



# ALSTON & BIRD

## Health & Welfare Benefits

Monthly Update





# HEALTHCARE REFORM: DÉJÀ VU ALL OVER AGAIN

FEBRUARY 2, 2017



# Agenda

- Repeal/Replace Activities
  - Executive Order(s)
  - Reconciliation Activity to Date
- Health Care Reform Proposals
  - Trump Campaign proposals
  - Empowering Patients First (Price)
  - Patients' Choice Act (Ryan, et al)
  - Other Proposals
- Similarities/Broad Brush Conclusions
- The “Dirty Dozen of ACA” and How they may Fare



# ACA Executive Order (1/20/17)

- “To the extent permitted by law”, the heads of tri-agencies will:
  - exercise all authority to waive, defer, grant exemptions from or delay the implementation of any provision of ACA that imposes a fiscal burden
  - Exercise all authority to give flexibility to States
  - Encourage development of free and open market for health insurance
- Agencies must comply with APA where required
- What exactly does the order do?



## Other Executive Action

- “Freeze” Memo (1/20/17)
  - Send no regulation to OFR
  - Withdraw regulations sent but not published
  - Postpone regulations published but have not taken “effect”
- Regulatory Costs Order (1/30/17)
- What health plan related regulations/rules are affected?





# Health Care Reform Proposals

- President Trump's Campaign Proposal
- 2015 Reconciliation Bill (vetoed by President Obama)
  - 2017 Reconciliation bill not yet introduced
- Patient Freedom Act of 2017 (S 191)—Cassidy/Collins
- A Better Way: Health Care (2016 Ryan Outline of proposal)
- Obamacare Replacement Act (S. 222)-Rand Paul's proposal
- Empowering Patients First (2015 Price proposal)
- Other Proposals



# 2015 Reconciliation Bill

- Highlights:
  - Repealed premium tax credit/subsidies after 2 years
  - Eliminated penalties for individual mandate and employer shared responsibility provisions
  - Repeals optional Medicaid expansion
  - Repeals Cadillac Tax
  - Reduces HSA distribution excise tax from 20% to 10%
  - Repeals Health FSA salary reduction limitation
  - Removes prescription requirement for OTC drugs
  - Reverses tax changes made to RDS program
  - Eliminate Transitional Reinsurance Contribution and prohibit distribution of reinsurance



# A Better Way--Ryan

- Improve/expand HSAs
- Refundable tax credit for all Americans (adjusted for age) except those eligible for employer sponsored health coverage/excess can be contributed to HSA
- Cap on 106 tax exclusion for employer provided accident and health coverage
- Purchase individual market coverage across state lines
- Expand “association” plans
- No pre-existing condition exclusions
- Coverage for dependent children to age 26





# Empowering Patients First Act--Price

- Repeal ACA ENTIRELY
- Refundable tax credit (excess can be applied to HSA)
- Cost sharing subsidies to certain individuals—one time credit to HSA
- Expand/improve HSAs
- Pre-existing condition exclusions permitted absent continuous coverage
- Expand association health plans
- Purchase individual coverage across state lines
- Cap 106 exclusion
- Dependent coverage to age 26



# Patient Freedom Act—Cassidy/Collins

- Maintains essential consumer protections (no pre-ex, dependent coverage to age 26, no annual or lifetime dollar limits on EHBs, etc)
- State flexibility:
  - Obamacare
  - Market based system using federally funded Roth HSAs
    - Funded through refundable, tax credits
    - State or Feds may administer
  - Self-guided system with no federal funding
- Price Transparency
  - Limits cost for OON emergency services
  - Limits the cost of prescription drugs provided by OON hospitals
  - Providers must post prices for services



# Obamacare Replacement Act-Paul

- Repeals:
  - Individual and employer mandates
  - Community rating restrictions
  - EHB requirement
  - MLR
  - “Other” insurance mandates
- Pre-ex permitted absent continuous coverage (One time, 2 year open enrollment window)
- Universal deduction on both income and payroll taxes for health coverage (regardless of whether individual or group coverage)
- HSA expansion/improvements
- Purchase individual coverage across state lines
- Association health plans—treat as large, single employer plans
- Stop loss is not health insurance



# Similarities/Broad Brush Conclusions

- Parts of ACA repealed
  - Individual and employer mandate,
  - Exchange coverage and premium tax subsidies (but likely delayed)
- Parts of ACA retained
  - Age 26, lifetime caps, age rating (modified to 5:1)
  - Prohibition on pre-existing conditions (modified for coverage continuity)
- HSAs given a big boost
- More flexibility with regard to employer plan design
- Less “dependence” on employer based coverage
  - Tax credits
  - Tax incentives for individual policies
  - Cross state insurance marketing
- Likely cap on employee exclusion for employer provided health care
  - Cadillac tax repeal may be delayed as bargaining chip





# Dirty Dozen of ACA and How they May Fare

- Individual Mandate
- Premium Tax subsidies
- Employer Mandate (IRC 4980H)
- ACA Reporting (IRC 6055/6056)
- Market Reform Coverage Mandates (IRC 4980D)
- Risk Redistribution
- Cadillac Tax (IRC 4980I)
- ACA 1557 and Required Notices
- Limitations on Employer Funded Individual Policies and HRA Design
- FSA Limitations Under ACA
- Wellness Program Rules
- Other Requirements (PCORI, etc)




# Individual Mandate/Premium Tax Subsidies

- Exchange repeal timing will be tricky as Congress will attempt to avoid a massive loss of coverage
  - Phase-in
  - Adverse selection and minimal coverage headaches
- House “Stop-Gap” proposals: Exchange Stabilization Bills
  - Health Coverage State Flexibility Act of 2017 (shorten 90 day grace period)
  - State Age Rating Flexibility Act (expand underwriting spread from 3:1 to 5:1)
  - Plan Verification and Fairness Act (Verifies special enrollment eligibility)
  - Preexisting Conditions Protection and Continuous Coverage Incentives Act
- Premium tax subsidy likely will be replaced by tax credit for those who elect qualifying coverage
  - Voluntary choice (“backpack” for health care)
  - Likely capped
  - Unclear how “qualifying coverage” will be determined



# Employer Mandate (IRC 4980H)

- So-called pay or play rule will likely see its demise as part of Reconciliation
  - More freedom with respect to:
    - Eligibility determinations
    - Contribution determinations
    - Benefits provided under plans (less onerous MV requirement)
  - But not really carte blanche with regard to eligibility/contributions
    - IRC 105(h) for self insured plans
    - VEBA nondiscrimination rules
    - Cafeteria plan nondiscrimination rules
    - Insurance carrier limitations on
  - MEC only plans not likely necessary any longer
- What about pesky reporting (next slide)



# ACA Reporting (IRC 6055/6056)

- Unclear if will be repealed immediately
  - Reporting vehicle likely required if phase out premium tax subsidies
  - Reporting vehicle likely necessary for tax credits
  - Reporting vehicle may be needed to cap employee exclusion for health care
- Possible simplified reporting and/or relaxation of penalties
  - Remember Sledgehammer/Tackhammer under IRC 4980H will likely be repealed





# Market Reform Coverage Mandates

- Likely that mandated coverage packages will be revisited. Affecting requirements such as
  - Preventive care
  - EHBs for fully insured plans (and MV for self funded plans)
  - OOP limitations
- Action will foster growth for “less complete” benefit packages
  - Mini-med plans may resurge



# Risk Redistribution

- ACA is full of risk shifting and subsidies
  - Reinsurance fee (expired)
  - Sector fee on insurance business
  - Limitations on underwriting based rating
    - Small group: geography, tobacco use, age 3:1
  - Risk pooling in/out of exchanges
  - Premium tax subsidies
- Some argue that some market subsidies necessary to transition market out of ACA
- Redistribution mechanism likely repealed/modified
  - With exception of some form of high risk pool maintained by states



# Cadillac tax (IRC 4980I)

- Recap
  - Effective 2020 a 40% excise tax imposed on excess cost of health coverage imposed on health coverage providers
  - Applies to insurance, self insurance, FSA and HSA contributions
  - Expected \$80B+ revenue
- Bipartisan and Business support repeal
- Repeal may be delayed/made contingent on cap on employee exclusion for employer provided health coverage (\$12,000/30,000)
  - Impact very similar to Cadillac tax, with “cost” imposed directly on employee
  - HSAs likely exempt



# ACA 1557 and Required Notices

- Recap:
  - Prohibition on “discrimination” with regard to age, national origin, sex, gender, gender identity, etc with respect to health care
  - Rather onerous notice (15 taglines) and appeal requirements
- Substantive and procedural requirements may be subject to repeal
  - Underlying Civil Rights Act provisions would separately apply





# Limitations on Employer Funded Individual Policies and HRA Design

- Recap: IRS guidance (Notice 2013-54 and final regulations) prohibit employer involvement with individual major medical coverage and restrict HRA plan design to certain integrated and excepted benefit HRAs
- Cures Act allows certain non-ALE employers to adopt an HRA that can be used to fund individual medical policies
  - Congress may consider broader expansion (increase coverage)
- Possible ACA limitations on HRAs that may be undone
  - Prohibition on stand-alone HRAs
  - Limitation on HRAs to those with MV coverage



# Health FSA Limitations Under ACA

- Following ACA-imposed changes may be reconsidered:
  - \$2500 cap on health FSA salary reductions
    - Query: What is potential impact on \$500 carryover
  - Prohibition on OTC reimbursement without an Rx
  - Prohibition on stand-alone general purpose FSA
  - Imposition of Cadillac tax on health FSA benefits



# Wellness Program Rules

- ACA rules codified and expanded HIPAA wellness program rules
  - 30% (rather than HIPAA 20%) cap on health standard based wellness program incentive
  - Unclear whether/how repeal/replace would impact these rules
- EEOC Rules under ADA and GINA
  - 30% cap on any disability based inquiry
  - Additional notice and administration requirements
  - House Republican Blueprint would repeal these rules



# Other Provisions

- PCORI
- Within Congressional Review Act time frame
  - Final disability claim regulations
  - Proposed Form 5500 regulations
  - Final premium tax credit regulations