Insight

ACA Cancelation "Fix" Creates Potential Liability for Insurers

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Last week President Obama announced his plan to address the concerns of millions of Americans who have had their health insurance coverage cancelled as a result of the Affordable Care Act (ACA). The President's proposal allows state insurance regulators to authorize reinstatement of any health plan offered in their state as of October 2013 for 2014, even if those plans do not meet the ACA's qualified health plan requirements. This assumes the plan sponsor is willing and able to offer the already cancelled plans.

Last week, American Action Forum analysts noted eight unanswered questions about the proposal and examined the "logistical nightmare" facing consumers, state insurance commissioners, and plan sponsors as a result of the President's plan. In addition to the logistical issues, the President's plan opens the door to legal liabilities for plan sponsors.

While insurers will not face legal consequences from federal regulators—as a result of the President's authority to set enforcement priorities—these non-qualified health plans will still be illegal under the ACA. In some states, take Washington state as an example, insurance regulators will decide to continue requiring insurers to comply fully with the ACA. In other words, the President's "fix" will not apply to consumers with cancelled plans in those states.

In states that do decide to allow reinstatement of non-qualified plans, insurers face a dilemma—anger policyholders by refusing to reissue the non-compliant policies or risk civil litigation by reinstating non-compliant coverage. An insurer who continues to provide a policy that does not comply with the ACA's requirements, and denies payment for an ACA-covered procedure in keeping with the policy could be sued by the enrollee. If sued, the insurer has three options: pay for a procedure that is not covered and thus, not paid for in premiums; settle out of court for a sum that is likely larger than what the procedure would have cost; or go to court to defend a policy that is illegal under federal law.

This last option bears repeating: an insurer will have to ask a judge to uphold the terms of a policy that is illegal under federal law. Offering such a plan is simply not a rational choice for an insurer. It is difficult to imagine any insurer assuming that risk and continuing to provide non-compliant policies.

Without actual changes to the statute, President Obama's plan is unlikely to result in many insurers reissuing cancelled policies. The "fix" ultimately is little more than an exercise in shifting blame to the insurance industry, a skill this President has mastered.