello (R-PA), released draft text of an individual market stabilization package. The package largely builds off of a bipartisan deal struck by Senators Alexander and Patty Murray (D-WA) ("Alexander-Murray"), while incorporating parts of reinsurance measures introduced by Senator Collins and Representative Costello. To the extent the new text includes any changes to Alexander-Murray, those changes have been bolded in the discussion below.

In general, the new package would:

- fund the Affordable Care Act's (ACA) cost-sharing subsidies for the ***next three years, through 2021***;
- require promulgation of federal regulations to implement state "health care choice compacts" under section 1333 of the ACA to allow individual-market qualified health plans (QHPs) to be offered in more than one state;
- liberalize aspects of the ACA's section 1332 state waiver program, including allowing states to apply for waivers to establish ***state reinsurance programs or invisible high-risk pools***; and
- ***implement consumer notice requirements for short-term, limited-duration insurance (STLDI) and prohibit the use of any appropriated federal funds to cover abortions***.

Cost-Sharing Payment Appropriations and Potential Reforms

The package appropriates funds for cost-sharing payments under section 1402 of the ACA for a portion of 2017 (October 1, 2017 through December 31, 2017) and for plan years 2019-2021. ***Cost-sharing payments would also be available for plan year 2018 for "basic health programs" established under section 1331 of the ACA and certain QHPs, provided that the Secretary of Health and Human Services ("Secretary") can determine—based on a certification/appropriate documentation from the issuer and a certification from the state regulator—that the issuer did not increase premium rates for the plan year based on an assumption (or instruction from a state regulator) that the issuer would receive cost-sharing payments.***

ACA-Established State Compacts for Offering Individual Market QHPs Across State Lines

Like Alexander-Murray, the new text directs the Secretary, in consultation with the NAIC, to develop regulations within 1 year to effectuate section 1333 of the ACA (42 U.S.C. 18053). That section allows states to enter into compacts/agreements under which QHPs can be offered in the individual markets in all participating states and only be regulated by the state in which the plan is written/issued. The issuer of the QHP would continue, however, to be subject to market conduct, unfair trade practice, network adequacy and other consumer protection laws and regulations in the state in which the purchaser resides, and would have to be licensed in each compacting state.

The Secretary has the discretion to approve such compacts only if s/he determines that the compact would:

- provide coverage at least as comprehensive as the essential health benefits package—as defined in regulations—required on the exchanges;
- cost sharing protections against excessive out-of-pocket spending at least as generous as the ACA structure;
- not increase the federal deficit; and
- not weaken enforcement of any consumer protection laws or regulations in any compacting state.

Section 1332 State Waiver Reforms

Similar to Alexander-Murray, many of the changes to the existing 1332 waiver program are procedural, allowing, for instance, for an expedited (45-day) determination by the Secretary to approve a state waiver application for a term of 3 years in "urgent situations" (i.e., when the Secretary determines that areas in a state are at risk of excessive premium increases or having no plans offered in a market for the current or following year). Expedited determinations are also permitted if the waiver application is for a waiver that:

- Is "the same or substantially similar" to a waiver that the Secretary has already approved for another state; or
- ***Includes an invisible high-risk pool or reinsurance program***.

Notable, more substantive changes, however, are:

- Repeal, as of the date of enactment of the bill, all existing 1332 regulations and guidance (instructing the Secretary to issue new guidance within ***60 days*** (previously 30 days in Alexander-Murray), including examples of model state plans that meet the waiver requirements); and
- Allowing states—as part of a 1332 waiver—to develop "basic health programs" under section 1331 of the ACA, which offers standard health plans (providing at least the essential health benefits, having an MLR of at least 85%, and providing cost-sharing assistance on par with the Exchanges) to low-income individuals not eligible for Medicaid, in lieu of offering them coverage through an Exchange (pass-through federal funding under section 1332 would be available to establish such programs).

Collins-Costello Reinsurance Provisions Related to 1332 Waivers -

The new language also includes components of reinsurance bills from Senator Collins and Representative Costello. ***In particular, the measure would allow states to establish or maintain reinsurance or invisible high risk pool programs (i.e., an invisible high risk pool under which issuers cede risk to the pool without affecting premiums or terms of coverage; a reinsurance program that assumes a portion of the risk for high-cost claims with the state; a reinsurance program established by another method; or a program based on another state's approved reinsurance program) through the 1332 waiver process for fiscal years 2018-2021. To facilitate such programs, the text appropriates $500 million in fiscal year 2018 and $10 billion annually in fiscal years 2019-2021.***

If a state does not have a 1332 waiver that includes a high-risk pool or reinsurance program in effect, the text implements a "default federal safeguard," which allows the Secretary to use any allocated funds (as appropriated for high-risk pools or reinsurance programs) to "provide incentives to appropriate entities to enter into arrangements with the state" to facilitate individual market stabilization efforts.

Procedural Modifications to 1332 Waivers -

- The basic criteria for granting a waiver are largely unchanged, except language has been added regarding ensuring cost-sharing and spending protections "of comparable affordability [to the ACA structure]"—replacing more strict "at least as affordable" language—"including for low-income people, people with serious health needs, and other vulnerable populations;"

- Makes it easier for states to apply for a waiver by allowing a Governor certification, rather than enactment of a law, demonstrating that the state has a waiver plan in place;
- Requires state waiver plans to be budget neutral for the federal government over a 10-year budget period and during the proposed term of the waiver (***except for grants awarded for reinsurance programs and invisible high-risk pools, which are explicitly not considered in determining budget neutrality or impact on the federal deficit***);
- Aside from expedited waivers described above, the text would require the Secretary to make ordinary waiver determinations within ***120 days*** (instead of the current 180 or the 90 proposed in Alexander-Murray);
- The “scope of waiver” provisions are unchanged (the Secretary determines the scope based on the application submitted by the state), but waivers would automatically be in effect for 6 years, unless a state requests a shorter time; they may be renewed for unlimited 6-year periods through application to the Secretary; and the Secretary may not suspend or terminate the waiver in whole or in part during the term, unless the state materially fails to comply with the conditions of the waiver; and
- The text permits, but no longer would require, the Secretary to promulgate regulations pertaining to waiver consideration and transparency (which now have to include, among other things, public notice and comment processes at the state and federal level, periodic reports by the state, and periodic review by the Secretary of the waiver program).

Other Miscellaneous Reforms

The package contains several other provisions, including:

- Opening up catastrophic plans (referred to as “copper plans”) to all potential individual market enrollees;
- Calling for the Secretary to obligate over $105 million for outreach and enrollment activities (e.g., educating consumers and facilitating enrollment through an in-person consumer assistance program) for plan years 2019 and 2020;
- ***A requirement that STLDI issuers include a notice in their marketing, contract, and application materials to inform consumers that STLDI coverage differs from coverage under other QHPs;***
- ***A requirement that states regulating STLDI not run afoul of the federal standard***; and
- ***Hyde Amendment language—prohibiting the use of any appropriated federal funds to cover abortion.***