



# ACA Repeal: Where Things Stand— And What Lies Ahead

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## The Status of ACA Repeal

- ★ The Patient Protection and Affordable Care Act (ACA) was enacted in 2010 and significantly changed the federal laws governing most aspects of healthcare and insurance, such as Medicaid, the individual insurance market, and employer-sponsored group health plans (GHPs)
  - This presentation primarily focuses on the rules that directly or indirectly affect GHPs
- ★ At the time the ACA was passed, Democrats controlled both the House and the Senate
- ★ No Republicans voted in favor of the ACA, and the official stance of the Republican Party is that the ACA must be repealed and replaced
- ★ Once Donald J. Trump was sworn into office in January, Republicans controlled both chambers of Congress and the Presidency for the first time since the ACA's enactment

## The Status of ACA Repeal

- ✦ The executive agencies with enforcement and rulemaking authority over the ACA—primarily, Treasury, IRS, DOL, and HHS—have begun reviewing the current ACA regulations for potential changes at the regulatory and sub-regulatory levels
- ✦ In January 2017, Congressional Republicans initiated the “budget reconciliation” process, which allows for expedited consideration of certain legislation that impacts federal outlays and revenues
  - Importantly, reconciliation bills are filibuster-proof in the Senate (i.e., need only 51 votes to pass)
- ✦ On May 4, the House narrowly passed the American Health Care Act (AHCA) using reconciliation
- ✦ The Senate has stated that it will prepare and vote on its own ACA-replacement bill rather than the AHCA
  - It is unclear when the Senate will complete this process—possibly not until just before the August recess (or later)

## Agenda

- ✦ Brief Overview of the ACA
- ✦ The Budget Reconciliation Process and its Relevance to ACA-Replacement Legislation
- ✦ Overview of the AHCA
- ✦ ACA-Replacement Legislation in the Senate—How Might it Differ from the AHCA?
- ✦ The Role of the Executive Branch in ACA Replacement—and What it Has Done So Far
- ✦ *House v. Price* and its Potential Impact

# Brief Overview of the ACA

## Brief Overview of the ACA

- ✦ Three core components:
  - > Guaranteed issue and community rating (access);
  - > Subsidies for low-income individuals (affordability); and
  - > Individual mandate (ensure stable risk pools)
- ✦ Although many ACA provisions impact employers and GHPs, employers and GHPs were not the primary stakeholders whom Congress considered when the ACA was drafted
- ✦ There are essentially three categories of ACA provisions for GHPs
  - > Taxes and fees;
  - > Reporting requirements; and
  - > Coverage mandates/requirements

## GHP-Related Provisions

- ★ The ACA and other GHPs-related rules are primarily contained in the following statutes (and related regulations/guidance):
  - > ERISA
  - > Internal Revenue Code (Code)
  - > Public Health Service Act (PHSA)
- ★ The following government agencies have the authority to enforce those laws and issue regulatory/sub-regulatory guidance:
  - > DOL for ERISA provisions;
  - > Department of Treasury and IRS for Code provisions; and
  - > Department of Health and Human Services (HHS) for PHSA provisions

## GHP-Related Provisions

### ★ Taxes and Fees

- > Employer Mandate
- > Cadillac Tax
- > PCORI fees
- > Transitional Reinsurance Program Fees
- > Reduced deduction available to employers who provide retiree health coverage and receive the retiree drug subsidy (RDS)

### ★ Reporting

- > Employer reporting on GHP coverage and offers of coverage on Forms 1094 and 1095 (for IRS to administer subsidies and employer and individual mandates)
- > W-2 cost of coverage reporting

### ★ Coverage-Related Mandates

- > Prohibition of pre-existing condition (PEC) exclusions
- > Prohibition of annual and lifetime dollar limits on essential health benefits (EHBs)



## GHP-Related Provisions

### ★ Coverage-Related Mandates (cont'd)

- > Child coverage up to age 26
- > Summary of benefits and coverage (SBC) requirements
- > Routine costs associated with approved clinical trials
- > Prohibition of “excessive” plan waiting periods for eligibility
- > Required coverage of in-network preventive health services with no cost-sharing
- > Prohibition of “rescissions” of coverage
- > Limits on annual out-of-pocket expenses for in-network benefits
- > Appeals process and external review requirements
- > Restrictions on tax-free reimbursements of OTC medications by health FSAs, HSAs, HRAs and Archer MSAs
- > Nondiscrimination rules for insured GHPs (not yet implemented)
- > Annual cap on salary reduction contributions to health FSAs

## Non-GHP Provisions

- ✦ **Minimum Standards:** Each policy in the individual and small-group markets must meet certain minimum coverage standards by covering EHBs
- ✦ **Individual Mandate:** Unless a person qualified for an exemption, he or she must purchase health insurance or pay a non-compliance penalty
  - > Arguably, this provision impacts GHP enrollment
- ✦ **Health Insurance Exchanges:** If a person did not have access to affordable insurance through his employer or the government (such as Medicare), the individual would purchase coverage on an Exchange
- ✦ **Low Income Subsidies:** Individuals and families with an income less than 400% of the federal poverty level who purchase health insurance through an Exchange could be eligible for a subsidy from the government (if certain requirements were met)

## Non-GHP Provisions

### ★ Medicaid Expansion

- > Medicaid is a state-administered program created in the 1960s to provide healthcare services to the poor, which has been a major cost to states
- > To help, the federal government contributes a percentage of each state's Medicaid budget (on average, 55+%), as long as the state abides by strict federal guidelines
- > A person historically had to satisfy two tests to be eligible for Medicaid:
  - belonging to a “categorically” eligible group (generally children, pregnant women, parents, blind or disabled persons, and the elderly); and
  - meet the financial test set by the state for that group
- > Prior to the ACA, the federal government mandated that eligibility levels for children and pregnant women be at least for those up to 100-133% of the federal poverty level, but eligibility levels for parents could be much lower, and states were not required to cover adults without dependent children at all

## Other Provisions

### ★ Medicaid Expansion (cont'd)

- > One of the major provisions of the ACA was to expand the eligible group and increase the Medicaid income threshold. It was meant to be a requirement for a state in order for it to receive federal funds for Medicaid
- > The U.S. Supreme Court ruled that a state may “opt out” of the expansion without jeopardizing its existing federal Medicaid funds
- > If a state did not opt-out, a person in that state could qualify for Medicaid if he earned earn up to 133% of the federal poverty level (this included adults without children)
- > The ACA also provides a 5% “income disregard,” which effectively increased the qualifying threshold to 138%

# The Budget Reconciliation Process

## Why Use Reconciliation?

- ✦ Changes to the ACA statutes must be made through the legislative process
  - > Passed by the House and Senate
  - > Signed into law by the President
- ✦ In the Senate, most bills require a filibuster-proof majority (60 votes) to invoke “cloture” and end debate on a bill (Senate Rule XXII)
  - > GOP controls 52 Senate seats
  - > The Rules and Exceptions Clause of the Constitution permits changes to this requirement (albeit invoking cloture on a proposal for this change requires 67 votes)
- ✦ Using the “reconciliation” process, certain legislation that has more than an incidental impact on federal outlays or revenues is immune from the Senate filibuster
  - > Therefore, reconciliation legislation essentially needs the support of only 50 Republican Senators to pass (the Vice President can cast the 51<sup>st</sup> vote)
  - > The Byrd Rule places a number of limitations on the types of provisions that can be included in a reconciliation bill—but the extent to which the minority party can enforce the Byrd Rule against the majority party is not entirely clear.

## Reconciliation Primer: Sources of the Senate's Procedural Rules

- ♦ U.S. Constitution
- ♦ Standing rules
- ♦ Standing orders
- ♦ Statutory rules passed by Congress
- ♦ Informal precedents

## How Reconciliation Works (Generally)

- ✦ Budget Resolution. Under the Congressional Budget and Impound Control Act of 1974 (CBA) and subsequent amendments to the CBA, the House and Senate are to adopt an annual budget resolution concerning federal outlays (spending), revenues, and debt limits
  - > The resolution establishes goals for outlays, revenues and debt limits during the following fiscal year and at least four (but generally ten) future years
  - > Primarily addresses discretionary spending in the appropriations process
  - > If Congress wants to use additional legislation to meet these goals, it must use budget reconciliation
  - > Here, Congress is using the FY 2017 budget resolution for ACA replacement
- ✦ Reconciliation Instructions. To initiate reconciliation, Congress includes instructions in the budget resolution
  - > The Congressional committees tasked with crafting reconciliation legislation
  - > The (non-binding) deadlines for the legislation
  - > The dollar amount of changes to outlays or revenues
  - > The time period over which the changes apply



## How Reconciliation Works (Generally)

- ✦ ACA-Replacement Reconciliation Legislation in the House
  - > Ways and Means Committee
    - Jurisdiction over, among other ACA provisions, those that affect federal tax revenues (e.g., employer mandate)
  - > Energy and Commerce Committee
    - Medicaid and certain other provisions
  - > Budget Committee
    - Combines the Ways and Means and Energy and Commerce bills into an omnibus package
  - > Rules Committee
    - Sets the rules for debate over the bill by the full House (e.g., limitations on amendments and length of debate)
  - > The entire House votes on the bill after it passes in the applicable committees

## How Reconciliation Works (Generally)

- ✦ ACA-Replacement Reconciliation Legislation in the Senate
  - > Finance Committee
  - > Health, Employment, Labor and Pensions (HELP Committee)
  - > Budget Committee
    - Combines the Finance and HELP Committee bills into a single bill for consideration by the Senate
  - > Senate Floor
    - Debate limited to 20 hours (split evenly between majority and minority parties)
    - Senators may raise “point of orders” seeking to remove impermissible provisions (Byrd Rule)
- ✦ Once the House and Senate Pass Reconciliation Legislation

Generally, any differences between bills passed by the House and Senate are resolved through a “conference committee”

  - > Each chamber sends conferees to negotiate a single bill
  - > Negotiated bill must then be approved by both the House and Senate

## The Byrd Rule

- ✦ Set forth in Section 313 of the CBA (2 U.S.C. § 644) and limits the types of provisions that can be included in Senate reconciliation legislation (e.g., avoid the filibuster)
  - > Technically, the reconciliation rules apply to the House as well, but the House does not have a filibuster
  - > Impermissible provisions are referred to as “extraneous”
    - This aspect of the Byrd Rule was made permanent by the Omnibus Budget Reconciliation Act of 1990
- ✦ Reconciliation provisions can be challenged through “point of order” objections by individual Senators
  - > But the majority party theoretically has substantial authority over how the Byrd Rule is enforced
  - > 60 votes are required to overturn a Byrd Rule ruling on a point of order (Section 904(d) of the CBA)

## The Byrd Rule

- ✦ A lot of exceptions apply, but a provision is generally considered extraneous if it:
  - > Does not produce a change in outlays or revenues;
  - > Produces an outlay increase or revenue decrease when the instructed committee is not in compliance with its instructions;
  - > Is outside the jurisdiction of the committee that submitted the title or provision for inclusion in the reconciliation measure;
  - > Produces a change in outlays or revenues which is merely incidental to the nonbudgetary components of the provision;
  - > Would increase the deficit for a fiscal year beyond the “budget window” covered by the reconciliation measure (generally 10 years); or
  - > Recommends changes in Social Security
- ✦ Can be waived with 60 votes
- ✦ Other requirements include, for example, that any amendments be “germane” to the bill

## Examples of Potentially Extraneous Provisions

### ✦ Repealing the Cadillac Tax entirely

- > Byrd Rule Issue—Arguably would increase the deficit for a fiscal year beyond the “budget window” covered by the reconciliation measure
  - But could the Senate use “dynamic scoring” to claim the change is revenue neutral? (See later slide regarding who determines the budgetary impact of a reconciliation provision)
- > Alternative—a delay of under ten years (often referred to as a “sunset” arguably does not violate this rule)

### ✦ Repealing the Employer Mandate entirely

- > Byrd Rule Issue—Arguably produces a change in outlays or revenues which is merely incidental to the nonbudgetary components of the provision
- > Alternative—Reducing the Employer Mandate tax penalties to \$0

### ✦ Repealing the ban on pre-existing condition exclusions

- > Byrd Rule Issue—Arguably has some impact on outlays (e.g., amount and utilization of federal subsidies), but probably incidental to nonbudgetary component (eliminating a coverage mandate)
  - Same issue would appear to arise with revising or repealing many other benefit mandates

## Examples of Potentially Extraneous Provisions

- ✦ Imposing additional citizenship-verification requirements on ACA tax credits
  - > Byrd Rule Issue #1—Arguably outside the jurisdictions of both the Senate Finance and HELP Committees
    - Although the Senate Finance Committee has jurisdiction over tax credits, the Senate Homeland Security and Governmental Affairs Committee arguably is the only committee with jurisdiction over Homeland Security, the agency that would be tasked with enforcing these new requirements
    - Similar issue with expanding tax credits to veterans (Tricare)—jurisdiction of Committee on Veterans' Affairs
  - > Byrd Rule Issue #2—Arguably makes changes to Social Security
    - Citizenship verification appears to piggyback off of current ACA process, which involves use of Social Security numbers

## Byrd Rule—Potential Loopholes?

### ✦ Eliminating the Filibuster for All Senate Legislation

- > Rules and Exceptions Clause of the Constitution:  
“Each House may determine the Rules of its Proceedings”
- > Would eliminate the need to use reconciliation for ACA-replacement legislation
- > Has not been proposed by Senate Leadership
  - While theoretically possible, appears unlikely at this juncture
- > Potentially significant political consequences
  - Upset voters?
  - No party retains its majority forever, so theoretically Democrats could later use the same approach for their agenda

## Byrd Rule—Potential Loopholes?

- ★ Clever scoring to ensure that the impact on outlays or revenues meets the reconciliation requirements
  - > Common misconception that the Congressional Budget Office (CBO) and Joint Committee on Taxation (JCT) estimates are authoritative for determining compliance with the Byrd Rule
  - > The Chair of the Budget Committee—rather than the Parliamentarian, CBO, JCT or Presiding Officer or the Parliamentarian—is the one who provides guidance on the budgetary impact (or lack thereof) of reconciliation provisions (albeit the Chair has historically relied on the CBO and JCT estimates for this purpose)
  - > Section 312(a) of the CBA (2 U.S. Code § 643):
    - “For purposes of this subchapter and subchapter II, the levels of new budget authority, outlays, direct spending, new entitlement authority, and revenues for a fiscal year *shall be determined on the basis of estimates made by the Committee on the Budget* of the House of Representatives or the Senate, as applicable.”



## Byrd Rule—Potential Loopholes?

- ★ Clever scoring to ensure that the impact on outlays or revenues meets the reconciliation requirements (cont'd)
  - > Could the Chair use “dynamic scoring” to claim that, for example, repealing the Cadillac Tax entirely is budget-neutral because increased economic growth replaces lost tax revenue?
  - > Or could the Chair take the position that repealing or revising a particular ACA benefit mandate—or repealing the ACA altogether—has more than an incidental impact on outlays and revenues?
    - Byrd Rule does not define what “merely incidental” means

## Byrd Rule—Potential Loopholes?

### ♦ Ignoring the Senate Parliamentarian

- > The Senate Parliamentarian plays an advisory role in determine whether reconciliation provisions are extraneous
- > Many incorrectly state that the Parliamentarian is the ultimate authority for this purpose
  - Rather, the Senate Presiding Officer rules on a point of order
  - Parliamentarian advises the Presiding Officer based on Senate precedent
- > The Presiding Officer almost never—at least not in recent history—ignores the Parliamentarian, but has the right to do so
  - Article I, Section 3, clause 4 of the Constitution provides that the Vice President is the Presiding Officer, when in attendance
  - If not the VP, another Republican will serve as the Presiding Officer
- > To date, Republican Leadership has not advocated using this approach (but see Politico article on later slide)

## Byrd Rule—Potential Loopholes?

### ✦ Ignoring the Senate Parliamentarian (cont'd)

The CBA makes clear that the Presiding Officer rules:

- > Section 313(c) (“Extraneous materials”):
  - “[t]he Committee on the Budget of the Senate shall submit for the record a list of material considered to be extraneous under subsections (b)(1)(A), (b)(1)(B), and (b)(1)(E) of this section to the instructions of a committee as provided in this section. *The inclusion or exclusion of a provision shall not constitute a determination of extraneousness by the Presiding Officer of the Senate.* (emphasis added)
- > Section 313(e) (“General point of order”):
  - “Notwithstanding any other law or rule of the Senate, it shall be in order for a Senator to raise a single point of order that several provisions of a bill, resolution, amendment, motion, or conference report violate this section. *The Presiding Officer may sustain the point of order* as to some or all of the provisions against which the Senator raised the point of order. *If the Presiding Officer so sustains the point of order* as to some of the provisions . . . then only those provisions . . . against which the *Presiding Officer sustains* the point of order shall be deemed stricken pursuant to this section. Before *the Presiding Officer rules on such a point of order*, any Senator may move to waive such a point of order as it applies to some or all of the provisions against which the point of order was raised. Such a motion to waive is amendable in accordance with the rules and precedents of the Senate. *After the Presiding Officer rules on such a point of order*, any Senator may appeal the ruling of the Presiding Officer on such a point of order as it applies to some or all of the provisions on which *the Presiding Officer ruled.*” (emphasis added)

## Byrd Rule—Potential Loopholes?

### ✦ Ignoring the Senate Parliamentarian (cont'd)

Will the GOP pursue this route? According to a May 16<sup>th</sup> Politico article:

- > “Conservative GOP Sens. Ted Cruz and Rand Paul are pushing to test the limits of how much of Obamacare can be repealed under Senate rules, setting up a potential “nuclear” showdown. The key factor in allowing reconciliation to proceed is whether each provision in the bill has a direct impact on the budget — a question typically put to the Senate parliamentarian, a nonpartisan staffer named Elizabeth MacDonough.”
- > “But Cruz, of Texas, and Paul, of Kentucky argue that it is up to whoever is presiding over the Senate at the time, which can be Vice President Mike Pence as president of the Senate. Under their argument, Pence could make the call about whether certain parts of Obamacare can be scrapped or whether new policy, such as allowing insurers to sell across states lines, can be enacted — and he would presumably be more aggressive than MacDonough.”
- > “But as the Senate drafts its health care bill, Cruz and Paul are finding themselves on a virtual island. Many other Republicans interviewed by POLITICO say they have no interest in testing the Senate’s procedural bounds, arguing that doing so would undermine the institution and quickly lead to the end of the legislative filibuster.”
- > After the story posted, Sen. Mike Lee’s spokesman said he had been mistaken and that Lee supports Cruz and Paul’s position.

## Byrd Rule—Potential Loopholes?

### ♦ Replacing the Parliamentarian

- > Perhaps for optics purposes—or to avoid setting a precedent—the majority party can replace the Parliamentarian in lieu of ignoring his or her advice
- > Senate Republicans did this when passing the Bush-era tax cuts in 2001
  - Robert Dove, the Parliamentarian at that time, had advised that a number of provisions in the Republican's legislation were extraneous
  - Senate Republicans presumably felt it was more practical to replace him rather than ignore his advice

# The American Health Care Act (AHCA)

## The AHCA

- ✦ A reconciliation bill that originated in the House Committees on Ways and Means and Energy and Commerce
- ✦ After a number of setbacks, passed by the House on May 4, 2017
- ✦ Repeals and replaces many spending- and revenue-related ACA provisions
  - Also includes some provisions that arguably are questionable under a literal reading of the Byrd Rule
- ✦ Addresses Medicaid, the individual market, GHPs and various other healthcare rules
- ✦ Senate has stated it will not vote on the AHCA

## AHCA Provisions That Would Directly or Indirectly Impact GHPs

### ★ *Repeal of the Individual Mandate Penalty*

- > Effective Date: Retroactive to January 1, 2016
- > Potential GHP/Employer Impact: According to CBO and JCT, eliminating the penalty could cause some GHP enrollees to drop coverage voluntarily
  - Younger, healthier individuals are presumably more likely than older, sicker individuals to decline coverage in the absence of the individual mandate penalty
  - “Most of that increase [of 14 million uninsured] would stem from repealing the penalties associated with the individual mandate. Some of those people would choose not to have insurance because they chose to be covered by insurance under current law only to avoid paying the penalties, and some people would forgo insurance in response to higher premiums.”
    - What % of the 14 million are those dropping non-GHP coverage?
    - How much (if any) would this drive up the cost of GHP coverage?



## AHCA Provisions That Would Directly or Indirectly Impact GHPs

### ★ *Repeal of the Employer Mandate Penalty*

- > Effective Date: Retroactive to January 1, 2016
- > Potential GHP/Employer Impact:
  - Penalty relief for employers who didn't meet the 95% and affordability/minimum value requirements for one or more months since January 2016
  - Going forward, opportunity to increase hours requirements for eligibility
    - Simplify eligibility rules
  - How many employers would actually make these changes?
    - Does the employer's industry make a difference (e.g., high-tech vs. retail)?
  - Presumably, this would by operation simplify the ACA reporting rules under Sections 6056 upon the AHCA's replacement of the ACA tax credits in 2020
    - Huge compliance burden for large employers

## AHCA Provisions That Would Directly or Indirectly Impact GHPs

### ★ *Delay of the Cadillac Tax*

- > Effective Date: Delayed from 2020 until 2026
- > Potential GHP/Employer Impact:
  - Put on hold planned benefit cutbacks that were geared towards avoiding the tax
  - According to CBO/JCT, the delay would decrease revenues by over \$48 billion (albeit that amount is not entirely the result of employer savings).

### ★ **Repeal of limit on salary reductions for health FSAs**

- > Effective Date: January 1, 2017
- > Potential GHP/Employer Impact: Increased FICA tax savings on additional contributions (otherwise taxed as wages)
  - But because of the uniform coverage rules, will employers be hesitant to reinstate higher limits?

## AHCA Provisions That Would Directly or Indirectly Impact GHPs

- ★ *Expand HSA contribution limits and general availability*
  - > Effective Date: January 1, 2018
  - > Potential GHP/Employer Impact: Additional FICA tax savings
  
- ★ **Repeal the ACA's prohibition of tax-free reimbursements of over-the-counter medications**
  - > Effective Date: January 1, 2017
  - > Potential GHP/Employer Impact: Additional FICA tax savings

## AHCA Provisions That Would Directly or Indirectly Impact GHPs

### ★ *Repeal the ACA's limit on employer deductions for plans that receive RDS payments*

> Effective Date: January 1, 2017

> Potential Employer/GHP Impact:

- For those who still offer these plans, potentially a larger tax deduction
- Will other employers choose to adopt these plans?

## AHCA Provisions That Would Directly or Indirectly Impact GHPs

### ★ *State Waivers of Certain ACA Mandates for Individual and Small-Group Plans*

- > Waiver of the maximum age-based pricing ratio. Increase the maximum age-based premium-pricing ratio to 5:1 and allow states to seek a waiver of this requirement and price premiums using an even higher ratio beginning in 2018
- > Waiver of the EHB-coverage requirements. Beginning in 2020, the AHCA would permit a state to waive this requirement and define its own EHBs — or eliminate EHBs entirely
- > Waiver of the requirement to use community rating. Beginning in 2019 (and for 2018 special enrollment), states could seek a waiver of the ACA's community rating requirements for enrollees who previously had a gap in coverage of at least 63 days. Insurers then would be permitted to use medical underwriting to determine such an enrollee's premiums for essentially the first 12 months of the enrollee's coverage

## Potential GHP Impact of State Waivers

- ★ A single state receipt of partial/complete EHB waiver might affect these two requirements for self-funded GHPs in every state:
  - > Prohibition of annual and lifetime dollar limits on EHBs
  - > Requirement to cap total out-of-pocket costs for in-network EHBs
- ★ Under current regulations, EHBs for purposes of these requirements are those listed on the state “benchmark” plan of the GHP’s choice
  - > HHS seems likely to retain this rule, but theoretically could change it to eliminate the potential impact of state EHB waivers
  - > It is unclear whether Congress intended (or was aware of) this potential impact when it added the state-waiver provisions—or whether the regulatory agencies could even interpret the specific statutory changes as extending to GHP-related provisions in ACA
- ★ If waiver provision extends to GHP rules, self-funded GHPs presumably could select a waiver state’s EHB-free benchmark plan
  - > Impose annual/lifetime limits on any benefit—as well as plan-wide limits
  - > No cap on out-of-pocket costs
- ★ As a practical matter, insured GHPs in non-waiver states would be limited to selecting insurance policies available in their states

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## Other AHCA Provisions

### ★ *Changes to Tax Credits*

- > Beginning in 2018, make current ACA credits available for non-exchange coverage
- > Beginning in 2020, replace current ACA credits (which are tied to the cost of exchange coverage) with fixed, age-based credits
  - **Potential employer impact:**
    - Individual cannot receive tax credit if *eligible for* GHP coverage other than excepted benefits)
    - This would simplify employer reporting (e.g., no need to report on affordability). AHCA proposes use of W-2 for this purpose
    - To receive the credit in advance, an employee would need to provide an employer letter certifying that he/she is not eligible for the employer's coverage. Would this be a large compliance burden for employers?
- > Would appear to greatly reduce amount of subsidy for most people
- > Will this increase the demand for employer-sponsored coverage?



## Other AHCA Provisions

### ★ *Changes to Medicaid*

- > Background. Medicaid is partially funded by the federal government and partially funded by the states
  - The ACA increased federal Medicaid funding to states that covered childless adults up to 133% of the federal poverty level.
- > Partial Continuation of Expansion. If a state expanded Medicaid before March 1, 2017, the AHCA would make available the ACA's additional funding for enrollees who both
  - enrolled before December 31, 2017; and
  - do not have more than a month break in eligibility for Medicaid ("grandfathered enrollees")

States would only receive the pre-ACA matching funds for non-grandfathered enrollees
- > Reduced Eligibility. After December 31, 2017, a state would no longer be able to cover individuals who (1) are under 65 years of age and (2) have income in excess of 133% of the poverty line

## Other AHCA Provisions

### ★ *Changes to Medicaid* (cont'd)

- > Repeal of Increased Funding for Children. AHCA also repeals the increase in Medicaid eligibility (currently 138% FPL) for children ages 6-19 as of December 31, 2019
- > Per Capita Funding Limits. AHCA converts federal Medicaid funding to a per capita cap beginning in FY 2020
  - State option for block grant instead of per capita
  - Minimum federal income eligibility limit for these children will revert to 100% of FPL
- > Various Other Changes. Some of the other Medicaid changes would include:
  - Medicaid funds cannot be used for Planned Parenthood clinics for one year (effective immediately)
  - States also would have the option to require individual be working as condition of Medicaid eligibility

## Other AHCA Provisions

### ★ *Changes to Individual Market Coverage*

- > Continuous Coverage Penalty. AHCA essentially replaces the individual mandate with provision that allows insurers to charge those with gaps in coverage a higher premium temporarily
  - If an individual has not been enrolled in creditable coverage for the prior 12 months, insurers in the individual small-group must impose a 30% premium surcharge for the first 12 months of coverage. Applies beginning in 2019 and for 2018 special enrollment
  - **Potential employer impact:** Will HIPAA certificates of creditable coverage again be required?
    - For example, if an employee terminates employment and seeks individual insurance coverage, would the HIPAA certification be needed to avoid the continuous coverage penalty?
  - Does this provision violate the Byrd Rule? If so, will the Presiding Officer allow it to be removed?
    - Penalty is paid to insurers
    - Possibly some impact on outlays and revenues, but is the impact more than “incidental”?

## Other AHCA Provisions

### ★ *Changes to Individual Market Coverage* (cont'd)

- > Patient State and Stability Fund.
  - Federal funding of \$130 billion over 9 years, and additional funding of \$8 billion over 5 years for states that elect community rating waivers
  - Funds available help to high-risk individuals, promote access to preventive services, provide cost sharing subsidies, and certain other purposes
  - \$15 billion of funds in 2020 to be used only for services related to maternity coverage, newborn care, mental health and substance use disorders
  - For 2018-2026, \$15 billion is allocated for Federal Invisible Risk Sharing Program (reinsurance) grants to states
  
- > Repeal Prevention and Public Health Funding. AHCA would repeal federal funding for Prevention and Public Health Fund as of the end of FY 2018
  - Also rescinds any unobligated funds remaining at the end of FY 2018
  - Would provide \$422 million of supplemental funding for community health centers in FY 2017

## Other AHCA Provisions

### ♦ *Other Repealed Taxes*

- > Repeals the medical device tax as of January 1, 2017
- > Repeals the 3.8% net investment tax as of January 1, 2017
- > Repeals the 162(m)(6) deduction limit on performance-based compensation that applied to certain health insurance providers as of January 1, 2017 (for services starting as of that date)
- > Repeals the annual fee on brand pharmaceutical manufacturers as of January 1, 2017
- > Repeals the additional 0.9% Medicare tax as of January 1, 2023

# ACA Changes By the Trump Administration

## ACA Changes by the Trump Administration

- ✦ The President has the authority to appoint (subject to Senate confirmation) the Secretaries of Treasury, Labor and HHS
- ✦ Control over these agency heads effectively allows the President to control the ACA-related regulatory and sub-regulatory guidance those agencies issue
- ✦ The Administrative Procedure Act (APA) imposes a number of requirements on issuing, revising and withdrawing guidance (e.g., notice, comment, etc.)
  - > Regulatory guidance is subject to more requirements than sub-regulatory guidance
  - > The President can impose additional requirements through executive order
- ✦ Certain ACA statutes delegate considerable authority to the executive agencies regarding the application of the ACA rules
  - > The agencies also have at least some authority to delay or “reprioritize” enforcement
- ✦ Deviating too far from the apparent meaning of a statute risks a court challenge

## 2017 Regulatory Directives

### ★ Executive Orders

- > In January the President signed an executive order directing executive agencies to “minimize the unwarranted economic and regulatory burdens of the Act, and prepare to afford the States more flexibility and control to create a more free and open healthcare market.”
  - Does this mean the IRS will further delay issuing (or never issue) regulations implementing the ACA’s nondiscrimination rules for insured GHPs?
- > On April 21, the President also signed an executive order mandating that Treasury review existing regulations to reduce tax and compliance burdens, ordering this action on April 21

### ★ IRS Review of Guidance Issued After January 1, 2016

The Treasury Department has stated that it will undertake a review and re-evaluation of tax regulations issued since January 1, 2016, in accordance with the President’s April 21 order



## Potential GHP-Related Regulatory Changes?

- ✦ So far Treasury, DOL, HHS and the IRS under the new Administration have not made any significant regulatory or sub-regulatory changes to the ACA and non-ACA rules applicable to GHPs
- ✦ It is impossible to speculate what changes might be in store, but some changes that have been advocated by Republican Leadership include:
  - > Removing emergency contraceptives from the preventive care requirements
    - Given that the statute defines the services that are required for this purpose with reference to recommendations by specific agencies (e.g., U.S. Preventive Services Task Force ), excluding specific medications might require very careful crafting of regulatory guidance. Ultimately it is unclear whether this regulatory change would survive a court challenge

## HRAs and Employer Payment Plans

- ✦ Currently, only certain HRAs and employer payment plans can reimburse major medical expenses for individual insurance coverage (small-employer HRAs and HRAs/employer payment plans that cover no more than one current employee)
  - > This prohibition is based on the agencies' interpretations (most recently, IRS Notice 2015-17) that the arrangements violate the ACA rules regarding (1) preventive care and (2) annual and lifetime limits
    - Those statutes apply to GHPs
    - The agencies have taken the position that HRAs and employer payment plans are group health plans subject to the statutes
  - > Last year Congress passed an exception to the definition of "group health plan" for certain HRAs offered by small employers. Unanswered questions include:
    - Do the agencies have the regulatory or sub-regulatory authority to withdraw their current position? Could they argue the ACA statutes in question don't apply to account-based plans? Could they argue that employer payment plans are not GHPs?
    - Does Congress' passage of the "small-employer HRA" law somehow codify the agencies' current position?

## *House v. Price*

## *House v. Price*

- ★ The ACA includes the refundable tax credit providing premium assistance for the purchase of coverage
  - > Appropriation for this is clearly in the statute
- ★ The ACA also contains a provision for reduced cost-sharing for individuals enrolling in silver-tier Exchange plans
  - > Essentially, if a person is eligible for the tax credit, insurers offering coverage on the Exchange must reduce deductibles, coinsurance, payments and similar charges—these are the cost-sharing reductions (CSR)

## *House v. Price*

- > For these CSR, the insurers are supposed to get their money back
- > To qualify for the CSR, an individual must enroll in a silver tier Exchange plan and have household income that exceeds 100% but does not exceed 250% of the poverty line for a family of the size involved
- > Eligibility for the premium tax credit is a prerequisite to receiving the CSR
- > Appropriation for the CSR is not directly stated, but rather inferred in the Act

## *House v. Price*

- ✦ The lower court ruled in favor of the House and stated that the U.S. Treasury and the HHS violated the US Constitution by reimbursing the insurance carriers for the CSR costs when the spending of that money was not validly appropriated by Congress
  - > The court stated that the appropriation must be clear and direct to be valid—it could not be inferred
- ✦ Any further reimbursements were enjoined until valid appropriation was in place, although the injunction was stayed pending appeal
  - > Essentially, while the court ruled against the use of taxpayer money to pay for CSRs, it would allow it during the time period that the case was being appealed

## *House v. Price*

- ★ So far HHS has approved CSR reimbursements to insurers
  - > But the President recently indicated that he would like those payments to cease
- ★ On May 22, Politico reported that the Administration is seeking another 90-day delay in the lawsuit

## *House v. Price*

### ♦ Why this case matters to employers?

- > If the court rules that there is no appropriation for the CSRs, the Exchanges will collapse—if the ACA requires that the insurance carriers include the cost sharing reductions but there is no federal money to reimburse the insurance carriers, then the insurance carriers will leave the Exchanges
- > If there are no Exchanges, more individuals will look to their employers for coverage
- > If there are no Exchanges, the pre-65 retirees will look to their former employers for coverage
- > If the Exchanges collapse, the Democrats will have to work with the Republicans on a replacement plan for the ACA



# In Summary— Back to Employer Plans

## Summary

- ✦ Given the complexity of the reconciliation rules, competing ideologies in Congress regarding healthcare, and other legislative and political issues, it is impossible to speculate if—or when—any ACA-replacement legislation will reach the President’s desk for signature
  - > Such a bill, however, likely will not be the AHCA
- ✦ There is a possibility that the Senate will release its replacement bill by the end of May, but it might take until as late as August
- ✦ The GHP-related replacement provisions have attracted comparatively less controversy in the media, but reconciliation rules arguably limit Congress’ ability to pass a bill with only those provisions
  - > These changes on their own likely would not comply with the instructions in the budget resolution, which mandate a certain level of spending decreases
- ✦ Bipartisan legislation remains possible, the likelihood of which may depend on the stability—or instability—of the individual insurance market

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