New EHB Rule: Will it Get Trumped?

The term “essential health benefits” (EHBs) was one of many new concepts introduced by the Patient Protection and Affordable Care Act (ACA) for group health plans. The ACA defines EHBs as the following ten categories of benefits: ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance use disorder services, prescription drugs, rehabilitative and habilitative services and devices, laboratory services, preventive and wellness services and chronic disease management, and pediatric services (including oral and vision care). To further define the scope and limit of EHBs, HHS required each state to select a “benchmark” health plan. The benchmark plan’s benefits within the EHB categories would set the parameters for EHB services. The ACA requires insured health plans in the small group market to cover all EHBs, unless the plan meets certain ACA grandfathering requirements. Grandfathered plans, large group market plans, and self-insured plans, therefore, are not required to cover EHBs (in the rest of this post I refer to all such plans as “Non-EHB Plans”). The concept of EHBs, however, is relevant to Non-EHB Plans because of another ACA requirement. The ACA prohibits health plans from imposing annual and lifetime dollar limits on covered benefits, but this prohibition applies only to benefits that are EHBs. Annual and lifetime dollar limits are permitted for benefits that are not EHBs. Therefore, any plan that wishes to impose a dollar limit on a covered benefit must first determine whether that benefit is an EHB. Non-EHB Plans have been permitted to define EHBs by selecting a reference plan from any of the over 510 plans benchmark plans available to the states. But now the universe of EHB reference plans has shrunk from over 510 to 54. Citing enforcement challenges for federal and state regulators, and confusion among participants about the scope of EHBs, HHS issued a rule in November of 2015, which is effective in 2017, limiting the potential EHB reference plans to the benchmark plans actually selected by the states plus the three largest Federal Employees Health Benefits Program options. But the political landscape has changed dramatically since this EHB rule was issued. On January 20, 2017, President Trump issued Executive Order 13765, which directs HHS to “exercise all authority and discretion available . . . to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of [the ACA] that would impose a . . . regulatory burden” on individuals, families, healthcare providers, or health insurers. Despite this sweeping mandate, the Executive Order acknowledges that HHS must comply with the Administrative Procedure Act (APA) if compliance with the Executive Order would require the revision of existing regulations. The EHB rule could impose a burden on health plans or their participants. For example, a Non-EHB Plan could discover that its annual dollar limit on a benefit is no longer permitted because every available reference plan defines the benefit as an EHB. Removal of the limit could increase the plan’s costs. Alternatively, the plan could remove the benefit entirely, which would adversely affect participants who need the benefit. But to remove the EHB rule, the APA requires HHS, at a minimum, to publish a notice of revocation in the Federal Register. Until this occurs, HHS could choose not to enforce this new requirement, although it’s not clear whether any authority or discretion is available to HHS for this position. The impact of Executive Order 13765 on the EHB rule – and the ACA itself – is uncertain. For now, Non-EHB Plans should take a conservative approach. Beginning with its 2017 plan year, any Non-EHB Plan that imposes an annual or lifetime dollar limit on any benefit should confirm that it has selected one of the 54 available benchmark plans to establish a permissible definition of EHBs, and that the selected plan does not define as an EHB any benefit subject to a dollar limit. But don’t get too comfortable with this new EHB rule. While speculation about the ACA’s future is beyond the scope of this post, one thing is certain: Executive Order 13765 – the first Executive Order issued on his first day in office – clearly manifests the president’s commitment to fulfil his campaign promise to repeal and replace the ACA.