Executive Authority to Reform Health: Options and Limitations

EXECUTIVE SUMMARY

INTRODUCTION:
Within constitutional and statutory boundaries, the Obama Administration can use its executive authority and administrative tools to reform health care incrementally without Congressional approval. Under current law, the Administration can:

1) promote its policy goals through demonstration projects;
2) increase the use of health information technology;
3) reduce drug costs;
4) increase coverage portability; and
5) expand State Children’s Health Insurance Plan (SCHIP) eligibility.

The Administration does not, however, have the unilateral power to establish a national health insurance exchange, create a new small business health tax credit, or require employers to “pay-or-play.”

TOOLS OF THE PRESIDENTIAL ADMINISTRATION TO REFORM HEALTH CARE:
The Obama Administration has three primary tools to direct the actions of administrative agencies: regulations, sub-regulatory guidance, and executive orders. Administrative agencies promulgate regulations pursuant to Congressional delegations of authority in statutes. Sub-regulatory guidance implements policy within an executive agency and includes letters, memoranda, determinations, agreements, findings, and other types of directives. Presidents employ executive orders to direct the actions of agency employees and instruct them to create or implement particular policies.

PROMOTE POLICY GOALS THROUGH DEMONSTRATION PROJECTS:
The Administration can pursue its policy goals through Medicaid, Medicare, and SCHIP demonstration projects. Section 1115 of the Social Security Act (Act) gives the Secretary of Health and Human Services (HHS) broad authority to waive certain Medicaid and SCHIP requirements for states to test new ideas. Similarly, Section 222 of the Social Security Amendments of 1972 gives the Secretary authority to develop demonstration projects to test provider quality initiatives. For example, the Secretary could allow states to expand coverage for low-income adults using Section 1115 waivers, or implement “pay-for-performance” for care received under Medicare using Section 222 waivers.

INCREASE THE USE OF HEALTH INFORMATION TECHNOLOGY:
The new Administration can increase the use of health information technology (IT) through several ways. President Obama can issue an executive order similar to Executive Order 13410, which directed administrative agencies to complete a comprehensive review of the numerous health IT programs currently underway and to coordinate the activities of various agencies. Additionally, the Centers for Medicare & Medicaid Services (CMS) can promulgate regulations to expand the scope of the physician reimbursement program. Finally, CMS can create more demonstration projects similar to the Electronic Health Records Demonstration, which reimburses physicians who adopt health IT and report performance data.
REDUCE DRUG COSTS IN MEDICARE:
The Administration can reduce drug costs by creating a Medicare drug re-importation program under section 1121 of the Medicare Modernization Act of 2003 (MMA). In addition, the Secretary can lower costs by negotiating payments with Medicare Administrator Contractors under its section 911 contracting authority. Because the MMA explicitly denies the Administration the authority to negotiate Medicare Part D drug prices with manufacturers for drugs, legislative amendments would be necessary to give the Secretary negotiating power.

ENHANCE PATIENT PROTECTIONS AND IMPROVE COVERAGE PORTABILITY:
There are two ways that the Administration can enhance patient protections and improve coverage portability with fewer restrictions. First, the Administration can institute greater patient protections in the Federal Employees Health Benefits Plan (FEHBP) to help policymakers better understand these protections before enacting them for the insurance industry. Second, the Administration can amend the Final Rule for the Health Insurance Portability and Accountability Act (HIPAA) to improve coverage portability for individuals.

LIFT AGENCY DIRECTIVES THAT RESTRICT SCHIP AND MEDICAID:
The Administration can expand SCHIP and Medicaid eligibility by reconsidering current regulations that restrict eligibility and cut funding. For example, President Obama issued a Memorandum on February 4, 2009, requesting that the Secretary of the Department of Health and Human Services immediately withdraw an August 17, 2007, letter -- which limited state health officials’ discretion to set income eligibility caps for families whose children participate in the children’s health insurance program, -- and implement SCHIP without the requirements it imposed.

BUILD ON FEHBP:
Numerous policymakers have proposed opening the Federal Employees Health Benefit Plan (FEHBP) to the public or creating a similar program for Americans with pre-existing conditions. The new Administration could memorialize many of FEHBP’s best practices through executive orders or memoranda so that private insurers and the federal government can better understand what policies work to reduce costs and ensure quality care. Making coverage available to members of the public through the program, however, would require Congressional action.

POLICIES THAT REQUIRE LEGISLATIVE ENACTMENT:
Although the Administration has significant opportunities to invoke its executive authority, it can only act within the bounds of a statute. There are numerous policy changes that would require legislative enactment first. Any changes to the tax code or proposals to purchase insurance across state lines, for example, would require legislative action.

CONCLUSION:
Although the President’s executive authority could allow him to begin implementing crucial reforms, he also must pay careful attention to legal, budgetary, and legislative constraints on that authority. The above policy recommendations are examples of ways that the new Administration can take incremental steps toward health care reform. There are many opportunities for using the President’s executive authority and administrative tools to lay the foundation for more expansive health reform.