

# 2017 End of Year Update Benefit Advisors Network

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\*Presentation current as of December 12, 2017



# Agenda

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- Historical Perspective
- Obamacare in 2017
- The State of the Union—Or At Least Those in Washington
- Fixing Obamacare
- Highlights of Legal and Regulatory Changes in 2017
- What to Expect in 2018

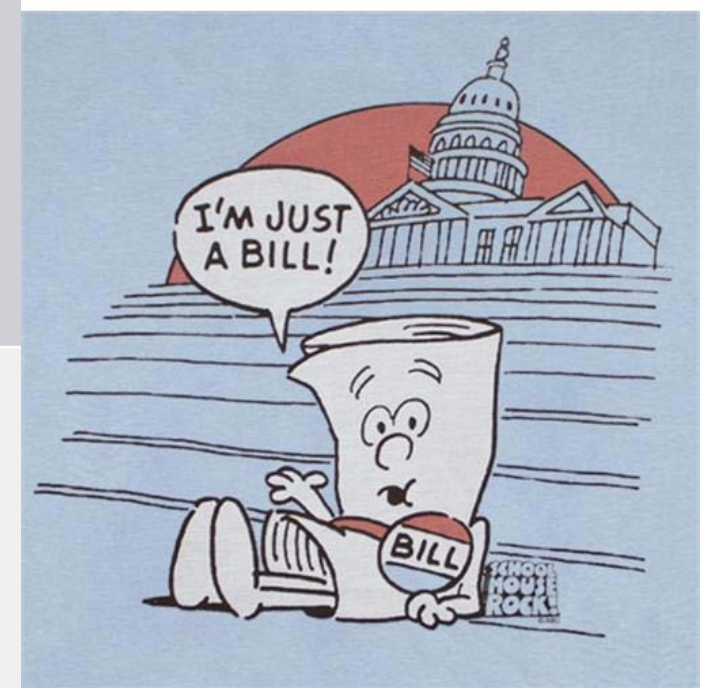


# Historical Perspective



# Historical Perspective

- **Passed in 2009/2010 When Democrats Held White House, Senate & House**
- *Passed on a partisan basis*
- *Senate bill passed in House*
- *Reconciliation used in Senate to Avoid Filibuster*
- *No Conference Committee*
- *No Technical Amendments*
- *Scores of lawsuits by individuals, businesses, states, Congress*



## Obamacare in 2017

# Obamacare in 2017



## It Ain't Healthy

### Individual Market

- The Individual Market is the Heart of Obamacare
  - Idea was to provide those traditionally unserved *access to affordable care*
- Access
  - Uneven across the states
  - Many carriers exited or are threatening to exit the individual market
  - Majority of states now have fewer carriers offering coverage than at start of Obamacare
  - Aetna Exiting 11 States, following Humana, UnitedHealth and others
  - *Every county in the US now has at least one Marketplace plan available*



# Obamacare in 2017



## It Ain't Affordable in Many Markets

### Average Premium Increases\*

Seattle	239%
Los Angeles	71%
Boise	70%
Portland	42%
Nashville	44%

### Are the Exchanges in a Death Spiral?

- 2017 S&P study looked at the performance of many Blue Cross across the country
- *Study shows that the carriers significantly reduced their losses last year, are likely to break even this year and that most could profit in 2018*
- Confirms CBO analysis



# Cost-Sharing Reductions

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## *Future Looks Grim*

- President Trump stops CSR payment to carriers due Oct. 18
  - *What are CSRs?*
    - Cost-Sharing Reduction Payments designed to repay carriers for cost of providing low-cost health care (and subsidizing Congressional coverage)
  - *Can the President Legally Stop CSRs?*
    - Live by the sword—die by the sword
    - Article II of the Constitution – Take Care Clause
  - *What Happens if CSRs Cease?*
    - The threat has already shown us the future
    - Less access and higher cost





# The State of The Union: Or At Least Those In Washington

# 115<sup>th</sup> Congress



## Political Currents

Current Congress	
House:	<b>241 - 194</b>
Senate:	<b>52 - 48</b>



R. Portman (OH)



R. Paul (KY)



S. Collins (ME)



M. Lee (UT)



S. Moore Capito (WV)



L. Murkowski (AK)



J. Moran (KS)



T. Cruz (TX)



R. Johnson (WI)



D. Heller (NV)



J. McCain (AZ)



# 115<sup>th</sup> Congress



## Political Currents

November 2018
33 Senate seats (8/25)
All House seats



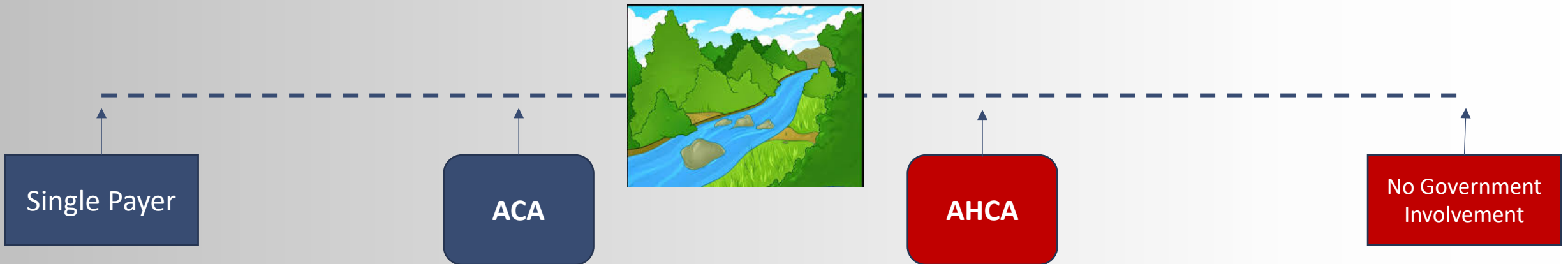
## Fixing The ACA



# Bridging Philosophies



<b>Democrats:</b>	<b>Defined Benefit Model</b>
<b>Republicans:</b>	<b>Defined Contribution Model</b>



# Congressional Responses

- **American Health Care Act (AHCA) (Passed House: 217-213) (217-20/193-0)**

- *Better Care Reconciliation Act (June/July 2017)*
- *Obamacare Repeal Reconciliation Act (Repeal Without Replace) (June/July 2017)*
- *Health Care Freedom Act (Skinny Repeal) (July 2017)*
- *Graham Cassidy (September 2017)*
  - *Was not brought to a vote prior to Sept. 30th deadline*
  - *Meanwhile, CHIP funding expired*
- *Alexander/Murray Claim Working On Bi-Partisan Bill*



# ACA vs. Major Republican Proposals



	Affordable Care Act (ACA)	American Health Care Act (AHCA)
<b>Mandates</b>	<ul style="list-style-type: none"> <li>Individual mandate</li> <li>Employer mandate on ALE's</li> </ul>	<ul style="list-style-type: none"> <li>No individual or employer mandate eff. retro to 1/1/16</li> <li>Insurers can impose a one year 30% surcharge on consumers with a lapse in continuous coverage</li> </ul>
<b>Assistance</b>	<ul style="list-style-type: none"> <li>Income-based subsidies for premiums that limit after-subsidy cost to a percent of income</li> <li>Cost sharing reductions for out-of-pocket expenses</li> </ul>	<ul style="list-style-type: none"> <li>Age-based refundable tax credits for premiums, phased out for higher incomes</li> <li>No cost sharing reductions for out-of-pocket expenses</li> <li>ACA subsidies phased out after 2019; AHCA credits effective in 2020</li> </ul>
<b>Premium Age Differences</b>	<ul style="list-style-type: none"> <li>3:1</li> </ul>	<ul style="list-style-type: none"> <li>5:1 (MacArthur amendment would allow a ratio above 5:1)</li> </ul>
<b>Medicaid</b>	<ul style="list-style-type: none"> <li>Matching federal funds to states for anyone who qualifies</li> <li>Expanded eligibility to 138% of poverty level income</li> </ul>	<ul style="list-style-type: none"> <li>Federal funds granted to states based on a capped, per-capita basis starting in 2020</li> <li>States can choose to expand Medicaid eligibility, but would receive less federal support for those additional persons</li> </ul>
<b>Health Savings Accounts</b>	<ul style="list-style-type: none"> <li>\$3,400/\$6,750 contribution limit for 2017</li> </ul>	<ul style="list-style-type: none"> <li>Increased to match HDHP OOP limits (\$6,550/\$13,100 for 2017)</li> </ul>
<b>"Cadillac" Tax</b>	<ul style="list-style-type: none"> <li>Cadillac tax on high-cost plans implemented in 2020</li> </ul>	<ul style="list-style-type: none"> <li>Cadillac tax on high-cost employer plans delayed until 2026</li> </ul>
<b>Other Taxes</b>	<ul style="list-style-type: none"> <li>3.8% tax on net investment income</li> <li>0.9% Medicare tax on individuals with income over \$200,000 (or families with income over \$250,000)</li> <li>Limit placed on contributions to health FSAs</li> <li>Annual health insurance provider tax</li> <li>OTC medication excluded as qualified medical expense</li> </ul>	<ul style="list-style-type: none"> <li>Repeal of these taxes retroactive to the beginning of 2017 (except for the repeal of the Medicare tax, which would begin in 2023)</li> </ul>
<b>Essential Health Benefits</b>	<ul style="list-style-type: none"> <li>Insurers are required to offer ten essential health benefits (individual and small group plans)</li> </ul>	<ul style="list-style-type: none"> <li>MacArthur amendment: individual and small group plans must offer the ten essential health benefits, but a waiver option is available</li> <li>Mental health and substance abuse not required in some Medicaid plans</li> </ul>



# What *Most* Seem to Agree On



## Maintaining Insurance Reforms

- Prohibition on denying coverage due to preexisting medical conditions
- Prohibition on discrimination based on gender\*
- Guaranteed issue of coverage to all applicants
- Guaranteed renewability of coverage
- Coverage of dependents on parents' plan up to age 26





# Some Modest Proposals

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- Fix the Affordable Care Act—It's Broken—But Aim Small, Miss Small
  - Single payer is not the answer
  - Republicans Should Try To Avoid The Key Mistake the Democrats Made With Process
  - Fill Regulatory Positions
  - Consider Actually Addressing *The Problem*



# Some Modest Proposals



## Single Payer



- **Colorado: Single Payer (Failed)**
- **California: Abandoned When Determined It Would Cost 2X Current State Budget**
- **Vermont: Quietly Abandoned**
- No Model For Single Payer for 350M That Works
- No Model for Federal Government Success as **Market Participant**



# Some Modest Proposals



## Avoid Key Mistake Made By Democrats

- **Cost of HealthCare and Paying for It is a Bi-Partisan Issue**
- Democrats in 2009 – 2010 Passed ACA on a Strictly Partisan Vote
- Republicans Should Attempt to Fix ACA on a Bi-Partisan Basis
- Politics Will Get in the Way and Voters Should Make Them All Pay



# Some Modest Proposals



## Fill Regulatory Positions

- **At last count:**
  - **No nominee for 253 out of ~620 key agency posts**
  - **158 Nominees**
  - **208 Confirmed**
- **Laws are interpreted by agencies**



# Some Modest Proposals



## Consider Actually Addressing the Problem

- **Problem is not the way we pay for insurance**

- Problem is the cost of healthcare
  - Tort Reform
  - Sale of Health Insurance Across State Lines
  - Pharmaceutical Reform
  - Hospital Billing Reform
  - Enforcement of Sherman Act and Other Federal Laws—Curb Monopolization
  - Focus on Quality



# Tax Cuts and Jobs Act – Welfare Benefits Provisions



## House Version

- Repeal medical expense deduction (eliminates deduction for medical expenses over 10% of AGI)
- Repeal employer-provided education assistance (eliminates exclusion for non-job-related employer-provided education assistance up to \$5,250)
- Repeal dependent care FSAs after 2022 (eliminates exclusion for dependent care expenses up to \$5,000)
- Repeal of adoption assistance programs (eliminates exclusion for qualified adoption expenses paid by an employer up to \$13,750)
- No Individual Mandate Repeal

## Senate Version

- Same as House version, except that the rule would sunset after 2025
- No changes proposed (stays as-is)
- No changes proposed (stays as-is)
- No changes proposed (stays as-is)
- Individual Mandate Repealed as of 1/1/19



## Highlights of Legal and Regulatory Changes in 2017

# New Regulations

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## *Administration Scales Back Contraceptive Coverage Requirement*

- On Oct. 6, HHS, DOL and Treasury released regulations allowing employers to decline to cover contraceptives under their health plans based on a religious or moral objection
- Rules are effective immediately, although notice requirements apply
  - Rules were released in two parts, one covering employers with moral objections, the other for those with religious objections
- State AG's in CA and MA and the ACLU sued seeking to stop implementation of the regulations
  - Many states mandate contraceptive coverage for fully insured plans





# New Regulations

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## *Administration Scales Back Contraceptive Coverage Requirement (cont.)*

- The Religious Exemption automatically exempts all employers with a religious objection
- The Moral Exemption exempts all employers – except publicly traded companies – with a moral objection
- Employers may decide whether their employees receive independent contraceptive care coverage through the accommodation process
  - By making the accommodation process voluntary for employers, employees are no longer guaranteed the seamless coverage for contraceptives that exists under the accommodation process



# From the Office of the President



## Executive Order Promoting Healthcare Choice and Competition



- **Oct. 12<sup>th</sup> order directs the federal agencies in charge of implementing the ACA to expand access to association health plans (AHPs), short-term insurance plans, and health reimbursement arrangements (HRAs)**
  - DOL should expand the “commonality of interest” requirement for purposes of determining whether an association is an “employer” under ERISA
  - DOL should also consider ways to promote AHP formation on the basis of common geography or industry
  - Note: AHPs of employers are MEWAs and regulated at state and federal level
  - Short-Term Limited Duration Insurance
  - Current rules limit STLDI coverage to 3-month non-renewal gap insurance
  - Order directs agencies to allow for longer coverage periods and renewability
  - States may challenge this aspect as well
  - HRAs should be expanded to allow reimbursement of individual market plans



# IRS Responds to Executive Order



## IRS Notice 2017-67 – Expansion of QSEHRAs

### • October Notice Responds to President's Executive Order to Expand HRAs

- Confirms QSEHRAs are subject to PCORI fee
- Includes guidance on the following topics:
  - Eligible employer and eligible employee
  - Same terms requirement
  - Statutory dollar limits
  - Written notice requirement
  - MEC requirement
  - Substantiation requirement
  - Reimbursement of medical expenses
  - Reporting requirement
  - Coordination with PTC
  - Failure to satisfy the requirements to be a QSEHRA
  - Interaction with HSA requirements



# IRS Responds to Executive Order



## Qualified Small Employer HRAs

- **Allows small employers (non-Applicable Large Employers) to use an HRA to reimburse medical expenses and individual market health insurance premiums, up to a specified annual limit**
  - Limit for 2017 is \$4,950 (individual) / \$10,050 (family)
  - Limit for 2018 is \$5,050 (individual) / \$10,250 (family)
  - Limits must be prorated for partial years of coverage
  - Employer contribution generally must be the same for all eligible employees; however, certain variations are permitted based on age and number of covered family members
  - Employers offering a QSEHRA cannot offer any Group Health Plan coverage to employees, including dental and vision



## What to Expect in 2018

# What to Expect in 2018



## ■ No more “silent” tax returns

### Individual Mandate Compliance

- In October 2017, the IRS announced it will not accept electronically filed tax returns unless the taxpayer indicates whether they had coverage, had an exemption, or will make a shared responsibility payment
  - Likewise, paper tax returns “may be suspended pending the receipt of additional information and any refunds may be delayed”
- This is in contrast to the 2017 filing season when the IRS indicated it would accept and process tax returns where a taxpayer is silent on coverage
- Specifically, individuals must check a box on line 61 of Form 1040 as to whether they had health insurance all year
- Those who did not must attach an exemption form (Form 8965) or make a shared responsibility payment



# What to Expect in 2018



## ■ IRS Priority Guidance Plan

### Health and Welfare Plans

- Guidance on certain transactions involving welfare benefit funds
- Guidance on issues under §4980H (Employer Shared Responsibility)
- Regulations under §4980I regarding the excise tax on high cost employer-provided coverage (Cadillac Tax)
- Guidance under §9831(d) on qualified small employer health reimbursement arrangements (QSEHRAs)



# What to Expect in 2018



## ■ Affordable offers of employer-sponsored health coverage in 2018

### Rev. Proc. 2017-36 – used to determine affordability threshold

- Under the ACA, Applicable Large Employers who wish to offer “affordable” coverage cannot charge more than **9.5% (as indexed)** of an employee’s household income or other metric as determined under the “safe harbor” provisions (e.g., W-2 income, Rate of Pay, Federal Poverty Level) for employee-only coverage
  - 2015: 9.56%
  - 2016: 9.66%
  - 2017: 9.69%
  - 2018: 9.56%
- Final 2017 ACA Reporting Forms & Instructions available
  - Few changes, mostly relating to removal of Transition Relief
  - New safe harbor for *de minimis* errors where no single amount differs by more than \$100 (certain conditions apply)





# What to Expect in 2018



	2018 (single/family)	2017 (single/family)
<b>Annual HSA Contribution Limit</b>	\$3,450 / \$6,900	\$3,400 / \$6,750
<b>Minimum Annual HDHP Deductible</b>	\$1,350 / \$2,700	\$1,300 / \$2,600
<b>Maximum Out-of-Pocket for HDHP (applies to all in-network benefits)</b>	\$6,650 / \$13,300	\$6,550 / \$13,100

	2018 (single/family)	2017 (single/family)
<b>ACA Maximum Out-of-Pocket (applies to all in-network EHBs)</b>	\$7,350 / \$14,700	\$7,150 / \$14,300

- ACA requires family plans to have an embedded individual OOP limit
- Embedded OOP limit rule applies to all plans, including HDHPs



# What to Expect in 2018



## More Employer Shared Responsibility Penalty Letters (Pay or Play)

- Employers have started to receive penalty letters for CY2015
- IRS using Letter 226J to propose and assess penalties. Letters include:
  - the proposed penalty by month and whether it's the “no offer” or “unaffordability” penalty;
  - a list of full-time employees who received a subsidy each month and who were not reported as being within a “safe harbor;”
  - instructions for the ALE if it disagrees with Letter 226J; and
  - a description of the actions the IRS will take if the ALE does not respond timely
- Response due within 30 days of receipt
- IRS will respond with one of five versions of Letter 227
  - Response to Letter 227 due within 30 days of receipt
  - If no response, IRS will issue a notice and demand for payment



# What to Expect in 2018



## New Claims Procedures For Disability Claims in 2018

- Apply to claims filed on or after 1/1/18\* – largely adopt procedural protections for health claims added by the ACA, and ensure:
  - Independence and impartiality of decision-maker
  - Denial notices discuss the standards behind the decision
  - Claimants can access claim file and present evidence during review process
  - Claimants can respond to any new evidence in advance of an appeal decision
  - Final denials are not based on new rationales unless claimants can respond
  - Failure to follow claims procedures is deemed to be exhaustion of administrative remedies, unless *de minimis*

*\*Effective date delayed until 4/1/18, although many plans have likely begun compliance*



# What to Expect in 2018



## EEOC to Issue Propose Rules on Wellness Incentives

- In AARP v. EEOC, a Federal court in Washington, DC ordered the EEOC to reconsider the limits it placed on wellness program incentives under the ADA and GINA
- EEOC had set a limit on incentives equal to 30% of the total cost of self-only coverage under the employer's group health plan
- Court found that EEOC did not properly consider whether the 30% limit on incentives would ensure the program remained "voluntary" and sent the regulations back to the EEOC for reconsideration

## In the meantime...

- To avoid "potentially widespread disruption and confusion" court will allow the rules to remain in place while EEOC determines how to proceed
- In its recent status report, EEOC advised the court it intends to issue a notice of proposed rulemaking by August 2018 and a final rule by October 2019 (with any substantively amended rule likely not applicable until the beginning of 2021 to give employers time to come into compliance)





# Questions?

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