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What You Need to Know about Cost-Sharing Reduction Payments

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Key Points

- On October 12, the Trump administration announced it would stop making cost-sharing reduction payments to insurers, because it lacked a constitutionally valid appropriation to do so—an action that restores Congress' "power of the purse."
- While some have proposed that Congress should appropriate funds for the payments, such action would effectively reward insurers' prior risky behavior—assuming cost-sharing reductions would continue to be paid, even after a federal judge struck them down as unconstitutional—thereby perpetuating moral hazard.
- A better course of action is repealing the undermining regulations surrounding Obamacare, which necessitated the unconstitutional cost-sharing reduction payments to insurers in the first place.

On October 12, the Trump administration announced it would immediately terminate a series of cost-sharing reduction payments to insurers. Meanwhile policymakers have spent time debating and discussing cost-sharing payments in the context of a "stabilization" bill for the Obamacare exchanges. Here's what you need to know about the issue ahead of this year's open enrollment period, scheduled to begin on November 1.

What are cost-sharing reductions?

Cost-sharing reductions, authorized by Section 1402 of Obamacare, provide individuals with reduced co-payments, deductibles, and out-of-pocket maximum expenses.[*] The reductions apply to households who purchase exchange coverage and have family income of between 100 percent and 250 percent of the federal poverty level ($24,600 for a family of four in 2017 [ASPE]). The system of cost-sharing reductions remains separate from the subsidies used to discount monthly insurance premiums, authorized by Section 1401 of Obamacare.[†]

What are cost-sharing reduction payments?

The payments (also referred to as CSRs) reimburse insurers for the cost of providing the discounted policies to low-income individuals. According to the January Congressional Budget Office (CBO) baseline, those payments will total $7 billion in the fiscal year that ended on September 30, $10 billion in the fiscal year ending on September 30, 2018, and $135 billion during fiscal years 2018-2027 (CBO).

What is the rationale for CSR payments?

Insurers argue that CSR payments reimburse them for discounts that the Obamacare statute requires them to provide to consumers. However, this cost-sharing reduction regime would not be necessary but for the myriad new regulations imposed by Obamacare. These regulations have more than doubled insurance premiums from 2013 through 2017, squeezing middle-class families (HHS). Providing government-funded subsidies to insurers partially to offset the cost of government-imposed mandates on insurers and individuals alike is simply using one poor policy solution to address another misguided policy problem.

Why are the CSR payments in dispute?

While Section 1402 of Obamacare authorized reimbursement payments to insurers for their cost-sharing reduction costs, the text of the law did not include an explicit appropriation for them. It is possible that the Obama administration's willingness to make the payments, despite the lack of an explicit appropriation, violated Congress' constitutional "power of the purse." In deciding to terminate the CSR payments, the Trump administration agreed with this rationale.

* 42 U.S.C. 18071, as created by Section 1402 of the Patient Protection and Affordable Care Act, P.L. 111-148.
† 26 U.S.C. 36B, as created by Section 1401 of PPACA.

continued

What previously transpired in the court case over CSR payments?

In November 2014, the House of Representatives filed suit in federal court over the CSR payments, claiming the Obama administration violated both existing law and the Constitution and seeking an injunction blocking the administration from making the payments unless and until Congress grants an explicit appropriation (*U.S. House of Representatives v. Sylvia Mathews Burwell, et al*). In September 2015, Judge Rosemary Collyer of the United States District Court for the District of Columbia ruled that the House of Representatives had standing to sue, rejecting a Justice Department attempt to have the case dismissed. Judge Collyer ruled that the House as an institution had the right to redress for a potential violation of its constitutional "power of the purse."[‡]

On May 12, 2016, Judge Collyer issued her ruling on the case's merits, concluding that no valid appropriation for the CSR payments exists, and that the Obama administration had violated the Constitution by making payments to insurers. She ordered the payments halted unless and until Congress passed a specific appropriation—but stayed that ruling pending an appeal.[§]

How did the Obama administration justify making the CSR payments?

In its court filings in the lawsuit, the Obama administration argued that the structure of Obamacare implied an appropriation for CSR payments through the Treasury appropriation for premium subsidy payments—an appropriation clearly made in the law and not in dispute (Justia). President Obama's Justice Department made this argument despite the fact that CSR and premium subsidy regimes occur in separate sections of the law (Sections 1402 and 1401 of Obamacare, respectively), amend different underlying statutes (the Public Health Service Act and the Internal Revenue Code), and fall within the jurisdiction of two separate Cabinet departments (Health and Human Services and Treasury).

The Obama administration also argued, in court and before Congress, that it could make an appropriation because Congress had not prohibited the administration from doing so—effectively turning the Constitution on its head, by saying the executive can spend funds however it likes unless and until Congress prohibits it from doing so (House Committee on Ways & Means). In her ruling, Judge Collyer rejected those and other arguments advanced by the Obama Justice Department.

Did Congress investigate the history, legality, and constitutionality of the Obama administration's CSR payments to insurers?

Yes. Last year, the Ways and Means and Energy and Commerce Committees organized and released a 158-page report on the CSR payments (House Committee on Energy and Commerce). While congressional investigators received some documents relating to the Obama administration's defense of the CSR payments, the report described an overall pattern of secrecy surrounding critical details—portions of documents, attendees at meetings, etc.—of the CSR issue. For instance, the Obama administration did not fully comply with valid subpoenas issued by the committees, and attempted to prohibit Treasury appointees who volunteered to testify before committee staff from doing so. However, despite the extensive oversight work put in by two congressional committees, and the pattern of secrecy observed, neither of the committees have taken action to compel compliance, or redress the Obama administration's obstruction of Congress' legitimate oversight work.

What has the Trump administration done about the CSR payment lawsuit?

After the election, the Justice Department and the House of Representatives filed a motion with the United States Circuit Court of Appeals for the District of Columbia.[¶] The parties stated that they were in negotiations to settle the lawsuit and sought to postpone proceedings in the appeal (which the Obama administration had filed last year). The Justice Department and the House have filed several extensions of that request with the court, but have yet to present a settlement agreement, or provide any substantive updates surrounding the issues in dispute. In announcing its decision to terminate the CSR payments, the Trump administration said it would provide the court with a further update on October 30.

In August, the Court of Appeals granted a motion by several Democratic state attorneys general seeking to intervene in the suit (originally called *House v. Burwell*, and renamed *House v. Price* when Dr. Tom Price became secretary of Health and Human Services).[**] The attorneys general claimed that the president's frequent threats to settle the

‡ For Judge Collyer's ruling on motions to dismiss, dated September 9, 2015, see *U.S. House of Representatives v. Sylvia Mathews Burwell, et al. No. 1:2014cv01967 - Document 41 (D.D.C. 2015).*

§ For Judge Collyer's ruling on the merits, dated May 12, 2016, see *U.S. House of Representatives v. Sylvia Mathews Burwell, et al. No. 1:2014cv01967 - Document 73 (D.D.C. 2016).*

¶ The filing can be found at http://premiumtaxcredits.wikispaces.com/file/view/House%20v.%20Burwell%20abeyance%20order.pdf/601446774/House%20v.%20Burwell%20abeyance%20order.pdf.

** The original request can be found at https://morningconsult.com/wp-content/uploads/2017/05/Document-3.pdf, and the order granting the motion can be found at http://premiumtaxcredits.wikispaces.com/file/view/Order%20granting%20states%27%20intervention.pdf/616067489/Order%20granting%20states%27%20intervention.pdf.

case and cut off CSR payments meant their states' interests would not be represented during the litigation and sought to intervene to prevent the House and the Trump administration from settling the case amongst themselves—which could leave an injunction permanently in place blocking future CSR payments.

Upon what basis did President Trump stop the CSR payments to insurers?

Under existing law, court precedent, and constitutional principles, a determination by the executive about whether or not to make the CSR payments (or any other payment) depends solely upon whether or not a valid appropriation exists:

- If a valid appropriation does not exist, the executive cannot disburse funds. The Anti-Deficiency Act prescribes criminal penalties, including imprisonment, for any executive branch employee who spends funds not appropriated by Congress, consistent with Article I, Section 9, Clause 7 of the Constitution: "No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law."[††]

- If a valid appropriation exists, the executive cannot withhold funds. The Supreme Court held unanimously in *Train v. City of New York* that the executive cannot unilaterally impound (i.e., refuse to spend) funds appropriated by Congress, which would violate a president's constitutional duty to "take Care that the Laws be faithfully executed" (*Train v. City of New York*).

Has a court forced President Trump to keep making the CSR payments?

No. In fact, until the administration had announced its decision late Thursday, no one—from insurers to insurance commissioners to governors to Democratic attorneys general to liberal activists and Obamacare advocates—had filed suit seeking to force the Trump administration to make the payments. (While the Democratic attorneys general sought, and received, permission to intervene in the House's lawsuit, that case features the separate question of whether or not the House had standing to bring its matter to court in the first place. It is possible that appellate courts could, unlike Judge Collyer, dismiss the House's case on standing grounds without proceeding to the merits of whether or not a valid appropriation exists.)

Given the crystal-clear nature of existing Supreme Court case law—if a valid appropriation exists, an administration ***must*** make the payments—some would view the prolonged unwillingness by Obamacare supporters to enforce this case law in court as tacit evidence that a valid appropriation does not exist, and that the Obama administration exceeded its constitutional authority in starting the flow of payments.

†† The statutory prohibition on executive branch employees occurs at 31 U.S.C. 1341(a)(1); 31 U.S.C. 1350 provides that any employee knowingly and willfully violating such provision "shall be fined not more than $5,000, imprisoned for not more than two years, or both."

How will the decision to stop CSR payments affect individuals in exchange plans?

In the short to medium term, it will not. Insurers must provide the cost-sharing reductions to individuals in qualified exchange plans, regardless of whether or not they get reimbursed for them.

Can insurers drop out of the exchanges immediately due to the lack of CSR payments?

No—at least not in most cases in 2017. The contract between the federal government and insurers on the federal exchange for 2017 notes that insurers developed their products based on the assumption that cost-sharing reductions "will be available to qualifying enrollees," and can withdraw from the exchanges if they are not (CMS, 6). However, under the statute, enrollees will ***always*** qualify for the cost-sharing reductions—that is not in dispute. The *House v. Burwell* case instead involves whether or not insurers will receive federal reimbursements for providing the cost-sharing reductions to enrollees. This clause may therefore have limited applicability to withdrawal of CSR payments. It appears insurers have little ability to withdraw from exchanges in 2017, even if the Trump administration stops reimbursing insurers.

If insurers faced a potential unfunded obligation—providing cost-sharing reductions without federal reimbursement—to the tune of billions of dollars, how did they react to Judge Collyer's ruling last year?

Based on their public filings and statements, several did not appear to react at all. While Aetna and Centene referenced loss of CSR payments as impacting their firms' outlooks and risk profiles in their first Securities and Exchange Commission (SEC) quarterly filings after Judge Collyer's ruling, most other companies ignored the potential impact until earlier this year (Aetna Inc., 44; Centene, Inc., 42). Some carriers have given decidedly mixed messages on the issue—for instance, as Anthem CEO Joseph Swedish claimed on his company's April 26 earnings call that lack of CSR payments would cause Anthem to seek significant price hikes and/or drop out of state exchanges (Anthem, Inc. 2017b, 5), his company's quarterly SEC filing that same day indicated no change in material risks, and no reference to the potential disappearance of CSR payments (Anthem, Inc. 2017a).

Even before Judge Collyer's ruling in May 2016, one could have easily envisioned a scenario whereby a new president in January 2017 stopped defending the CSR lawsuit, and immediately halted the federal CSR payments: "Come January 2017, the policy landscape for insurers could look far different" than in mid-2016 (Jacobs 2016). However, despite public warnings to said effect—and the apparent lack of public statements by either Donald Trump or Hillary Clinton to continue the CSR payments should they win the presidency—insurers apparently assumed maintenance of the *status quo*, disregarding these potential risks when bidding to offer exchange coverage in 2017.

Did insurance regulators fail to anticipate or plan for changes to CSR payments following Judge Collyer's ruling?

It appears that many did. For instance, the office of California's state insurance commissioner reported having no documents—not even a single email—analyzing the impact of Judge Collyer's May 2016 ruling on insurers' bids for the 2017 plan year (Jacobs 2017). Likewise, California's health insurance exchange disclosed only two relevant documents: a brief email sent months after the state finalized plan rates for the 2017 year and a more detailed legal analysis of the issues surrounding CSR payments—but one not undertaken until mid-November, after Donald Trump won the presidential election.[‡‡]

The insurance commissioners' failure to examine the CSR payment issue in detail—when coupled with insurers' similar actions—represents the same failed thinking that caused the financial crisis. That herd behavior—an insurer business model founded upon a new administration continuing unconstitutional actions, and regulators blindly echoing insurers' assumptions—represents the same "too big to fail" mentality that brought us a subprime mortgage scandal, a massive financial crash on Wall Street, a period of prolonged economic stagnation, and a taxpayer-funded bailout of big banks.

How can Congress restore its Article I power?

With respect to the CSR payments, conservatives looking to restore Congress' Article I power—as Speaker Ryan recently claimed he wanted to do by maintaining the debt limit as the prerogative of Congress—could take several appropriate actions (Everett and Dawsey):

- Insist on a settlement of the lawsuit in the House's favor, consistent with the last Congress' belief that 1) Obamacare lacks a valid appropriation for CSR payments, and 2) decisions regarding appropriations always rest with Congress, and not the executive;
- Ask the Justice Department to investigate whether any Obama administration officials violated the Anti-Deficiency Act by making CSR payments without a valid congressional appropriation; and
- Insist on enforcement of the subpoenas issued by the House Ways and Means and Energy and Commerce Committees during the last Congress, and pursue contempt of Congress charges against any individuals who fail to comply.

How can Congress exercise its oversight power regarding the CSR payments?

Before even debating whether or not to create a valid appropriation for the CSR payments, Congress should first examine in great detail whether and why insurers and insurance commissioners ignored the issue in 2016 (and prior years); any potential changes to remedy an apparent lack of oversight by insurance commissioners; and appropriate accountability for any unconstitutional and illegal actions as outlined above.

The concern is that by blindly making a CSR appropriation without conducting this critically important oversight, Congress would make a clear statement that Obamacare is "too big to fail." Such a scenario—in addition to creating a *de facto* single-payer health care system—would, by establishing a government backstop for insurers' risky behaviors, bring about additional, and potentially even larger, bailouts in the future.

What are the implications of providing CSR payments to insurers?

Given the way in which many insurers and insurance regulators blindly assumed cost-sharing reduction payments would continue, despite the lack of an express appropriation in the law, there is concern that making CSR payments would exacerbate moral hazard. Specifically, when filing their rates for the 2017 plan year, insurers appear to have assumed they would receive over $7 billion in CSR payments—despite the uncertainty surrounding 1) the lack of a clear CSR appropriation in the statute; 2) the May 2016 court ruling calling the payments unconstitutional; 3) the unknown outcome of the 2016 presidential election; and 4) the apparent lack of a firm public commitment by either major candidate in the 2016 election to continue the CSR payments upon taking office in January 2017.

There is understandable opposition to rewarding this type of reckless behavior by insurers. Granting them the explicit taxpayer subsidies they seek would only encourage additional irresponsible risk-taking by insurance companies—

‡‡ Covered California response to Public Records Act request, August 25, 2017.

and raise the likelihood of an even larger taxpayer-funded bailout in the future.

How can Congress solve the larger issue of CSRs creating an unfunded mandate on insurance companies absent an explicit appropriation?

One possible way would involve elimination of Obamacare's myriad insurance regulations, which have led to insurance premiums more than doubling in the individual market over the past four years (HHS). Repealing these new and costly regulations would lower insurance premiums, reducing the need for cost-sharing reductions and allowing Congress to consider whether to eliminate the CSR regime altogether.

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Chris Jacobs is a senior healthcare policy analyst at the Texas Public Policy Foundation. He has over a decade of experience in a variety of policy roles on and off Capitol Hill. He worked as the policy director for America Next, a new start-up think tank, and as a senior policy analyst for the Heritage Foundation and the Joint Economic Committee's Senate Republican staff. Before that, Chris worked as a policy advisor for the House Republican Conference under Chairman Mike Pence during the debate surrounding the Patient Protection and Affordable Care Act. He was also a health policy analyst for the Senate Republican Policy Committee during the first two years of the law's implementation. He got his start on Capitol Hill as an intern for then-Congressman Pat Toomey of Pennsylvania.

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