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Administrative Actions To Reverse Sabotage and Lower Costs in the ACA Marketplaces

By Maura Calsyn and Nicole Rapfogel July 14, 2020

On his first day in office, President Donald Trump issued an executive order directing federal agencies to take all available steps to undermine the Affordable Care Act (ACA).[1] Since that day, the Trump administration and its allies have tried to repeal or weaken the ACA using all three branches of the federal government. First, they tried to repeal the entire law through the legislative process. When those efforts failed, their 2017 tax bill zeroed out the ACA's individual mandate penalty, directly undermining the marketplaces. Because the mandate encourages healthier people to enroll in the marketplaces, eliminating its penalty increased premiums in the individual market. Second, 18 Republican attorneys general and governors—with the support of the Trump administration—are yet again asking the federal courts to overturn the entire ACA. Third, the Trump administration has used a wide range of administrative actions—including rulemaking—to chip away at the ACA's consumer protections and increase consumers' costs.

The next administration must take immediate steps to reverse the growing number of policies designed to weaken the ACA's marketplaces. Below, this issue brief outlines administrative actions that can not only reverse the Trump administration's marketplace sabotage but also further lower premiums and improve the functioning of the nongroup market. This list is expected to grow given the ongoing COVID-19 pandemic; for example, an administration that prioritizes the health of Americans will need to adopt additional policies to further stabilize the marketplaces if the cost of treating patients with COVID-19 increases premiums in 2021 as predicted.[2]

Background

Before the ACA was enacted, people who did not have access to employer-sponsored insurance or public coverage faced numerous barriers to affordable health coverage. Insurers in the individual market could set premiums according to health status and sex, charging people with preexisting conditions and women more, denying coverage based on medical history, and excluding coverage for certain benefits. In addition,

most plans did not cover basic benefits such as behavioral health care or maternity care. Insurers typically set dollar limits on the amount of care they would pay for, both annually and over a person's lifetime, and consumers were at risk of having an insurer retroactively cancel their coverage if they made a mistake when applying for insurance.

The ACA's consumer protections prohibited these practices. The act also included other reforms to keep the individual market's risk pool large and stable amid these changes. For example, the ACA included a temporary reinsurance program that helped insurers pay for their most expensive claims, which in turn allowed insurers to keep their premiums lower. Outreach and enrollment assistance also help bolster enrollment, allowing costs to be spread across a wider group of enrollees. Without these market-stabilizing reforms that lower premiums, the ACA's consumer protections would have made people in poor health disproportionately more likely to enroll in coverage, driving up insurers' average cost per enrollee and raising premiums for everyone in the market for comprehensive coverage. And if those in better health had decided premiums were too expensive to make coverage worth it, costs would have risen even further—ultimately resulting in a so-called insurance market death spiral.

The ACA tries to minimize this risk in a variety of ways. It originally included an individual mandate to incentivize healthy individuals to enroll in coverage to spread insurers' risk across both healthier and sicker enrollees. Without this requirement, people could decide to wait until they are sick to enroll in coverage, making the marketplaces' risk pool sicker. In addition, the ACA includes two types of financial assistance for people who purchase insurance in the marketplaces: tax credits that bring down premiums for people with incomes up to 400 percent of the federal poverty level, and additional limits on how much people with incomes up to 250 percent of the federal poverty level pay out of pocket for their health care. The marketplaces' structure and functioning also contribute to the stability of the risk pool. It is critical for people to understand their options and be able to easily enroll in coverage; otherwise, only the sickest people will take the time to go through the process.

The Trump administration's regulatory sabotage of the ACA marketplaces has sought to undermine the law's consumer protections as well as the parts of the law intended to keep the individual market's risk pools stable. These efforts include policy changes that give insurers greater leeway to discriminate against people with preexisting conditions; agency actions that have made it more difficult for consumers to enroll in coverage or find information about the law and marketplace plans; and statements by President Trump and others that create uncertainty for insurers and consumers and drive up prices.

As a result, according to data from the 2020 open enrollment period, enrollment in marketplace coverage decreased by 1.27 million from 2016 to 2020.[3] While President Trump's policies have reduced coverage and raised plan premiums, the ACA marketplaces have overall proved resilient.[4] Moreover, in states where politicians have invested in building stable, robust, state-managed marketplaces, the ACA has thrived and offered

a stark contrast to the federally facilitated marketplace (FFM).[5] For example, Covered California, the state's marketplace, recently reported a 41 percent increase in new enrollees, bringing the total enrollment to 1.5 million people. State officials cited additional state financial assistance, a state-level individual mandate, and a large marketing campaign as contributing to this significant increase.

A president who cares about ensuring health care for Americans must not only undo the current administration's harmful actions that have led to the reversal of the ACA's historic gains in health insurance coverage but also adopt regulatory reforms to strengthen the ACA, lower prices for consumers in the individual market, and protect consumers from the financial risk posed by enrollment in substandard junk plans. Unfortunately, legislation adopted during the Trump administration intended to sabotage the ACA—such as the repeal of the individual mandate—cannot be undone through administrative action, and there are important improvements to the law that can only be adopted by legislation. Nevertheless, even within the boundaries of executive authority, the next president can adopt important reforms that will strengthen the ACA and lower marketplace premiums.

Reverse Trump administration actions that harm enrollees in the federal marketplace

The Trump administration has made it more difficult to learn about marketplace coverage options and to enroll in a marketplace plan. These actions have contributed to lower enrollment, which in time can also change the marketplace risk pools if younger and healthier people face larger barriers to awareness of marketplace coverage options and to enrollment. In November 2018, only 1 in 4 uninsured nonelderly adults knew the deadline for open enrollment.[6] Other actions taken by the administration have further weakened consumer protections in the marketplaces, encouraged the purchase of substandard plans, and raised premiums for marketplace plans.

Restore information about the ACA on key government websites

The Sunlight Foundation has reported numerous instances of the Trump administration removing key information from government websites. For example, in December 2018, the Trump administration modified the online individual marketplace platform, adding new links to connect with private agents and brokers selling both non-ACA and ACA-compliant coverage.[7] In addition, starting in 2018, the Trump administration approved insurers' and brokers' use of a new "enhanced direct enrollment" pathway in which they process the consumer's entire application.[8] In these transactions, the consumer never interacts with the marketplace, and agents and brokers are not required to help all people find coverage.[9] Not only do these entities offer plans that do not include the ACA's consumer protections, but many

agents and brokers can receive higher commissions when they enroll consumers in these substandard plans.[10] These nonmarketplace websites also make it more difficult to directly compare marketplace options. The marketplace website, in contrast, has consumer-focused tools, including glossaries and helpful information that meet federal accessibility rules.[11]

The administration also removed links to instructions for enrollment by mail or phone. Following public scrutiny, the Trump administration returned some of this ACA information to two webpages. But in May 2019, the Sunlight Foundation reported 26 acts of censorship by the Trump administration, including "excised words, removed links, altered paragraphs, and removed pages" from a variety of U.S. Department of Health and Human Services (HHS) websites.[12]

It is important that at the start of next year, following the upcoming election, the president immediately restore complete, accurate information about the ACA, its benefits, and enrollment options on HealthCare.gov as well as on other federal government websites. Any suggestion that junk plans should be considered a substitute for comprehensive coverage must be eliminated, and the potentially misleading direct enrollment program should be halted.

Restore outreach and enrollment support for the federal marketplace

President Trump has also slashed funding for programs that assist eligible individuals with enrolling in marketplace plans. Just weeks after the president's inauguration, the Trump administration canceled $5 million in outreach and advertisements for the home stretch of the open enrollment period.[13] According to the former chief marketing officer for HealthCare.gov, this act led to almost 500,000 fewer enrollees.[14] Months later, the Trump administration announced it would cut 90 percent of funding from advertisements meant to encourage enrollment.[15]

The Trump administration has also cut grant funding for the ACA's navigator program, which provides in-person guidance to people with questions about enrollment, by 84 percent.[16] While the administration initially argued that these actions would not affect sign-ups, internal emails show that top officials knew that cutting television advertisements would reduce enrollment by more than 100,000 individuals.[17]

The Trump administration further undermined the navigator program by encouraging navigators to steer potential enrollees toward short-term junk plans, rather than comprehensive coverage.[18] Additionally, the Trump administration halted communication with the Latino Affordable Care Act Coalition, a group of organizations that had coordinated with the Obama administration each open enrollment period to ensure Latinos had the information they needed to sign up for health insurance.[19] Additionally, President Trump's HHS stopped engaging with other partner groups, including youth organizations, medical organizations, women's groups, private companies, and churches—all of which played important roles in previous enrollment cycles.[20]

The next administration should restore funding for the navigator program to Obama administration levels, as well as immediately reach out to consumer organizations and other partner groups to restart coordination and engagement on enrollment efforts.[21]

Announce a special enrollment period

In April 2017, the Trump administration halved the annual open enrollment period for states using the federal enrollment platform down to 45 days, from November 1 to December 15 each year.[22] Later that year, it also shut down the HealthCare.gov enrollment portal for maintenance 12 hours each Sunday, totaling 60 hours of planned downtime in an already shortened period.[23] In 2017, HHS also pushed back the deadline for plans to provide information to enrollees about plan renewals and rates, limiting consumers' ability to make informed decisions.[24] The administration also delayed automatic reenrollment until after the open enrollment period ended, preventing those who were automatically reenrolled from selecting a different plan that may have been more affordable or appropriate for their health care needs.[25]

The Trump administration also made it more difficult for people eligible for a special enrollment period to enroll in coverage. People can enroll in marketplace coverage outside open enrollment if they have experienced certain life events such as losing health coverage, getting married, or moving. But starting last year, the Trump administration subjected double the number of people who seek coverage during a special enrollment period to burdensome paperwork requirements.[26] While this rule was enacted in 2017, it has dire consequences now; with skyrocketing unemployment rates during the coronavirus pandemic, those who lose employer-sponsored coverage are subject to these onerous verification requirements at an already challenging time.

The current administration may double down on marketplace sabotage in the coming months. For these reasons, if the next administration is receptive to reforms, it must reopen enrollment as soon as possible. A special enrollment period—one that includes restored outreach and enrollment assistance—at the end of January through February will allow people without insurance to purchase marketplace coverage.

Reverse regulations that encourage healthy individuals to buy junk plans

The Trump administration has adopted numerous regulations to encourage junk plans that do not include the ACA's consumer protections. These plans may look attractive to consumers because of their lower premiums, but they are cheaper for a reason. Insurers can vary the price of these plans based on a person's health status and refuse to sell them to people who they think will incur higher costs. They can charge women and older people higher prices; impose annual and lifetime limits; and exclude coverage for preexisting conditions and essential health benefits such as prescription drugs and mental health care.

People with junk plans often do not realize that they are still at risk for astronomical health care bills.[27] These plans not only provide terrible coverage for the people who purchase them but also raise costs for those who remain in comprehensive coverage. Because these plans can cherry-pick the healthiest people, those remaining in the marketplace will be sicker and older on average, which in turn raises marketplace premiums. The Urban Institute estimated that eliminating the individual mandate and expanding short-term junk plans would result in an 18 percent increase, on average, in premiums in the ACA-compliant individual market.[28] The Congressional Budget Office and Joint Committee on Taxation estimated a 3 percent increase in ACA-compliant nongroup and small-group premiums resulting from expansion of short-term and association health plans.[29] By 2028, they estimate premium increases of $400 to $450 for a single person and $900 to $950 for a family as a result of these policies.

The Trump administration finalized a rule that redefined short-term, limited-duration insurance to expand the market for underregulated, skimpy insurance plans by extending the maximum duration of these plans from three months to 12 months. In addition, the rule allows insurers to renew these plans annually for up to three years, allowing these short-term plans to become a year-round, renewable alternative to comprehensive coverage.[30] The Obama administration's three-month time limit for these plans, as well as the prohibition on renewing them beyond that period, should be reinstated.

In addition to undoing the harm of the Trump administration's short-term, limited-duration insurance rule, the next administration will have to reverse other regulations that undermine the marketplace risk pools. For example, the Trump administration adopted a rule that could allow employers to use health reimbursement accounts to shift their less healthy employees into the marketplace.[31] Under a separate U.S. Department of Labor rule, small businesses with healthy employees would be able to choose to form a so-called association health plan, leaving small businesses with less healthy employees in the small group insurance market. One analysis estimated that this change would increase premiums by 3.5 percent in the individual market, with 1 million people shifting from the individual market to junk plans.[32]

Reverse Trump administration payment notice policies that harm the marketplaces

Each year, the Centers for Medicare and Medicaid Services (CMS) issues a rule—the Notice of Benefit and Payment Parameters—that sets forth the requirements for issuers' participation in the ACA marketplaces. Once this annual rule is finalized in the spring, insurers design their plan offerings and then submit them to state regulators or the CMS in order to offer those plans during the fall open enrollment.

The Trump administration has used this rule-making process to make marketplace plans more expensive, weaken the benefits provided in these plans, and make it harder to enroll in coverage. Over the course of the Trump administration's tenure, these changes have decreased enrollment in the individual market and raised prices for enrollees who remain.

For example, in the 2020 notice, the Trump administration changed the way two calculations are updated: the share of premiums marketplace consumers must pay if they qualify for financial assistance and the maximum out-of-pocket limit.[33] As a result, most people who purchase subsidized coverage in the marketplaces will pay higher premiums. According to the administration's own analysis, this change will cause 70,000 people to drop marketplace coverage and "could ultimately result in net premium increases for enrollees that remain in the individual market ... as healthier enrollees elect not to purchase Exchange coverage."[34]

The 2019 notice also contained a number of harmful changes, including the following:

- It eliminated a previous requirement that each state in the FFM have at least two navigator groups to help consumers enroll in coverage. As a result, in 2019, there were only 39 navigator grantees for the federal marketplaces, with three states having no navigators. By comparison, in 2018, more than 80 groups received funding for outreach and enrollment assistance.[35]

- The 2019 notice weakened the ACA's medical loss ratio rule, which requires insurers to pay rebates to consumers if they do not spend at least 80 percent to 85 percent of premium funds on medical care. The Trump administration allows insurers to automatically claim that a portion of their premium goes to quality improvement programs, which will lower the amount of premium rebates going to consumers by $67 million per year.[36]

- It added burdensome paperwork requirements for the lowest-income marketplace enrollees.

- The notice allowed insurers to increase premiums up to 15 percent before insurers are required to provide an explanation for the increase. Previously, federal rate review was triggered when insurers raised premiums by 10 percent.[37]

- It gave insurers and states more flexibility to scale back benefits.

- It eliminated so-called simple choice plans, which had standardized cost sharing for each metal level and pre-deductible coverage for prescription drugs and certain services, making it easier to comparison shop.

- It shifted oversight of network adequacy for plans in the FFM to states, which could reduce access to care.

In order to make these changes in time for each fall's open enrollment, the rule has typically been issued in the previous fall and finalized in late winter or early spring; however, last year, the rule was not finalized until mid-April, and this year it was delayed until early May.[38] Because of this tight timeline for plan changes, the administration in the White House next year will need to be ready to implement any changes for the 2022 plan year soon after inauguration day.

Administrative actions to improve the ACA's marketplaces

The administration occupying the White House in 2021 must be ready and willing to adopt the following reforms to strengthen the ACA marketplaces and undo past harms. The next administration should also adopt the following reforms to strengthen the ACA marketplaces.

Upgrade HealthCare.gov consumer tools

Since the initial launch in 2013, the HealthCare.gov website has added to and upgraded its selection tools, making it easier to select plans. The Trump administration continued to modify the site, but many of the changes were designed to draw consumers to outside sites and encourage enrollment in substandard plans.[39] In addition to removing those functions, the next administration should work with consumer advocates to assess changes that will improve the shopping and plan-selection process.

For example, HealthCare.gov should incorporate a live chat feature on the site.[40] Adding this option for real-time assistance for a portion of consumers would allow the call centers and in-person assisters to focus on more complicated enrollment issues. In addition, efforts must be made to upgrade the network and formulary information available on the site; allowing consumers to more easily sort plans based on their preferred providers and current medications would improve the enrollment process. This information would be particularly useful to rural residents, whose plan selection may be driven in large part by the availability of local providers. Currently, HealthCare.gov includes star ratings for plans, but consumers should also have similar information about the quality of each provider.

Adopt a standardized benefit plan

Although choice is an essential feature of the marketplaces, too many choices can be confusing for consumers, making the process of shopping for health insurance overwhelming and frustrating. This choice overload can reduce customer satisfaction and lead to random, uninformed choices that may not reflect the individual's best interests or financial situation.[41] In order to make the comparison process easier, beginning next year, the president and his administration should once again create simple choice plans for the 2021 plan year. These plans should again be clearly marked on HealthCare.gov to make them easily identifiable to consumers.[42]

Evidence from Washington, D.C., and the six states that have standardized plans show that this approach benefits consumers.[43] All of these marketplaces require certain benefits to be offered pre-deductible and set low or moderate copayments. This approach ensures services and benefits, such as prescription drugs, nonpreventive primary care, and behavioral health care, are affordable for marketplace enrollees in these states.[44]

In 2022, the federal exchange should go even further by adopting a single, standard plan design for each metal tier, following California's lead. Issuers in the state can only offer the standard "Patient-Centered Benefit Designs," which allow "apples-to-apples

comparison of premiums, providers and quality."[45] Covered California—the state's marketplace—has one of the healthiest risk pools and highest levels of consumer satisfaction with their plan and health care.[46]

Require plans to incorporate payment and delivery reforms

The administration in the White House in 2021 should also require that plans on the federal marketplace incorporate payment and delivery system reforms—including bundled payment and accountable care structures—into their contracts with providers as a condition for offering marketplace plans. Plans might also implement value-based purchasing for hospitals and physicians under which they would reduce payments to providers with lower-quality ratings or payments to hospitals with high rates of preventable readmissions.

Leverage participation in Medicare Advantage to increase competition

Since the first year of the ACA's marketplaces, insurer participation has varied, and some areas in the country have only one marketplace insurer.[47] Additional competition can reduce prices and improve quality. One way to increase the number of insurers offering marketplace plans is to condition participation in the more profitable Medicare Advantage program with offering marketplace plans in the same geographic area.

Over the past three years, the average margins per enrollee for private insurers participating in the Medicare Advantage program were about double the margins per enrollee in the individual market.[48] In addition, enrollment in Medicare Advantage continues to increase, with more than 20 million Medicare beneficiaries enrolled in private plans last year.[49] Plans wishing to participate in the growing and very profitable Medicare Advantage market, which will reach more than $360 billion per year by 2023, should be required to offer plans in the individual market, increasing options for those shopping for marketplace coverage.[50]

Encourage state reinsurance programs

The ACA originally included a temporary three-year reinsurance program, which was one of a number of policies in the law designed to stabilize the new marketplaces and keep premiums low, especially during the first years of its implementation. Reinsurance provides funds to insurers with very high-cost enrollees, allowing insurers to price premiums without worrying about the risk posed by particularly expensive enrollees. As a result, premiums are lower for all enrollees. Reinsurance is not unique to the ACA; Medicare Part D includes a reinsurance program, which subsidizes 80 percent of excess drug spending above the catastrophic coverage threshold.[51]

Ideally, Congress would reinstate a reinsurance program, but until that time, a number of states have established their own reinsurance programs to lower premiums in their insurance markets. The ACA allows states to seek state innovation waivers, also known as 1332 waivers, named after the section of the ACA. These waivers allow

states to waive certain ACA requirements—as long as coverage remains equally affordable and comprehensive and states continue to provide coverage to the same number of individuals at no increased cost to the federal government. Currently, 12 states have 1332 reinsurance waivers.[52]

Reinsurance programs are highly effective at curbing rate hikes requested by insurers. For example, Anthem Inc., a Maine health insurance company, had planned on increasing 2019 rates by 13.8 percent but requested an 8.7 percent decrease in rates in response to the CMS approving Maine's 1332 waiver reinsurance program.[53] However, these reductions in premiums are offset by much of the sabotage the Trump administration has executed. For example, Minnesota requested an 8 percent reduction in 2019 rates due to its reinsurance program.[54] Health care analyst Charles Gaba estimated that rates would have been cut even further to 15 percent without the Trump administration's expansion of junk plans and repeal of the individual mandate.[55]

The Trump administration has not always acted in a timely manner to approve these waivers; in 2017, Oklahoma withdrew a waiver that would have created a reinsurance program after the administration failed to "provide timely waiver approval."[56] If the waiver had been approved, the state estimated that it would have lowered premiums by more than 30 percent. The administration in the White House next year should offer guidance to states wishing to adopt state reinsurance programs and fast-track waiver applications that are based on previously approved reinsurance designs.

Conclusion

Repairing four years of marketplace sabotage will be just one of many health-policy-related challenges facing the next administration. The steps outlined in this issue brief are just a starting point; the current administration might finalize a number of pending actions prior to January 2021 that will also need to be rolled back, as well as additional changes to address the impact of the COVID-19 pandemic on both the number of uninsured individuals and the marketplace's stability.[57] In addition, these administrative actions should be coupled with legislative changes to improve affordability, lower prescription drug prices, and expand coverage.

Maura Calsyn is the managing director of Health Policy at the Center for American Progress. Nicole Rapfogel is a research assistant for Health Policy at the Center.

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