Risk Corridors Payment Recovery Opportunity Under ACA Section 1342

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Focus of Presentation

- The risk corridors program and opportunities to recover funds from the federal government;
- The current state of play in the risk corridors litigation; and
- Potential legislative actions that may impact your right to recovery and funds available to satisfy a judgment

Overview

- The Affordable Care Act Section 1342 Risk Corridors Program
- Potential litigation against the U.S. Government in the Court of Federal Claims to recover the amounts due to health insurance issuers who participated on the Exchanges during the 2014-2016 benefit years.

Affordable Care Act Section 1342

- Affordable Care Act Section 1342 requires the Department of Health and Human Services ("HHS") to make payments under the Risk Corridors Program.
- Both the 2015 Budget Act and the 2016 Budget Act limit the sources of funding available for HHS to make payments under the Program.
- But HHS remains obligated to make full risk corridor payments to eligible issuers.

Risk Corridors Program

- ACA created three marketplace premium stabilization programs: (1) temporary risk corridors program; (2) transitional reinsurance program; and (3) risk adjustment; collectively referred to as the "Three Rs."
- Risk Corridors Program has two related mandatory terms for all Qualified Health Plans ("QHPs") issuers:
  - (1) any QHP issuer/insurer agreeing to operate on an exchange would receive compensation from the Government if its losses exceeded a certain defined amount due to high utilization and high medical costs; and
  - (2) the QHP issuers/insurers were required to pay the Government a percentage of any profits they made over similarly-defined amounts.

Risk Corridors Program, cont.

- In the 2015 and 2016 Budget Acts, Congress prohibited HHS from using Medicare and certain other trust funds to fund Risk Corridors Program payments.
- Congress did not:
  - Prohibit HHS from using other funds, or future appropriations; or
  - Amend the ACA to require the Risk Corridors Program to be budget-neutral.
- The absence of appropriations does not vitiate the unequivocal obligation set forth under § 1342 that the Federal government must make the Risk Corridors Program payments in full.
- And the Obama Administration has made numerous statements acknowledging the obligation to make full payment.

Tucker Act

- If Congress fails to appropriate sufficient funds to HHS, carriers nevertheless have an enforceable obligation against the U.S. Treasury under the Tucker Act that they may sue to collect.
- The Tucker Act, 28 U.S.C. § 1491, provides private entities that have claims for damages based on Federal contracts, statutes or regulations a right to sue for recovery in the Court of Federal Claims.
- Under the Tucker Act, the Court of Federal Claims has jurisdiction over claims against the United States founded upon the Constitution, <u>a federal statute or regulation</u>, or an express or implied contract with the United States.

Tucker Act, cont.

- The Tucker Act contains both a waiver of sovereign immunity and a jurisdictional grant, but does not create any substantive rights enforceable against the United States for damages.
- To state a cause of action under the Tucker Act, a plaintiff must identify a substantive right to money damages against the United States.
- ACA Section 1342 creates such a right – it is a money-mandating statute that creates a substantive right for money damages against the United States.
- Thus, a QHP is entitled to collect 100% of its Risk Corridors Program receivable from the Federal Government regardless of whether HHS has available funds or whether Congress has appropriated funds for it.

Next-Steps

- Conduct preliminary legal and business diligence in order to:
  - Analyze potential claim under the Risk Corridors Program
  - Assess whether losses exceeded threshold due to high utilization and high medical costs.
- Litigation framework at Court of Federal Claims.
- Recovery strategy

For Further Discussion

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