

NEARLY A DECADE LATER, THE ACA IS...

Panel

Barb Klever, Chairperson, Academy Individual & Small Group Markets Comm.

Jason Karcher, Member, Academy Individual & Small Group Markets Comm.

Ryan Mueller, Member, Academy Individual & Small Group Markets Comm.



AMERICAN ACADEMY of ACTUARIES

Objective. Independent. Effective.™

Agenda

- 1 Background**
- 2 Legislative Changes**
- 3 Regulatory Hurdles**
- 4 Litigation**
- 5 Future Challenges?**



AMERICAN ACADEMY *of* ACTUARIES

Objective. Independent. Effective.™

© 2019 American Academy of Actuaries. All rights reserved.
May not be reproduced without express permission.

Agenda

- 1 Background**
- 2 Legislative Changes**
- 3 Regulatory Hurdles**
- 4 Litigation**
- 5 Future Challenges?**



AMERICAN ACADEMY *of* ACTUARIES

Objective. Independent. Effective.™

© 2019 American Academy of Actuaries. All rights reserved.
May not be reproduced without express permission.

Background: The ACA—What Is It?

- The Patient Protection and Affordable Care Act (PPACA) was signed into law on March 23, 2010, and was amended via the Health Care and Education Reconciliation Act of 2010 on March 30, 2010.
- The law is broad in scope, but its primary aim was to provide access to expanded health coverage through three aims:
 - Guaranteed issue and a prohibition on rating for health status.
 - Subsidized coverage for lower-income individuals and expansion of Medicaid.
 - Mandated individuals to maintain coverage and every large employer to offer coverage—or penalty.
- Other major features of the law included:
 - Closing of the Medicare Part D “donut hole.”
 - Increased federal spending on Children’s Health Insurance Program (CHIP) and Medicaid.
 - Numerous taxes and fees to fund the increased costs of federal subsidies.
 - The creation of the Center for Medicare and Medicaid Innovation.
 - No-cost preventive care and more consumer protections.

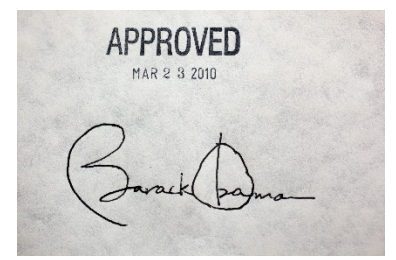


AMERICAN ACADEMY of ACTUARIES

Objective. Independent. Effective.™

© 2019 American Academy of Actuaries. All rights reserved.
May not be reproduced without express permission.

Background: 2010–2013



- Many popular provisions took effect soon after passage, including the prohibition of annual and lifetime dollar limits, coverage of preventive services without cost-sharing, and required coverage of dependents to age 26.
- Other provisions eventually were repealed/defunded:
 - Repealed the Community Living Assistance Services and Supports (CLASS) Act—would have created a public long-term care insurance program, but was deemed unworkable.
 - Defunding of “Consumer Operated and Oriented Plan” program (CO-Ops)—cuts in funding to programs and agencies implementing the Affordable Care Act (ACA).
- Legal problems out of the gate: *NFIB v. Sebelius*
 - The final ruling ultimately upheld the basic structure of the law, including the individual mandate as a tax, but struck down mandatory nature of Medicaid expansion and paved the way for future lawsuits.
- Rulemaking was slow in the early going, with many key aspects of the operation of the law not well known in March of 2013.



Background: 2014–2016

- Major ACA provisions became effective January 1, 2014, in the individual and small group markets.
- Issues with the implementation of marketplaces resulted in an open enrollment period ending in mid-April for the individual market.
- Transitional policy was announced on November 14, 2013, after 2014 premiums were determined.
- Risk corridor program and budget neutrality
 - In the 2014 Notice of Benefit and Payment Parameters, Department of Health and Human Services (HHS) confirmed that “the risk corridors program is not statutorily required to be budget neutral.”
 - In December 2014, Congress passed an appropriations rider that prohibited HHS from paying out more in risk corridors payments than it collects.
- In 2015, Congress amended the definition of small employer to mean employers with up to 50 employees, while giving states the option to expand the definition to include employers with up to 100 employees.
- Repealed an ACA provision which would have required employers with more than 200 full-time employees to automatically enroll their employees in health coverage, unless the employees opted out, and to keep them enrolled.
- On May 12, 2016, a U.S. District court ruled that the cost-sharing reduction (CSR) subsidies do not have permanent funding in the legislation. The ruling was placed on hold, pending appeal.



Background: 2017 and after

- Since becoming law, a Republican majority in the U.S. House (Jan. 2011–Jan. 2019) voted ~70 times to repeal, defund, or otherwise curb the ACA
 - Culminated in 2017 legislative attempts to “repeal and replace” the ACA, but ultimately failed even with Republican majority in Congress and control of the White House.
 - Other changes have been made into law, while others have only been proposed.
- Regulatory hurdles for the ACA since Executive Order by President Trump October 12, 2017.
 - Association Health Plans, Short-term Limited Duration Insurance, Health Reimbursement Arrangements.
- Federal court cases have been a consistent theme attempting to undermine the law, with mixed results.
 - Major case now is *Texas v. United States*.



Agenda

- 1 Background
- 2 Legislative Changes**
- 3 Regulatory Hurdles
- 4 Litigation
- 5 Future Challenges?



AMERICAN ACADEMY *of* ACTUARIES

Objective. Independent. Effective.™

© 2019 American Academy of Actuaries. All rights reserved.
May not be reproduced without express permission.

Legislative Changes

- Major changes that have become law since enactment:
 - Moratoriums on taxes/fees:
 - Health Insurance Tax (HIT): Suspended for 2019 but set to take effect for 2020.
 - Medical device excise tax: Suspended since 2016 but set to take effect for 2020.
 - Repealed the Independent Payment Advisory Board (IPAB), which was never constituted, but intent was to find savings in Medicare through a 15-member board that would have had power to change the Medicare program without congressional approval.
 - The Tax Cuts and Jobs Act of 2017 zeroed out the ACA's penalty for individuals who do not obtain coverage, effectively eliminating the mandate.
 - Imposition of the "Cadillac tax" on high-cost employer plans has been repeatedly delayed, currently through the end of 2021.



Legislative Changes

- Repeal/Replace Effort of 2017:
 - The American Health Care Act of 2017 (AHCA):
 - House's most substantive repeal and replace effort.
 - Only repeal/replace bill to pass either chamber of Congress.
 - The Better Care Reconciliation Act of 2017:
 - One of many repeal and replace attempts in the Senate.
 - Principles were similar to the AHCA.



Legislative Changes

- Repeal/Replace Effort of 2017 (cont.):
 - Obamacare Repeal Reconciliation Act of 2017:
 - Repeal ACA coverage provisions, but delay the repeal until 2020.
 - The Health Care Freedom Act:
 - Focused on repealing the individual and employer mandates.
 - Graham-Cassidy-Heller-Johnson Amendment:
 - Final Republican attempt to repeal/replace the ACA in 2017.



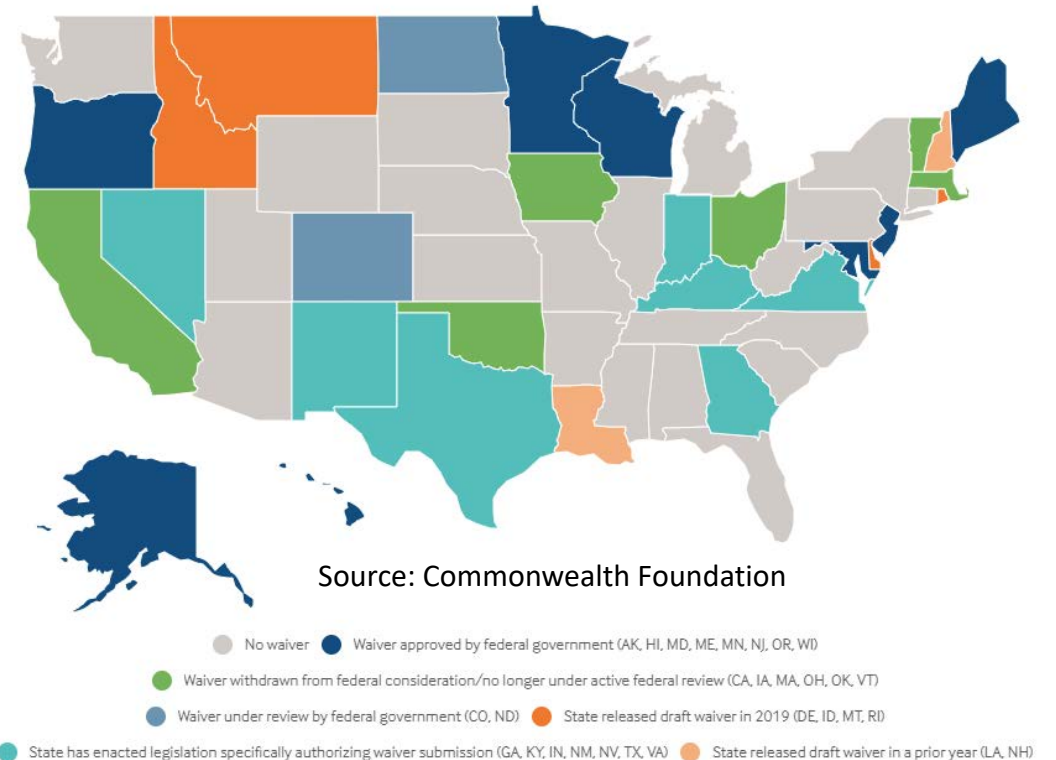
Legislative Changes

- Post-Repeal/Replace Efforts:
 - Alexander-Murray Market Stabilization:
 - Bipartisan effort by leaders of Senate HELP Committee.
 - Included funding for cost-sharing subsidies, changes to Section 1332 waiver rules, restored funding for outreach and enrollment, expanded access to “Copper” plans, authorization of funding for state reinsurance programs, interstate compacts.
 - Stalled in the Senate due to “Hyde language” on abortion policy.



Legislative Changes

- States take the lead:
 - ▣ 1332 Innovation Waivers
 - Reinsurance programs
 - ▣ Individual mandates
 - ▣ Medicaid expansion limits
 - ▣ Other state legislation
 - Expansion of public programs
 - *See Session 69*
 - Restrictions on existing public programs



Agenda

- 1 Background
- 2 Legislative Changes
- 3 Regulatory Hurdles**
- 4 Litigation
- 5 Future Challenges?



AMERICAN ACADEMY of ACTUARIES

Objective. Independent. Effective.™

© 2019 American Academy of Actuaries. All rights reserved.
May not be reproduced without express permission.

Regulatory Hurdles—CSRs

- In October 2017, the Trump administration announced that CSR payments to issuers would cease.
- Issuers responded by building the CSRs into premium rates, subject to state regulatory approval.
 - Methods allowed for building into rates varied by state and included silver loading and broad loading over all metals. A small number of states did not allow loading in 2018.
- Silver loading is the most prevalent method for building CSRs into premium rates. Silver loading results in higher premium tax credits and provides increased access to \$0 or very-low-cost bronze plans.
- The proposed 2020 Notice of Benefit and Payment Parameters (NBPP) requested comments on silver loading for 2021 and beyond.
 - The administration stated that they support a legislative solution that would appropriate CSRs and end silver loading. They requested comments on ways HHS could address silver loading in the absence of congressional action.



Regulatory Hurdles—Executive Order

- Executive Order by President Trump October 12, 2017, directed a three-pronged approach to health care post-legislative repeal/replace attempts.
- Final regulations were released in 2018 that would:
 - Lengthen the maximum duration of short-term limited duration (STLD) plans from three months to 12 months.
 - Expand the availability of association health plans (AHPs).
- Final regulations were released June 13, 2019, that would expand the availability of and uses for health reimbursement accounts (HRAs).



Regulatory Hurdles—STLDI

- ❑ Changes to STLDI took effect October 3, 2018.
- ❑ These plans are not required to follow ACA issue, rating, or benefit coverage requirements.
- ❑ Unhealthy individuals may be denied coverage or charged very high premiums for STLD plans.
- ❑ As a result, STLD plans will be more attractive to lower-cost individuals because of lower premiums for STLD plans compared with ACA-compliant plans.
- ❑ Market segmentation and adverse selection for ACA plans could result, leading to higher premiums for ACA plans.



AMERICAN ACADEMY of ACTUARIES

Objective. Independent. Effective.™

© 2019 American Academy of Actuaries. All rights reserved.
May not be reproduced without express permission.

Regulatory Hurdles—AHPs

- Changes to AHPs were phased in from September 1, 2018, through April 1, 2019.
- The final AHP rule broadened the ability for AHPs to be treated as large groups and allowed self-employed individuals to be eligible for AHPs.
- Large group plans have more flexibility than individual and small group ACA plans regarding rating rules and benefit coverage requirements, potentially creating adverse selection concerns for individual and small group ACA plans.
- To the extent that AHPs are able to create classes of lower-cost self-employed individuals, they may be able to offer lower premiums to these individuals than ACA plans, leading to higher ACA premiums in the individual market.



Regulatory Hurdles—HRAs

- The final rule allows employers that satisfy certain guardrails to provide employees with HRA funds to purchase individual market coverage, or create an excepted benefit HRA that could be used for the purchase of excepted benefits such as STLD coverage, dental coverage, or vision coverage.
- The impact of these rules on the individual market will depend on how effectively the guardrails prevent employers from transferring their most expensive employees to the individual market.



Agenda

- 1 Background
- 2 Legislative Changes
- 3 Regulatory Hurdles
- 4 Litigation**
- 5 Future Challenges?



AMERICAN ACADEMY *of* ACTUARIES

Objective. Independent. Effective.™

© 2019 American Academy of Actuaries. All rights reserved.
May not be reproduced without express permission.

Litigation

- Current major challenges in federal court:
 - *Texas v. United States of America*
 - Individual Mandate
 - *State of New York v. United States Dept. of Labor*
 - Association Health Plans (AHPs)
 - *Association for Community Affiliated Plans v. U.S. Dept. of Treasury*
 - Short-Term Limited Duration Insurance Plans (STLDI)



Litigation

- ▣ *Moda Health Plan Inc. v. United States*
 - Payment of risk corridor receivables
- ▣ *Montana Health Co-op v. United States*
 - Payment of cost-sharing reductions already provided



Litigation

- *Texas v. United States of America*
 - U.S. District Court for the Northern District of Texas
 - Judge O'Connor rules individual mandate no longer constitutional with penalty (tax) set at \$0.00
 - As mandate is essential to the ACA, it cannot be severed from the remaining ACA provisions
 - Entire ACA would be unconstitutional as a result
 - Department of Justice (DOJ) shifts stance, supports legal avenue to invalidate entire ACA
 - 5th Circuit Court of Appeals due to hear oral arguments on appeal in early July
 - Potential U.S. Supreme Court case



Litigation

- *State of New York v. United States Dept. of Labor (DOL)*
 - The U.S. District Court for the District of Columbia vacated key provisions of a rule issued by DOL to broaden the scope and availability of AHPs
 - Judge states rule “was intended and designed to end run the requirements of the ACA, but it does so only by ignoring the language and purpose of both ERISA and the ACA.”
 - Because DOL’s final rule contains a severability clause, allowing provisions that are found to be invalid to be severed from the remainder of the rule, the DOL must now determine whether the rest of the rule can remain in place without the vacated provisions.



Litigation

- *Association for Community Affiliated Plans v. U.S. Dept. of Treasury*
 - Short-term limited duration insurance plans final rule argued by plaintiffs to exceed authority and circumvents purpose of ACA
 - Should be based on three-month short-term coverage gap, not three years—no explanation in final rule given
 - Defendants argue Congress did not define STLDI
 - Oral arguments completed, ruling is pending



Litigation

- *Moda Health Plan Inc. v United States*
 - Attempt to collect amounts owed for the temporary risk corridor program
 - The plaintiffs are seeking compensation despite congressional action that essentially rendered the program budget-neutral
 - Appeals court ruled that risk corridors did not constitute a contract but rather an incentive program and so carriers are not entitled to compensation
 - Petition for certiorari in front of the Supreme Court
 - Related class action on hold pending final disposition



Litigation

- *Montana Health Co-Op vs. United States*
 - Plaintiffs contend issuers are still owed for any cost-sharing reductions provided to consumers
 - Numerous related cases at the district court level, all decided in favor of issuers
 - The risk corridors class action was extended to include CSRs, and is one of the cases with a favorable district court ruling
 - First cases have been docketed at appeals court with hearings pending



Agenda

- 1 Background
- 2 Legislative Changes
- 3 Regulatory Hurdles
- 4 Litigation
- 5 Future Challenges?**



AMERICAN ACADEMY *of* ACTUARIES

Objective. Independent. Effective.™

© 2019 American Academy of Actuaries. All rights reserved.
May not be reproduced without express permission.

Future Challenges

- Court proceedings and appeal process to play out over next year



Future Challenges

- What is the future of the ACA individual market?
 - ▣ Subsidized enrollment is fairly stable and issuer participation may be increasing.
 - ▣ But the ACA has not resulted in universal coverage and there is concern about high premiums for unsubsidized enrollees.
 - ▣ Policymakers of both parties are divided between making improvements to the ACA and completely replacing the ACA.



Related Academy Publications

- Letter to agencies regarding executive order aiming to expand availability of AHPs, short-term plans, and HRAs (November 2017)
<http://www.actuary.org/files/publications/Executive Order Academy Comments 110717.pdf>
- Comments on Association Health Plan proposed regulations (March 2018)
<http://www.actuary.org/files/publications/AHP Comment%20Letter 030518.pdf>
- Comments on Short-term, Limited Duration Insurance proposed regulations (April 2018)
<http://www.actuary.org/files/publications/STLD Comment%20Letter 040618.pdf>
- Comments on Health Reimbursement Arrangements and Other Account-Based Group Health Plans (December 12, 2018)
<https://www.actuary.org/sites/default/files/files/publications/HRA comments 12 13 2018.pdf>
- Comments on (1332) State Relief and Empowerment Waivers Guidance (December 17, 2018)
<https://www.actuary.org/sites/default/files/files/publications/1332 Guidance comments 12 18 18.pdf>



Related Academy Publications

- Letter to Senate on Proposal to Eliminate Individual Mandate (November 21, 2017)
[https://www.actuary.org/sites/default/files/files/publications/Letter to Senate Tax Reform Individual Mandate 11.21.17.pdf](https://www.actuary.org/sites/default/files/files/publications/Letter%20to%20Senate%20Tax%20Reform%20Individual%20Mandate%2011.21.17.pdf)
- Comments on the Graham-Cassidy-Heller-Johnson Proposal (September 22, 2017)
https://www.actuary.org/sites/default/files/files/publications/GCHJ_092217.pdf
- Letter to Senate HELP Committee on Stabilization (September 12, 2017)
[https://www.actuary.org/sites/default/files/files/publications/Letter to Senate HELP Committee 091217.pdf](https://www.actuary.org/sites/default/files/files/publications/Letter%20to%20Senate%20HELP%20Committee%20091217.pdf)
- Letter to Senate on ACA Individual Mandate (July 25, 2017)
[https://www.actuary.org/sites/default/files/files/publications/Academy Letter to Senate Individual Mandate 072517.pdf](https://www.actuary.org/sites/default/files/files/publications/Academy%20Letter%20to%20Senate%20Individual%20Mandate%20072517.pdf)
- Comments on the Better Care Reconciliation Act of 2017 (BCRA) (June 30, 2017)
[https://www.actuary.org/sites/default/files/files/publications/BCRA Comment Letter 063017.pdf](https://www.actuary.org/sites/default/files/files/publications/BCRA%20Comment%20Letter%20063017.pdf)
- Comments on American Health Care Act (AHCA) (March 22, 2017)
[https://www.actuary.org/sites/default/files/files/publications/AHCA comment letter 032217.pdf](https://www.actuary.org/sites/default/files/files/publications/AHCA%20comment%20letter%20032217.pdf)



Questions?



For More Information

David Linn

Senior Health Policy Analyst

American Academy of Actuaries

Linn@actuary.org

202-785-6931



AMERICAN ACADEMY of ACTUARIES

Objective. Independent. Effective.™

© 2019 American Academy of Actuaries. All rights reserved.
May not be reproduced without express permission.