

# The Affordable Care Act

June 8, 2017

# Panelists



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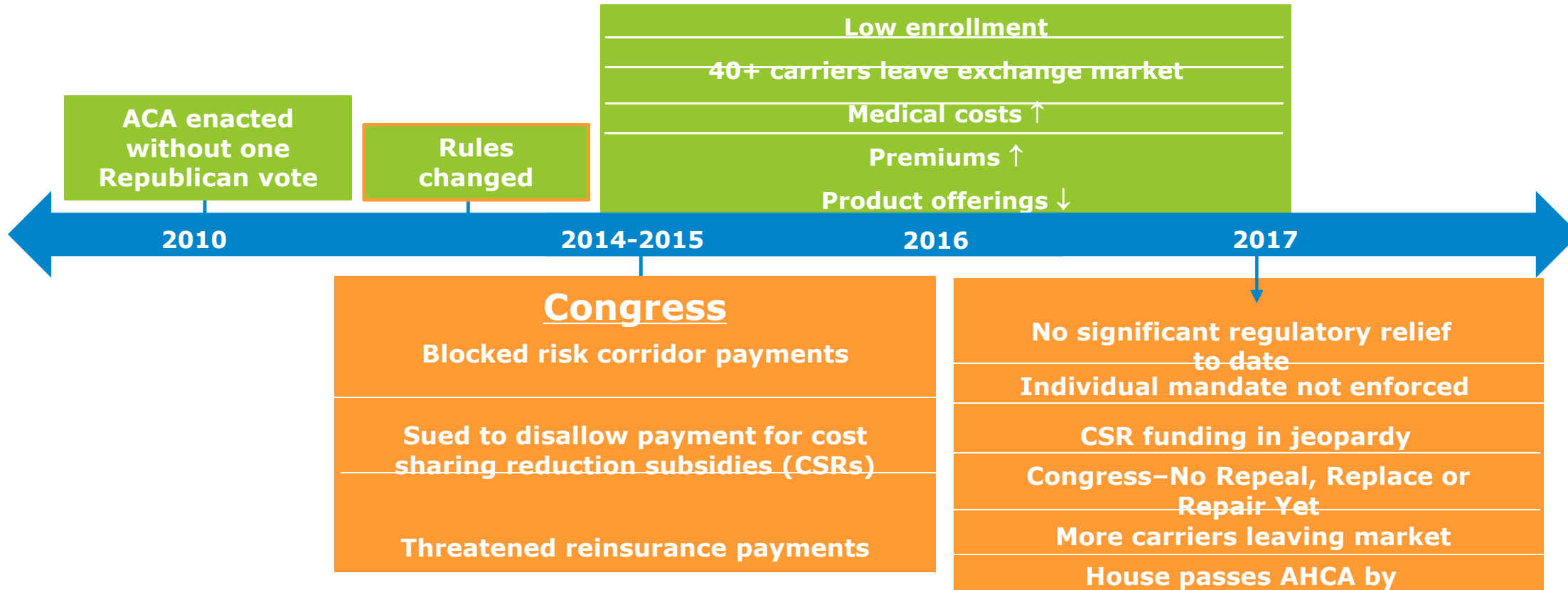
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# ACA: Where are we and what's next?

- Affordable Care Act (ACA) implementation – Where are we?
  - 2014 "full" implementation
  - Regulations drafted during Obama administration
  - Industry experience
- Repeal and replace – Setting the scene
  - American Health Care Act (AHCA)
  - Key bill terms anticipated
  - Industry responses
  - States and exchanges
  - Politics and elections

# ACA: Timeline





# ACA: Six years in

- Patient Protection and Affordable Care Act enacted March 23, 2010; together with the Health Care and Education Reconciliation Act of 2010 (March 30, 2010)—the Affordable Care Act (ACA)
- Single-largest piece of domestic policy legislation since Great Depression
- Insurance market reforms
- Individual and employer mandates
- Creation of 51 health insurance exchanges
- Medicaid expansion and Medicare program changes
- New taxes and fees
- Delivery system reforms

(Continued on following page)

# ACA: Six years in

(Continued from preceding page)

- US Departments of Health and Human Services, Treasury and Labor have implemented the law since 2010
- Dozens of regulations and thousands of pages of regulations
- Sub-regulatory guidance and notices
- Dozens of regulatory delays implemented. Administrative flexibility or politics?

# ACA: Past regulatory delays

- Employer mandate and related employer and insurer reporting obligations
- Initial and annual open enrollment period
- Federal SHOP exchange online enrollment and employee choice
- "If you like your health insurance plan, you can keep it..."
- Basic Health Program (BHP)

# ACA: Industry implementation

- **Big picture:** Federal regulatory law overlaying different state-based regulatory schemes in each state; different definitions of health insurance, exemptions and group vs. individual markets, among others.
- **Current offerings:** Fully ACA-compliant (for plans and policies effective on or after January 1, 2014).
- **New offerings and strategies:** Creative benefit plan designs, partnerships with competitors and other players, private exchanges.
- **Future offerings and strategies?**

# ACA: Trump's executive order

- "Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal"
- Inauguration day timing

# ACA: President Trump's executive order

## EXECUTIVE ORDER MINIMIZING THE ECONOMIC BURDEN OF THE ACT PENDING REPEAL

BY THE AUTHORITY vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. It is the policy of my Administration to seek the prompt repeal of the Patient Protection and Affordable Care Act (Public Law 111-148), as amended (the "Act"). In the meantime, pending such repeal, it is imperative for the executive branch to ensure that the law is being efficiently implemented, take all actions consistent with law 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.

Sec. 2. To the maximum extent permitted by law, the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies (agencies) with authorities and responsibilities under the Act shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.

Sec. 3. To the maximum extent permitted by law, the Secretary and the heads of all other executive departments and agencies with authorities and responsibilities under the Act, shall exercise all authority and discretion available to them to provide greater flexibility to States and cooperate with them in implementing healthcare programs.

Sec. 4. To the maximum extent permitted by law, the head of each department or agency with responsibilities relating to healthcare or health insurance shall encourage the development of a free and open market in interstate commerce for the offering of healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers.

Sec. 5. To the extent that carrying out the directives in this order would require revision of regulations issued through notice-and-comment rulemaking, the heads of agencies shall comply with the Administrative Procedure Act and other applicable statutes in considering or promulgating such regulatory revisions.

Sec. 6. (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

# ACA: AHCA

- March 2017 Ultimatum

President Donald Trump is giving House Republicans an ultimatum: Pass the American Health Care Act on Friday, or Obamacare stays.

Mick Mulvaney, the Office of Budget and Management director, made clear to Republicans on Thursday night that Trump wanted a vote Friday and that he was done negotiating on the bill to overhaul healthcare. If it is not passed, the president **will move on from the bill**, reports said.



President Donald Trump. AP

- Source: <http://www.businessinsider.com/trump-healthcare-pass-ahca-obamacare-2017-3>

# ACA: AHCA

- April 20 press: Accomplish repeal-and-replace by week ending April 29

## ***The Atlantic* Politics & Policy Daily: Repeal and Replace: Reloaded**

President Trump said he'd like to pass a health-care reform bill by the end of next week.



Kevin Lamarque / Reuters

Source: <https://www.theatlantic.com/politics/archive/2017/04/the-atlantic-politics-policy-daily-repeal-and-replace-reloaded/523785/>



# ACA: AHCA

- "MacArthur Amendment"
- Dated April 13, 2017, published April 20, 2017

## Insurance Market Provisions

The MacArthur Amendment would:

- Reinstatement of Essential Health Benefits as the federal standard
- Maintain the following provisions of the AHCA:
  - 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
  - Community Rating Rules, except for limited waivers

## Limited Waiver Option

The amendment would create an option for states to obtain Limited Waivers from certain federal standards, in the interest of lowering premium costs and expanding the number of insured persons. States could seek Limited Waivers for:

- Essential Health Benefits
- Community rating rules, except for the following categories, which are **not** waivable:
  - Gender
  - Age (except for reductions of the 5:1 age ratio previously established)
  - Health Status (unless the state has established a high risk pool or is participating in a federal high risk pool)

## Limited Waiver Requirements

States must attest that the purpose of their requested waiver is to reduce premium costs, increase the number of persons with healthcare coverage, or advance another benefit to the public interest in the state, including the guarantee of coverage for persons with pre-existing medical conditions. The Secretary shall approve applications within 90 days of determining that an application is complete.

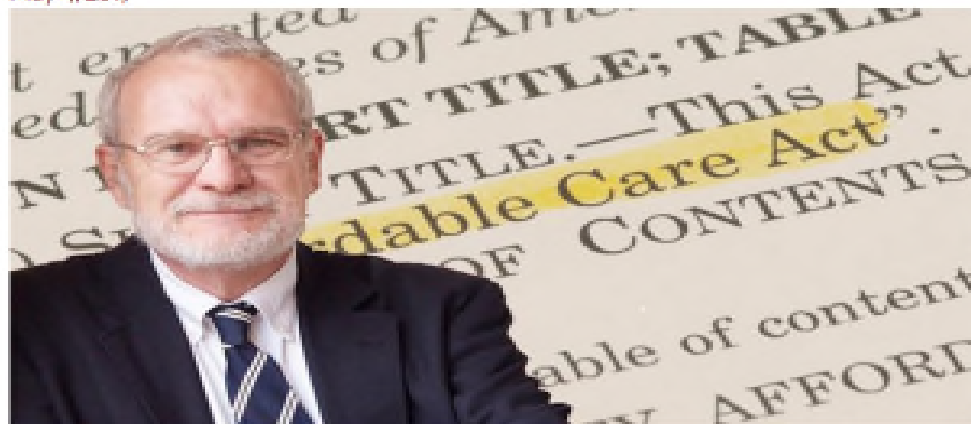
# ACA: AHCA

## Health Affairs Blog

### House Passes AHCA: How It Happened, What It Would Do, And Its Uncertain Senate Future

Timothy Jost

May 4, 2017



On May 4, 2017 the House of Representatives passed the American Health Care Act (AHCA) by a near party-line vote of 217 to 213. The AHCA was first introduced in the House on March 6, 2017 in response to the long-standing promise by Republican members of Congress to repeal the Affordable Care Act.

# Heartland Insurance Symposium 2017



Congressional Budget Office

Nonpartisan Analysis for the U.S. Congress

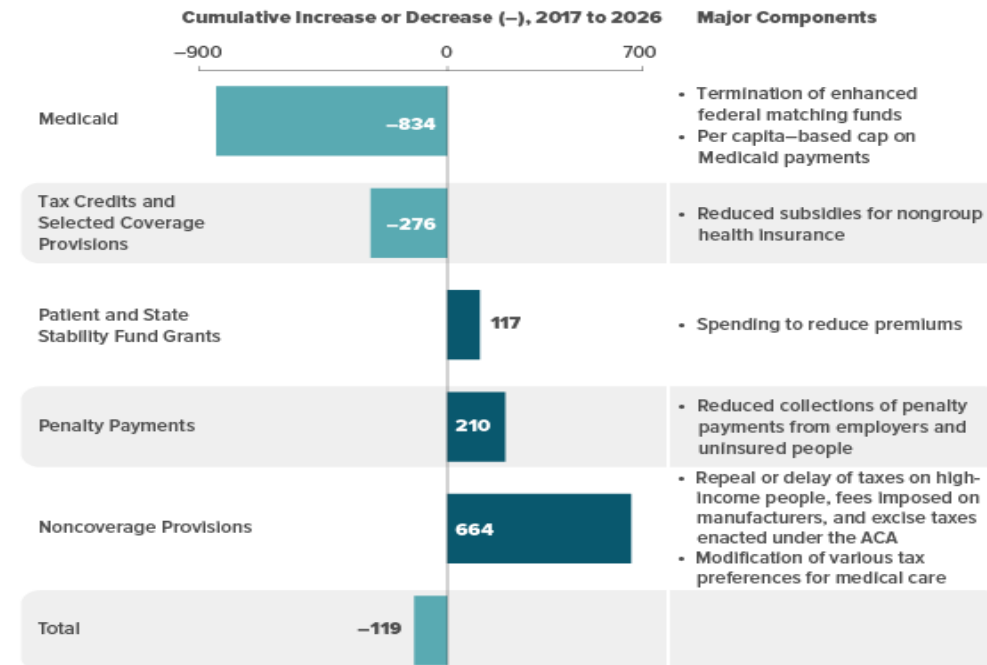
## H.R. 1628, American Health Care Act of 2017

May 24, 2017 | Cost Estimate

CBO and JCT estimate that enacting the American Health Care Act would reduce federal deficits by \$119 billion over the coming decade and increase the number of people who are uninsured by 23 million in 2026 relative to current law.

## Net Effects of H.R. 1628 on the Budget Deficit

Billions of Dollars



Sources: Congressional Budget Office; staff of the Joint Committee on Taxation.

These estimates are for H.R. 1628, the American Health Care Act of 2017, as passed by the House of Representatives on May 4, 2017.

ACA = Affordable Care Act.

CONGRESSIONAL BUDGET OFFICE

MAY 2017

# Heartland Insurance Symposium 2017

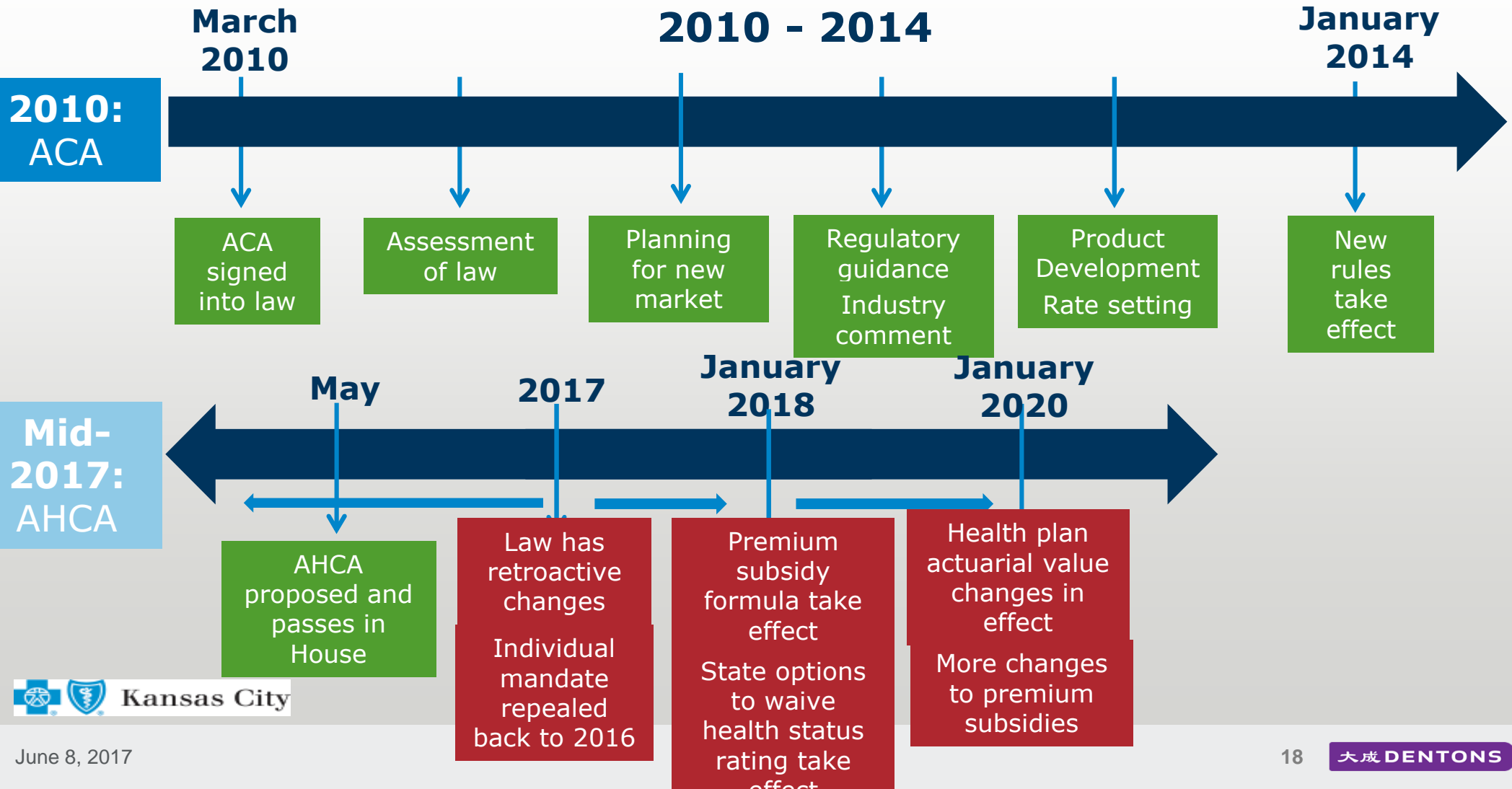
- Industry Implementation
  - **Big Picture.** Federal regulatory law overlaying different state-based regulatory schemes in each state; different definitions of health insurance, exemptions, and group vs. individual markets, among others.
  - **Current Offerings.** Fully ACA-compliant (for plans and policies effective on or after January 1, 2014).
  - **New Offerings and Strategies.** Creative benefit plan designs, partnerships with competitors and other players, private exchanges.
  - **Offerings and Strategies post-AHCA?**

# Repeal and replace




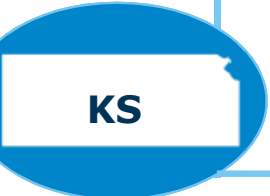
American Health Care Act heightens unpredictability for 2018

# Legislative runway: then vs. now




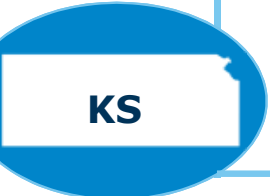
# 2014 ACA individual market

Two carriers enter – Blue KC and Coventry

		Blue KC	Cigna	Humana	Aetna/ Coventry	UHC	Medica
 MO	Metro	✓			✓		
	Rural	✓			✓		
 KS	Jo/Wy	✓			✓		

# 2015 ACA individual market


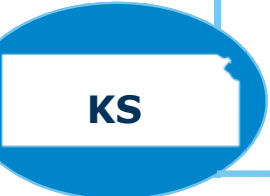
## Humana enters in the MO metro

		Blue KC	Cigna	Humana	Aetna/ Coventry	UHC	Medica
 MO	Metro	✓		✓	✓		
	Rural	✓			✓		
 KS	Jo/Wy	✓			✓		




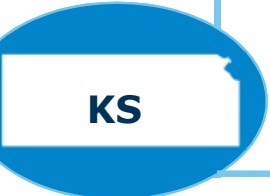
# 2016 ACA individual market

Coventry exits KS; United enters in KS and MO

		Blue KC	Cigna	Humana	Aetna/ Coventry	UHC	Medica
 MO	Metro	✓		✓	✓	✓	
	Rural	✓			✓	✓	
 KS	Jo/Wy	✓				✓	

# 2017 ACA individual market

United and Coventry exit KS & MO; Medica enters in KS and Cigna enters in MO

		Blue KC	Cigna	Humana	Aetna/ Coventry	UHC	Medica
 MO	Metro	✓	✓	✓			
	Rural	✓					
 KS	Jo/Wy	✓					✓

# 2108 ACA individual market

## Humana and Blue KC exit

		Blue KC	Cigna	Humana	Aetna/ Coventry	UHC	Medica
 MO	Metro		?				
	Rural						
 KS	Jo/Wy						?

# Landscape for 2018 remains in flux



- **There are few confirmed decisions for 2018**

- Humana – Complete market exit in Missouri
- Coventry – Complete market exit in Missouri and Kansas
- Aetna – Complete market exit in Missouri and Kansas
- Blue KC – Terminating Individual ACA plans in Missouri and Kansas
- Wellmark Blue Plan – Complete market exit in Iowa
- Nebraska Blue Plan – No longer will sell individual ACA plans



- **Some plans have issued holding statements or announced significant rate increases**

- Anthem threatens departure from ACA if cost-sharing reduction funding isn't provided – will propose large rate increases



- **It is difficult to predict Carrier Plan decisions for 2018**

- Some plans will continue in the market with increased rates
- Other plans may choose to exit the market or reduce their footprint



# Questions

# Thank you

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# State Level Financial Regulation

June 8, 2017

# Panelists



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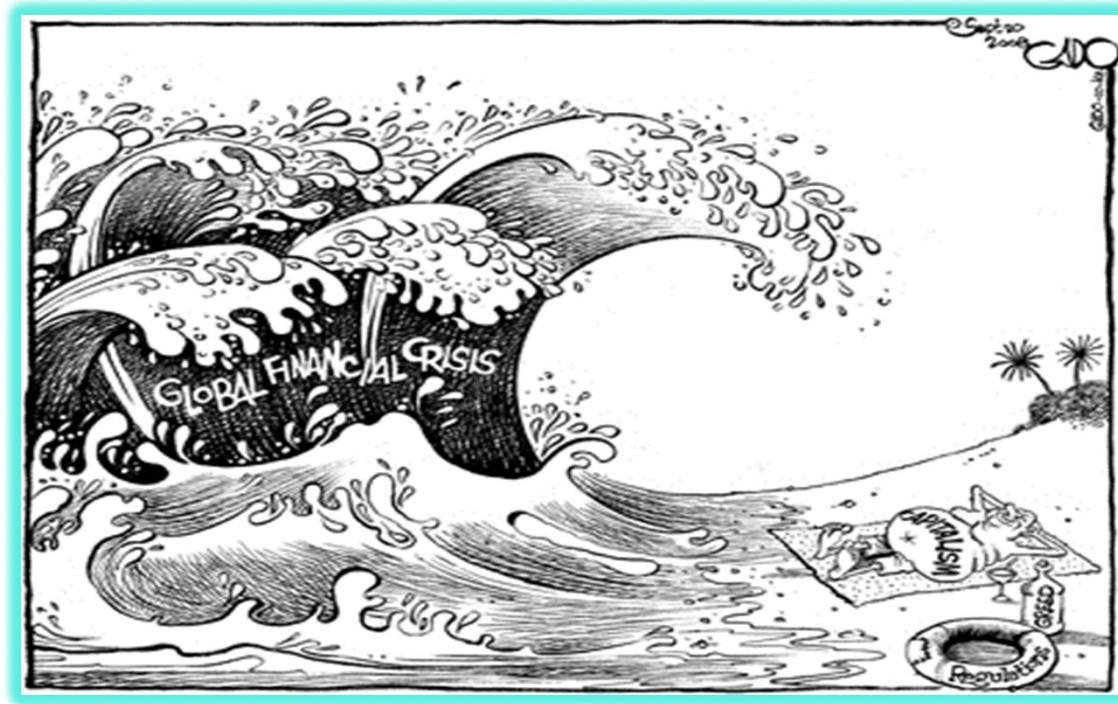
# Background

- State regulators have developed a detailed and uniform financial regulatory system
- In the early 1990s, a number of major changes were made to US framework
  - RBC, accreditation, FAST system, FAWG, etc.
- Continuous improvements since then have resulted in more enhancements
  - Model audit rule, risk-focused exams, uniform statutory accounting



# Background

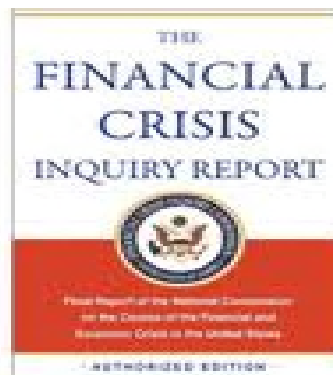
- Given the success of US insurance regulation, why were changes necessary?



# Background



- 2008 financial crisis
  - Fallout
  - Lessons learned
    - Financial Crisis Inquiry Commission
      - “An essential cause of the financial and economic crisis was appallingly bad risk management by the leaders of some of the largest financial institutions in the United States and Europe. Each failed firm that the Commission examined failed in part because its leaders poorly managed risk.”

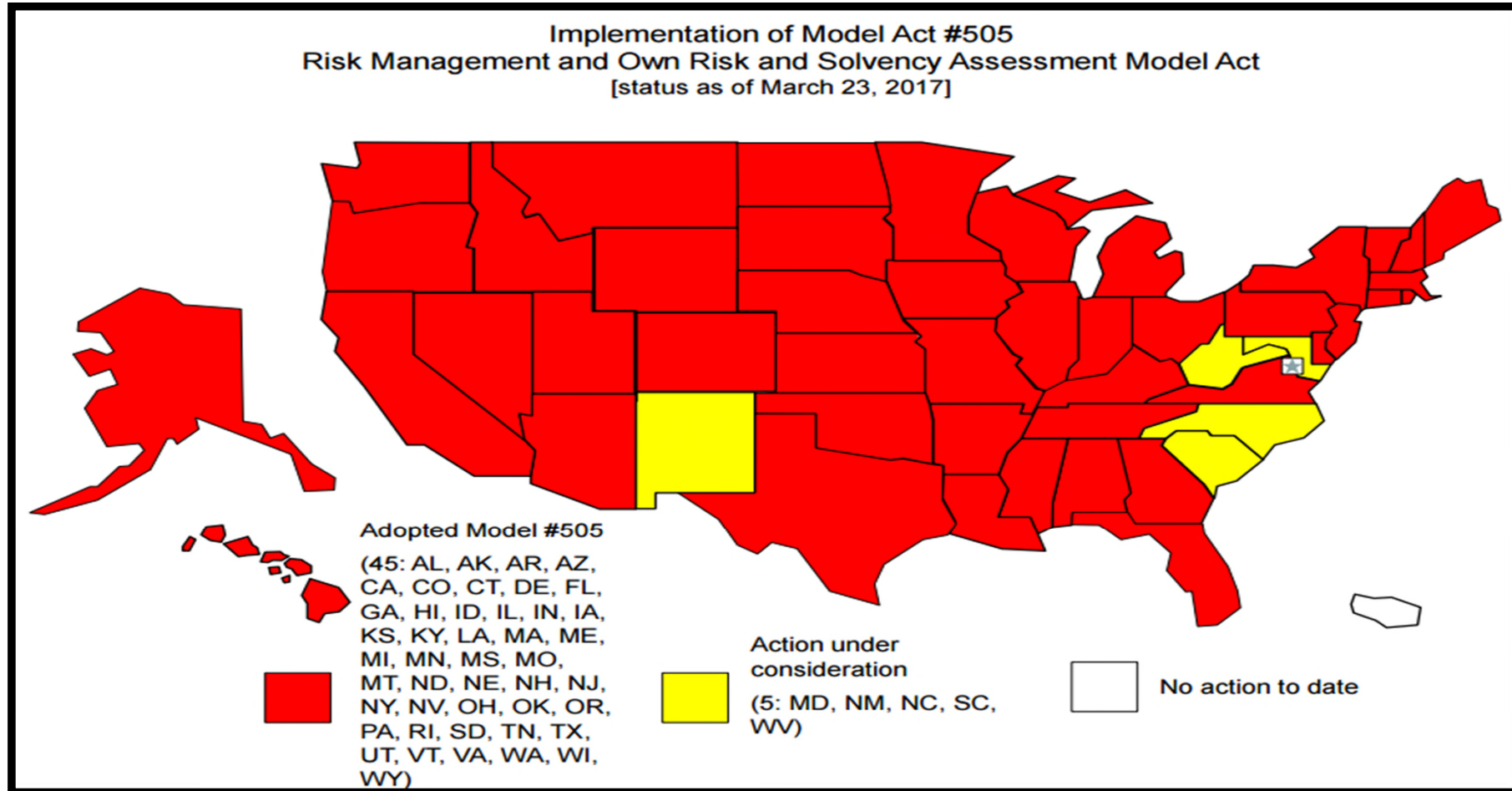


# ORSA requirements

- Risk Management and ORSA Model Act - adopted by NAIC in September 2012
  - Imposes three core requirements on a state's domestic insurers (unless exempt)
    - Maintain a risk management framework
    - Complete an Own Risk and Solvency Assessment (ORSA)
    - File an ORSA Summary Report with the insurance commissioner
  - Effective January 1, 2015
  - Exempts insurers <\$500 million premium, groups <\$1 billion premium



# ORSA adoption

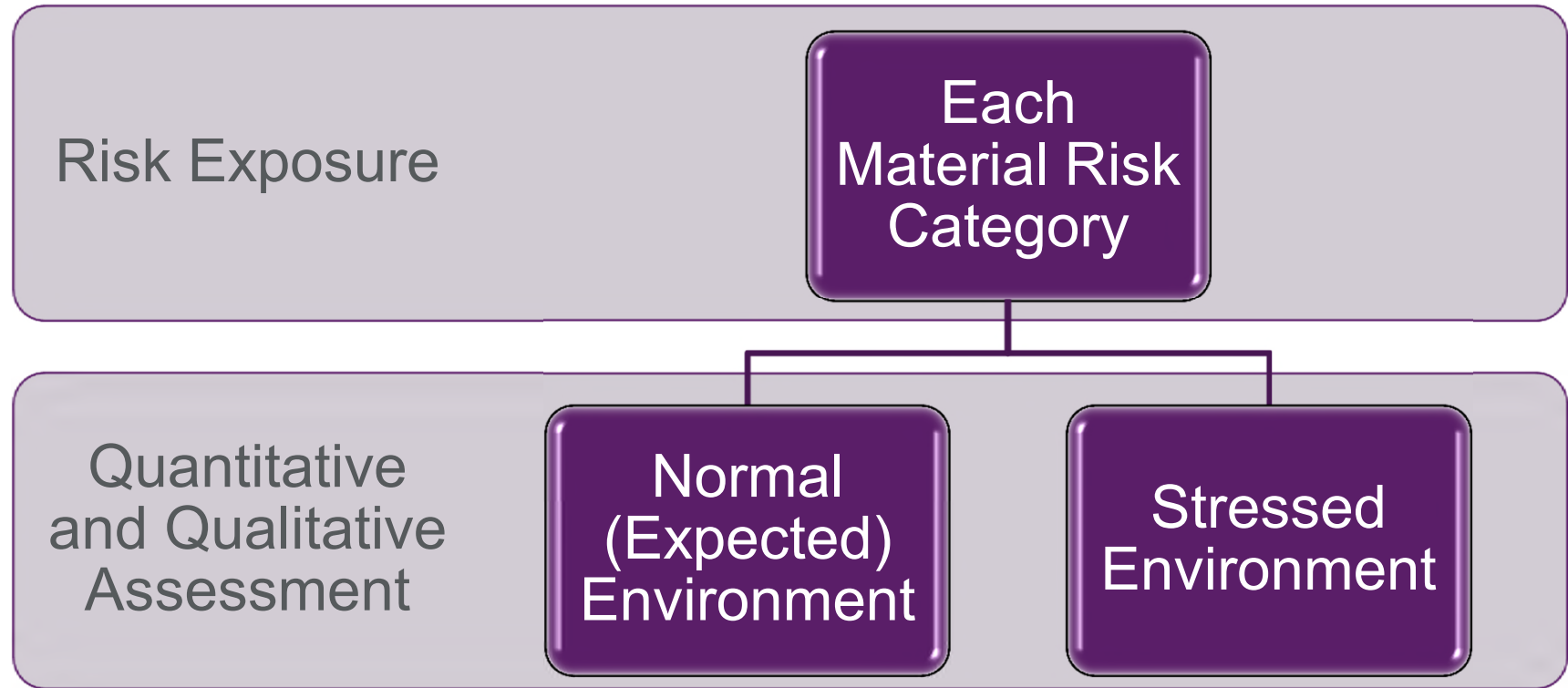


# ORSA requirements

- ORSA Guidance Manual - Adopted by NAIC in March 2012
- Guidance Manual provides the following:
  - Summary Report, at a minimum, should discuss:
    - Section 1 – Description of Insurer's Risk Management Framework
    - Section 2 – Insurer's Assessment of Risk Exposure
    - Section 3 – Group Risk Capital and Prospective Solvency Assessment
  - ORSA Summary Report may be provided in any combination as long as all insurance legal entities within the group are represented
  - Regulators will use the ORSA Summary Report to gain a high-level understanding of the group's ERM processes



## ORSA – Section II



# ORSA: Section III



Section 3 combines the qualitative elements of risk management policy with the quantitative measures of risk exposure to determine the level of financial resource needs.



# ORSA: impact on all insurers

- While the performance of an ORSA and filing of an ORSA Summary Report is only required of large insurers, all companies will be impacted by increased regulatory focus in this area
  - Risk-Focused Exam and Analysis process will spend more time reviewing ERM processes and evaluating prospective risks
  - All companies should be prepared to discuss their risk management activities with regulators

# Corporate Governance

Process to identify necessary enhancements:



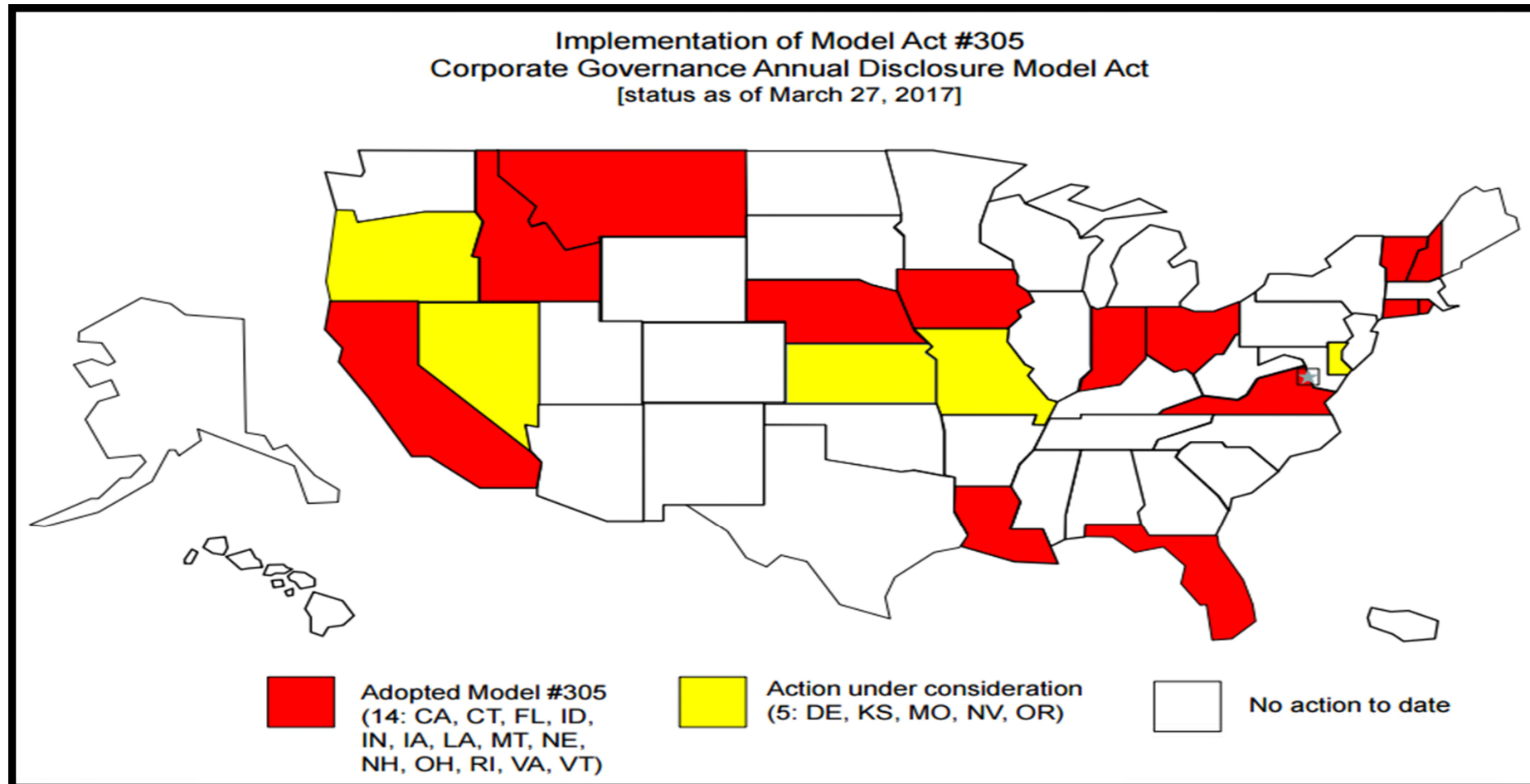
# Corporate Governance

- Annual collection of information on company CG practices
  - *Corporate Governance Annual Disclosure Model Act* developed to authorize confidential collection of information:
    - Applicable to all US insurers (no exemptions)
    - Disclosure to be filed annually to domestic or lead state regulator by June 1
    - Flexibility in level at which information is to be provided (ultimate parent, holding company or insurer)
    - Ability to reference information provided in other filings (e.g. SEC Proxy Statement, ORSA Summary Report, etc.)

# Corporate Governance

- *Corporate Governance Annual Disclosure Model Regulation* developed to outline detailed instructions for disclosure:
  - Instructs insurers to update disclosures each year to show changes from prior year
  - Insurers are required to provide information in the following areas:
    - Corporate Governance Framework & Structure
    - Board of Directors Policies & Practices
    - Management Policies & Practices
    - Oversight of Critical Risk Areas

# Corporate Governance adoption



# CG: impact on all insurers

- All insurers will be required to file annual disclosures with regulators
  - Disclosures allow companies to demonstrate the effectiveness of their governance practices
  - Regulators will incorporate disclosure information into solvency monitoring processes
    - Financial analysis will be more involved
- Regulators have authority to require corrective action if significant governance concerns are identified

# Discussion

- ORSA, ERM, CGAD
- Best (and worst) corporate governance practices
- Insurers should do more of...
- Insurers should please stop...
- How do regulators approach applications?
- Looking forward



# Questions



# Thank you

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# The DOL Fiduciary Rule after Trump's first 100 days

T. David Cowart

June 8, 2017

# Purposes of the New Rule

- Make an agent (or advisor) into a fiduciary, called an “***Investment Advice Fiduciary***;”
- Create a conflict of interest in the agent's advice and compensation;
- Make the agent liable for excise taxes (and sometimes damages);
- Make the supervisory broker (and further upstream) liable, too; and
- Create a distance between investment advisors and their retirement clients.

By so doing, the central aim is to transform the way investment advisors to IRAs (and some small ERISA plans) are paid.

# The Problem: Exposure

- Exposure (from making no changes) depends upon the retirement vehicle involved in the transaction.
- *If it is an IRA -*
  - (1) The agent (and maybe his affiliated broker and financial institution) will be liable for a two-tiered, annual excise tax to the IRS for engaging in a prohibited transaction. There is also a risk of disqualifying the IRA.  
*Code § § 4975, 408(e)(2)*
  - (2) The excise tax grows geometrically over time, and after only a few years can be very expensive. Because it renews itself annually, it can go on for years without a normal limitations defense.
  - (3) The excise tax can be stopped only by correcting the prohibited transaction, which involves undoing the transaction. It is a self-assessing tax.
  - (4) The cost and necessity of correction can make the agent and others into guarantors of investments.
  - (5) But, ERISA will not complicate the risk. This new regulation applies but only under the Internal Revenue Code. *§ 2510.3-21(f)*

# Exposure

- *If it is an ERISA plan -*
  - (1) The described excise tax exposure to the IRS is there, plus
  - (2) ERISA will also apply, making the agent (and more easily, his affiliated broker and financial institution) personally liable for (i) damages arising from either breaching applicable fiduciary duties or engaging in transactions prohibited by ERISA and (sometimes) (ii) restoring profits realized from the breach or prohibited transaction.
  - (3) Correction under ERISA also involves reversing the prohibited transaction. Correction under ERISA and correction under the Internal Revenue Code are not necessarily the same thing.

# Delays

A Presidential Memorandum was directed to the Secretary of Labor on February 3, 2017. (82 Fed. Reg. 9675)

The Presidential Memorandum told the Secretary of Labor

- To determine whether the restated investment advice fiduciary rule might adversely affect how Americans gained access to retirement savings and financial advice; and
- To prepare an updated economic and legal analysis concerning the impact of the restated fiduciary rule, considering three specifically enumerated criteria.

Then, if the Secretary of Labor concluded at least one enumerated detriment existed or that the fiduciary rule was inconsistent with the Administration's stated priorities, the Secretary was required to publish "a proposed rule rescinding or revising" the fiduciary rule.

On February 3, the Secretary of Labor committed to "consider[ing] its legal options to delay the applicability date...".

# Delays

After publishing proposed changes on March 2, 2017 (82 Fed. Reg. 12319) that would amend both the final regulation and the related PTEs released with the final regulation on April 8, 2016, amendments were published on April 7, 2017 (82 Fed. Reg. 16902). The changes to the 2016 package of regulatory and PTE guidance (the “final rule”)

- amended Labor Regulations section 2510.3-21 to remove “April 10, 2017” and to substitute “June 9, 2017” as the regulatory applicability date in the three places the date appeared in the regulation.
- amended Best Interest Contract Exemption (the “BICE”) to (i) change the applicability date of the BICE to June 9, 2017; (ii) relax the applicability of the Level Fee Fiduciary exception in the BICE during transition; and (iii) allow enhanced access as a Level Fee Fiduciary for robo-advice providers.
- amended the “Transition Period” requirements in BICE Section IX to (i) run from June 9, 2017 to January 1, 2018, (ii) apply the transitional Impartial Conduct Standards beginning June 9, 2017; and (iii) prevent the application of the remaining Transition Period BICE standards during 2017.

# Delays

The changes to the 2016 final rule package of regulatory and PTE guidance also

- amended CPTe 84-24 (i) to change its applicability date to January 1, 2018; (ii) to apply the unique 84-24 Impartial Conduct Standards beginning June 9, 2017; and (iii) to apply needed definitions by June 9, 2017.
- amended a laundry list of other PTEs (that were amended on April 8, 2016) to extend their applicability dates to June 9, 2017).



# Delays

On March 10, 2017, the Department of Labor adapted a temporary nonenforcement policy, promising not to initiate an enforcement action based on a failure to satisfy the regulation or a related PTE “during the ‘gap period’.” *Field Assistance Bulletin No. 2017-01 (March 10, 2017)*

- This enforcement relief was conditioned on the Department’s issuing “a final rule after April 10 implementing a delay in the applicability date.” The delay was issued before April 10.
- The only other circumstance where this policy would apply literally is if “the Department decides not to issue a delay...”. It did issue a delay.
- Does this nonenforcement policy apply?

At roughly the same time, the Treasury Department and the IRS adopted “a temporary excise tax non-applicability policy that conforms with the DoL’s temporary nonenforcement policy described in FAB 2017-01.” The IRS announced it “will not apply § 4975 and related reporting obligations [to] any transaction or agreement to which the DoL’s temporary nonenforcement policy, or other subsequent related enforcement guidance, would apply.” *Announcement 2017-4*

# What to do now?

**If -**

- there is no delay to the January 1, 2018 applicability date;
- there are no significant amendments to the investment advice fiduciary regulation or the related PTEs; and
- neither the investment advice fiduciary regulation nor the BICE (or related PTEs) are repealed; then

**...in the meantime,**

- one set of rules will apply until June 9, 2017;
- a markedly different set of rules will apply from June 9, 2017 through December 31, 2017; and
- another markedly different set of rules will apply beginning January 1, 2018.

The last set of rules beginning January 1, 2018 (and some about the later in 2017 rules) are explained in the rest of these slides.

# Exception to Exposure for Welfare Plans

When applying the new regulation, “investment property” will **not** include -

- health insurance policies;
- disability insurance policies;
- term life insurance policies; and
- other property

to the extent they do **not** have an investment component. § 2510.3-21(g)(4)\*

# Exception for Executing Securities Transactions

A person who is (i) a broker or dealer registered under the Securities Exchange Act of 1933, (ii) a reporting dealer who makes primary markets in certain U.S. government securities or (iii) a bank supervised by the U.S. or a state will **not** be a fiduciary of any sort under ERISA or the Internal Revenue Code solely because the person executes purchase or sale transactions for securities of a plan or IRA as directed by a fiduciary of that plan or IRA, if -

- The fiduciary and its affiliates are not the executing broker, dealer or bank.
- The fiduciary's transaction execution instructions generally state (i) the security, (ii) a price range, (iii) a time span (not greater than five business days) and (iv) a quantity. § 2510.3-21(e)(1)

# More Exceptions

- A broker-dealer (registered under the Securities Exchange Act of 1933?), a reporting dealer (who makes primary markets in U.S. government or agency securities?), and a bank (supervised by the U.S. or a state?) which is a fiduciary of an ERISA plan or an IRA as a result solely of executing purchases and sales of securities for the plan or IRA will **not** be deemed to be an ERISA fiduciary with regard to any assets of the plan or IRA over which it has no discretionary authority, control or responsibility and is not otherwise an ERISA fiduciary. § 2510.3-21(e)(2)
- If a “person” is an investment advice fiduciary for an ERISA plan or IRA, that person will **not** be deemed to be an ERISA fiduciary with regard to any assets of the plan or IRA over which it has no discretionary authority, control or responsibility and is not otherwise an ERISA fiduciary. § 2510.3-21(d)
- Limits to these exceptions
  - (1) ERISA's co-fiduciary liability is not affected by these limits.
  - (2) These limits do not affect whether the person is otherwise a “party in interest” under ERISA or a “disqualified person” under the Code.

# “Employee” Exception

An individual will not be an investment advice fiduciary if she -

- acts in her capacity as an employee of the sponsor (or its affiliate) of an ERISA plan (which does not include an IRA) and gives advice to another employee who is a participant or beneficiary, so long as (i) her job does not require giving such advice, (ii) she is not registered or licensed to give such advice (and does not have to be), and (iii) she does not receive direct or indirect compensation (above her normal compensation) for the advice.  
*§ 2510.3-21(c)(3)(ii)*
- acts in her capacity as an employee of the sponsor (or its affiliate) of an ERISA plan, as an employee of the ERISA plan, as an employee of the plan's fiduciary or as an employee of an employee organization and gives advice to a fiduciary, another employee (not as a participant or beneficiary) or an independent contractor if she does not receive direct or indirect compensation (above her normal compensation) for such advice.

*§ 2510.3-21(c)(3)(i)*

# “Independent Fiduciary” Exception

- This “independent fiduciary on steroids” exception is limited to “true arm’s length transactions between...professionals or...managers who do not have a legitimate expectation that they are in a relationship of trust and loyalty...”. *Supplementary Information*, 81 Fed. Reg. 20946, 20983 (April 8, 2016) (“Preamble”). It is “...designed to ensure that the parties...understand the nature of their relationships.” *Id.* The burden of proof is on the advisor. *Preamble*, at pg. 20984. The Department of Labor has commented on this exception in its Conflict of Interest FAQs (Part II - Rule), released on January 16, 2017 (“FAQs II”).
- Any advice given “to a fiduciary” about any investment-related transaction (*FAQs II*, Q&A-22) involving a plan or an IRA (*FAQs II*, Q&A-25) by an advisor -
  - (1) Who knows the recipient is a fiduciary of an ERISA plan or IRA;
  - (2) Who knows the recipient is “independent” (*FAQs II*, Q&A-28);
  - (3) Which is about a sale, purchase, loan, exchange or other transaction related to an investment; and
  - (4) Which is about an “arm's length” transaction;

# “Independent Fiduciary” Exception

- will **not** make the advisor an investment advice fiduciary if, *before* the transaction, the advisor -
  - (5) Knows (or reasonably believes) the independent fiduciary is (i) a regulated bank, (ii) a qualified insurance carrier, (iii) an investment advisor registered under the Investment Advisor Act of 1940 (or a state's equivalent), (iv) a broker-dealer registered under the Securities Exchange Act of 1934, or (v) the manager (or holder) of at least \$50,000,000;
  - (6) Knows (or reasonably believes) the independent fiduciary is capable of making individual evaluations of investment risks;
  - (7) Knows (or reasonably believes) the independent fiduciary is the fiduciary for this transaction;
  - (8) Knows (or reasonably believes) the independent fiduciary is responsible for exercising independent judgment about the transaction;



# “Independent Fiduciary” Exception

- (9) Informs the independent fiduciary the advice is **not** impartial and the advice is **not** fiduciary advice;
  - (10) Informs the independent fiduciary about the advisor's financial interests in the transaction;
  - (11) Does **not** receive a fee or other compensation directly from the plan, its fiduciary, participant or beneficiary, or from an IRA or an IRA owner in connection with the investment “(as opposed to other services);” and
  - (12) Has **not** admitted to fiduciary status. § 2510.3-21(c)(1)
- The advisor may rely on appropriate written representations from the independent fiduciary for #5-#8 above. § 2510.3-21(c)(1)(i),(ii),(iv). The representations must be in place at the time the transaction takes place and must cover the period during which the advice is given. (FAQs II, Q&A-21)

# “Independent Fiduciary” Exception

- The \$50,000,000 may be any combination of plan and non-plan assets and the combined assets of several plans and non-plan investors. *(FAQs II, Q&A-20)*
- The independent fiduciary can be a representative of a registered investment advisor. *(FAQs II, Q&A-23)*
- An IRA owner cannot be his own independent fiduciary. *(FAQs II, Q&A-26)*
- A fee between financial intermediaries is not a disqualifying fee under #11 above, unless it is paid by a plan or an IRA or by using their assets. *(FAQs II, Q&A-29)*
- An employee of the plan sponsor who is a participant, an officer or a fiduciary committee member can also be this independent fiduciary if he receives the advice in his independent fiduciary status. *(FAQs II, Q&A-27)*

# Participant/Owner Exception

A participant or beneficiary (or their relatives) of an ERISA-covered plan and an IRA owner (or a relative) cannot be a fiduciary for this purposes of this rule. *§ 2510.3-21(g)(7)*

# Investment Advice Fiduciary

- An “*Investment Advice Fiduciary*” is a person -
  - (1) Who gives certain, enumerated kinds of investment advice;
  - (2) Directly (or indirectly) to either (i) an ERISA plan, its fiduciary or its participant or beneficiary, or (ii) to an IRA or its owner;
  - (3) In exchange for compensation, received directly or indirectly; and
  - (4) Who admits to being a fiduciary of the ERISA plan or IRA for investments; or
  - (5) Who gives the advice under an agreement or understanding to make the advice individualized to the recipient for investments; or
  - (6) Who gives the advice under an agreement or understanding to provide advice specifically directed to the recipient's investment property.

§ 2510.3-21(a)

# Affected Investment Advice

“*Investment Advice*” is only -

- A recommendation (which means: a *suggestion*) to buy, hold, sell, or exchange securities or other investment property
- A recommendation to take a distribution, including its form and amount
- A recommendation to do a rollover or transfer, including its amount and destination.
- A recommendation about how to invest the proceeds after taking a distribution
- A recommendation about how to invest the proceeds after doing a rollover or transfer
- A recommendation about managing investments in securities or other property
- A recommendation of a person to give these kinds of investment advice  
*§ 2510.3-21(a)(1)(i)-(ii), (b)(1)*

Giving appraisals and other valuations is not investment advice, for now.

# “Recommendation”

A “communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion” about a course of action. § 2510.3-21(b)(1)

- Objective inquiry.
- A suggestion that is more individually tailored is more likely to be viewed as a recommendation.
- Recommendations can originate from a person or a computer.
- A selective list of securities for a particular recipient is a recommendation, even if no single security is recommended.
- A series of actions may be viewed as a recommendation, even if none of the single actions would be. § 2510.3-21(b)(1)
- Use these criteria to determine if an action is a recommendation, subject only to a list of activities that are expressly not recommendations.  
§ 2510.3-21(b)(2)

# Carve-outs

These situations do not generate a recommendation. They were called “carve-outs” in the proposed regulation, but that reference was abandoned.

- “Platform providers”
- Assistance with only investment selection or monitoring
- General communications
- Investment “education” that does not include recommendations of specific products or alternatives and does not provide recommendations about how to manage a particular investment.

*§ 2510.3-21(b)(2)*

# “Platform Provider” Carve-out

A person can avoid being an investment advice fiduciary (by avoiding giving regulated recommendations) if its relationship with an ERISA plan (**not** an IRA) stays within these parameters:

- (1) It markets or merely provides a menu of securities or other property to an ERISA plan.
- (2) It uses a platform (or similar mechanism) to do so.
- (3) The platform's offered choices do not take any individualized needs into account.
- (4) The plan's fiduciary is independent of the platform provider.
- (5) The plan's fiduciary makes any investment selections chosen from the platform's menu.
- (6) The fiduciary's choice becomes an option that the plan's participants or beneficiaries may use to select a direct investment.
- (7) The plan's fiduciary is told in writing that the platform provider is not attempting to give impartial investment advice and is not giving advice as a fiduciary.

§ 2510.3-21(b)(2)(i)



# “Selection/Monitoring” Carve-out

A person can also avoid giving regulated recommendations by limiting what it gives as a platform provider to an ERISA plan (**not** an IRA) to materials that -

- Identify investment alternatives that meet objective criteria selected by the ERISA plan's fiduciary, but only if the provider discloses any financial interest it has in any provided alternative. *§ 2510.3-21(b)(2)(ii)(A)*
- In response to a RFI, RFP or something similar, identifies a limited set of investment alternatives based on only (i) the size of the plan sponsor, (ii) the size of the plan, (iii) the plan's current investment alternatives, or (iv) a combination of those three, but only if the provider discloses any financial interest it has in any provided alternative. *§ 2510.3-21(b)(2)(ii)(B)*
- Provides the ERISA plan's fiduciary with objective financial data, comparisons with independent benchmarks, or both. *§ 2510.3-21(b)(2)(ii)(C)*

This carve-out does not extend to IRAs.

# “General Communications” Carve-out

A person does not give regulated recommendations by furnishing general communications that a reasonable person would not view as an investment recommendation, such as -

- general circulation newsletters
- commentary in publicly broadcast talk shows
- comments in widely attended speeches and conferences
- research or news reports intended for general distribution
- general marketing materials; and
- general market data *§ 2510.3-21(b)(2)(iii)*

# “Investment Education” Carve-out

A person does not give regulated recommendations just because it provides any of four kinds of educational information or materials, if the information or materials do -

- **Not** include recommendations, solely or in combination, about specific investment products or specific plan or IRA alternatives; and
- **Not** include recommendations on investment or management of a particular security or securities or other property.

If this investment education carve-out would otherwise apply, it does not matter to whom the information or materials were given, who provided the information or materials, how often they were provided, the form in which they were communicated or whether the education materials or information were provided alone or in combination with other information or materials.

*§ 2510.3-21(b)(2)(iv)*

The final guidance revoked Interpretative Bulletin 96-1 ( § 2509.96-1) and its guidance about investment-related education.

# Four Allowed Kinds of Educational Materials

**#1:** Information and materials that (without referring to the appropriateness of an individual item) only -

- Describe the terms or operation of the ERISA plan or IRA; or
- Inform the recipient about
  - (1) the benefits of participation
  - (2) the benefits of “increasing” contributions
  - (3) the impact of pre-retirement withdrawals
  - (4) retirement income needs
  - (5) available forms of distribution
  - (6) advantages or disadvantages and risks of available forms of distribution; or
- Describe for available investment alternatives (under the ERISA plan or IRA)
  - (i) investment objectives and philosophies, (ii) risk and return characteristics, (iii) historical return information, (iv) product features, (v) investor rights and obligations, (vi) trading restrictions, (vii) fees and expenses, or (viii) prospectuses.

*§ 2510.3-21(b)(2)(iv)(A)*

# Four Allowed Kinds of Educational Materials

#2: Information or materials on financial, investment or retirement matters that -

- Do **not** address specific investment products
- Do **not** address specific ERISA plan or IRA alternatives
- Do **not** address available distribution options
- Do **not** address specific alternatives or services offered outside the ERISA plan or IRA; or

*§ 2510.3-21(b)(2)(iv)(B)*

# Four Allowed Kinds of Educational Materials

#2: (cont.): Information or materials on financial, investment or retirement matters that -

- Inform the ERISA fiduciary, participant or beneficiary, or IRA owner about
  - (1) General financial concepts
  - (2) General investment concepts
  - (3) Historical differences in rates of return among asset classes (using standard market indices)
  - (4) Effects of fees and expenses
  - (5) Effects of inflation
  - (6) Estimating retirement income needs
  - (7) Choosing investment time horizons
  - (8) Assessing risk tolerance
  - (9) Retirement-related risks; and
  - (10) General methods and strategies for managing assets in retirement in and outside of the plan or IRA.

# Four Allowed Kinds of Educational Materials

#3: Information or materials that provide “models of asset allocation portfolios of hypothetical individuals with different time horizons... and risk profiles,” if the models -

- Are based on “generally accepted investments theories that take into account the historic returns of different asset classes...over defined periods of time;”
- Disclose all material facts and assumptions on which they are based;
- Do **not** include or identify any specific investment product or available specific alternative (other than in limited circumstances, a DIA under an ERISA plan); and
- Include a statement to the effect that users of the model should appropriately include and consider their other assets, income and investments outside the plan or IRA when using the model. § 2510.3-21(b)(2)(iv)(C)

# Four Allowed Kinds of Educational Materials

**#4:** Information and materials which allow an ERISA plan fiduciary, participant or beneficiary or an IRA owner a way to “[e]stimate future retirement income needs and assess the impact of...asset allocations on retirement income... to evaluate distribution options, products or vehicles (using allowed educational information) [or]... to estimate a retirement income stream” so long as -

- The materials are based on “generally accepted investment theories that take into account the historic returns of different asset classes... over defined periods of time;”
- There is an objective correlation between suggested asset allocations or income streams generated by the materials and data from the user;
- Material facts and assumptions are disclosed or provided by the user;
- Other assets and income are considered, or reference is made to them;
- No specific investment alternatives available in the ERISA plan or IRA are included or identified (unless provided or (in limited circumstances), is an ERISA plan's DIA); and
- Assets outside the ERISA plan or IRA are taken into account or there is a disclosure that they should be. § 2510.3-21(b)(2)(iv)(D)



# The Solution: An Exemption for Investment Advice Fiduciaries

It is a lot easier now to become an investment advice fiduciary. It is tough to find relief. The ***Best Interest Contract Exemption*** (“BICE”) lets investment advice fiduciaries - who (i) want to cause an ERISA plan or IRA to pay them additional compensation as a result of their investment advice, or (ii) want to receive additional compensation from third parties as a result of their investment advice - to receive that otherwise prohibited compensation.

- The BICE is a bear (but a smaller one than before).
- Its relief is optional, but its conditions and requirements for that relief are mandatory. It is changing the industry.
- It is intended to be the new normal, the default relief.
- Its relief is layered, and access is limited.
- Its details can feel endless, and its fondness for specific disclosures (in particular) is daunting.

# The BICE - Protected Transactions

- The BICE allows certain protected persons to be paid variable compensation from services provided
  - (1) in connection with the purchase, sale or holding of an asset
  - (2) to an ERISA plan or IRAeven if the transaction and compensation were the result of investment advice by the protected person to a retirement investor.
- It provides relief from ERISA sections 406(a)(1)(D) and 406(b) and from sections 4975(c)(1)(D), (E) and (F) of the Internal Revenue Code. § 1(b)
- It does **not** provide relief if -
  - (1) All of the BICE's applicable conditions are not met.
  - (2) The plan is an ERISA plan, and
    - (a) the protected person is the plan's sponsor, or
    - (b) the protected person is a named fiduciary of the plan or its administrator who was selected for this purpose by a fiduciary who is not independent.

# The BICE - Protected Transactions

- It does **not** provide relief if -
  - (3) The compensation is from a transaction where the advisor was acting for its own account or that of an affiliate in a principal transaction.
  - (4) The compensation is from advice generated solely by an interactive web site without personal interaction or personal advice from an advisor (“robo-advice”), unless the provider is a level fee fiduciary.
  - (5) The advisor has discretion with respect to the recommendation. *1(c)*
  - (6) The general relief of the BICE does not apply when the recommendation is about investments in ERISA-covered plans. An exception could apply. *§ 11(g)*

# The BICE - Protected Persons

**“Advisors”** can use the BICE. An advisor is an individual who -

- Is an investment advice fiduciary with respect to the assets involved in the recommended transaction;
- Is an “employee, independent contractor, agent or registered representative” of certain financial institutions; and
- Satisfies applicable governmental regulatory and licensing requirements with respect to the advice. § VIII(a)

**“Financial Institutions”** can use the BICE. A financial institution is an entity with a relationship to the advisor that is (i) registered as an investment advisor (under the Investment Advisors Act of 1940, as amended, or the state where it is located), (ii) certain banks or savings associations, (iii) certain insurance companies, (iv) a broker or dealer registered under the Securities Exchange Act of 1934, or (v) an entity described as such in later individual exemptions. § VIII(e)

# The BICE - Retirement Investors

“***Retirement Investors***” are those who can get potentially conflicted advice from a protected person and can be only:

- A participant or beneficiary in an ERISA plan with the right to direct the investment of her account or take a distribution.
- The beneficial owner of an IRA (who is acting for the IRA).
- A fiduciary of an ERISA plan or an IRA who is not an investment advice fiduciary. § VIII(o),(n)

If the investment advice is directed to any other entity or individual, the BICE cannot protect the transaction. The restriction limiting the BICE's relief available for ERISA plans to ERISA plans covering fewer than 100 participants has been removed from this definition.

# The Layers of the BICE - The Conditions

To use the relief promised by the BICE for only *purchases* of an investment product (including an insurance policy or annuity contract) from some financial institutions -

- The transaction must be in the ordinary course of the financial institution's business.
- Only reasonable compensation can be paid to the financial institution (or its affiliates) out of the purchase.
- The terms must be at least as good as those generally available in an arm's length purchase with an unrelated party.

This relief is not available if (i) an ERISA plan is involved and the plan's sponsor or its tainted administrator is the advisor or financial institution, (ii) the compensation is from a principal transaction, (iii) the advice is robo-advice, or (iv) the advisor has discretion over the purchase. § VI

# The Layers of the BICE - The Conditions

To use the relief promised by the BICE for compensation from certain *pre-existing* investment transactions occurring before April 10, 2017 (or later as part of a systematic purchase program in effect before April 10, 2017) -

- The agreement to pay the compensation must have been in effect before April 10, 2017.
- The transaction must not have been prohibited at the time.
- The compensation now was not due to additional purchases (with an exception).
- The compensation received has been reasonable.
- Investment advice given after April 10, 2017 in this situation adhered to the best interest standard. § VII

# The Layers of the BICE - The Conditions

To use the relief promised by the BICE for recommendations about investments in *ERISA-covered plans* -

- Before or at the time of the transaction, the financial institution and advisor must affirmatively acknowledge fiduciary status with respect to investment advice about the recommended transaction. § 11(g)(1), § 11(b)
- The financial institution and advisor must comply with the “Impartial Conduct Standards.” § 11(g)(2), § 11(c)
- The financial institution must adopt policies and procedures that implement three required warranties, and it and the advisor must comply. § 11(g)(3), § 11(d)(1)-(3)
- The financial institution must disclose mandated information early and often. § 11(g)(4), § 11(e)
- The financial institution and advisor may not disclaim liability beyond what is allowed under ERISA, not try to waive the investor's right to be in a class action in a dispute with them, and not try to require unreasonable arbitration or mediation of individual investor claims against them. § 11(g)(5)



# The Layers of the BICE - The Conditions

To use the relief promised by the BICE for *level fee fiduciaries* -

- Before or at the time of the transaction, the financial institution and advisor must affirmatively acknowledge fiduciary status with respect to investment advice about the recommended transactions. § 11(h)(1), § 11(b)
- The financial institution and advisor must comply with the “Impartial Conduct Standards.” § 11(h)(2), § 11(c)
- In the case of a recommendation to rollover to an IRA (or switch to a level fee arrangement), the financial institution must document why the recommendation was in the investor's best interest. § 11(h)(3), § VIII(d)

A level fee fiduciary (i) can receive only compensation that is a fixed percentage of asset value or a set dollar amount that does not vary based on an investment recommendation and (ii) must disclose that fee in advance. § VIII(h) For further commentary, consult the Department of Labor’s Conflict of Interest (Part I-Exemptions) FAQs issued on October 27, 2016, Q&As-13 through -19.

# The BICE - The Conditions

To use the relief promised by the BICE for a *new BICE contract* for an IRA (or a plan not covered by ERISA) -

- There must be a contract, signed before or at the time of the transaction. No longer is it required before any recommendation is made, but a later contract must cover prior related advice.
- The contract must acknowledge the protected person's fiduciary status.
- The contract must contain an agreement to adhere to the “Impartial Conduct Standards.”
- The contract must warrant the protected person has adopted policies and procedures designed to mitigate the unsavory effects of conflicted advice.
- The protected person must disclose mandated information early and often.
- The protected person must generate and keep specific data about the investment recommendations it wants protected.
- The signed BICE contract must be accessible to the investor on the protected person's website. § 1(b), § 11(a)

# The BICE - The Contract

*Exception:* Existing investment-related contracts or agreements executed before January 1, 2018 and in effect on that date can be amended to include BICE requirements, instead of requiring a new BICE contract. § 11(a)(1)(ii)

- Amendment would be accomplished by delivering the proposed amendment, plus a full set of BICE-required disclosures to the investor before January 1, 2018. § 11(a)(1)(ii), § 11(e)
- A failure to terminate the existing contract within thirty days after delivery can be treated as negative consent. § 11(a)(1)(ii)

# The BICE - The Contract

*Exception:* If a financial institution does **not** get a BICE contract with an IRA (or plan not covered by ERISA), the BICE can still provide relief, if -

- The advisor giving a recommendation does not get paid compensation from the recommendation.
- There are policies and procedures designed to stop paying that compensation to the advisor.
- The protected persons comply with the “Impartial Conduct Standards,” implement certain required policies and procedures, and implement the BICE-required website.
- The failure to get the BICE contract was not an effort or arrangement designed to avoid compliance. § 11(a)(1)(iii)

# The BICE - Contract Terms

The following are general details about the required BICE contract:

- The protected persons and the retirement investor are required parties who must sign. § 11(a)(1)(i)
- The required signatures are needed before the conflicted recommended transaction is complete. § 11(a)(1)(i)
- The advisor (and his financial institution) must both admit to investment advice fiduciary status. § 11(b)
- The advisor (and his financial institution) must warrant to four specified protections. § 11(d)
- The contract must include required disclosures. § 11(e)
- The contract must **not** contain (i) exculpatory clauses disclaiming or limiting a protected person's liability for breaching the contract, or (ii) a waiver or qualifier of the investor's right to bring or join an action in court against a protected person. § 11(f)

# The BICE - Impartial Conduct Standards

These are at the core of the new exemption. In the BICE contract, the advisor (and his related financial institution) must commit to the following “*Impartial Conduct Standards*”:

- The investment advice given must be in the “Best Interest” of the investor.
- An investment will **not** be recommended if the total compensation expected from that investment to the advisor, financial institution and their affiliates will be more than reasonable compensation.
- **No** statements by the advisor (or his financial institution) to the retirement investor (about the investment, fees, conflicts or other relevant details) will be misleading at the time they are made. § 11(c)

# The BICE - Best Interest Conduct

- “**Best Interest**” conduct says the investment advice fiduciary will  
“act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor without regard to the financial or other interests of... [any] other party.” § II(c)(1), § VIII(d)
- The BICE's best interest standard sounds very familiar to those knowledgeable about ERISA's fiduciary standard in ERISA section 404(a)(1)(B). But, ERISA section 404(a)(1)(B) does not apply to the usual IRA, and the standard has been tweaked for the BICE.

# The BICE - Required Contract Warranties

The BICE contract must include the following -

- The financial institution warrants it has written policies and procedures reasonably and prudently designed to make its advisors follow the Impartial Conduct Standards.
- The financial institution warrants it has found its material conflicts of interest, imposed measures to limit their effects, and picked a monitor to oversee this.
- Subject to an exception, the policies and procedures forbid using quotas, performance appraisals, bonuses, differentiated compensation or other such incentives that might result in recommendations that are not best interest advice. § 11(d)



# The BICE - Unwelcome Contract Terms

There will be no BICE relief if the BICE contract has any of these terms -

- Exculpatory language disclaiming or limiting liability in the event of a breach.
- Conditions, waivers or limits on (i) being a part of a class action, (ii) being part of a class settlement, or (iii) being part of an individual settlement, although limits on punitive damages and rescission can be okay.
- Arbitration or mediation of individual claims in difficult places or limited in other unreasonable ways. *§ 11(f)*

# The BICE - Required Contract Disclosures

The BICE contract must include these disclosures clearly and prominently (in its terms or with the contract) -

- (1) State the best interest standard of care owed
- (2) Tell the investor what services are offered and how they will be paid
- (3) Describe material conflicts of interest
- (4) Disclose fees to be paid by the investor and by third parties
- (5) Describe policies, procedures and disclosures available upon request
- (6) Provide a link to the BICE-required website.

# The BICE - Required Contract Disclosures

The BICE contract must include these disclosures clearly and prominently (in its terms or with the contract) (con't.) -

- (7) Describe the model contract and policies available on the website.
- (8) Disclose whether the proprietary products are being offered and any limits those products put on the recommendations.
- (9) Discuss whether offered products generate third party payments and whether the chance of getting those payments limited offered products.
- (10) Provide contact information for complaints.
- (11) Discuss whether the investor's investments will be monitored and how often, and whether alerts will be sent. § 11(e)(1)-(7)

# The BICE - Required Separate Disclosures

- Independently of the BICE contract, the retirement investor must get two more kinds of disclosure to get BICE relief.
  - (1) *Transaction Disclosure.* Before executing a purchase, the financial institution must provide a single document that (i) recites the best interest standard of care owed, (ii) describes material conflicts of interest, (iii) tells the investor about policies, procedures and disclosures it can get, (iv) includes a link to the institution's website, and (v) tells the investor about content on the website.
  - (1) *Website.* The financial institution must create and maintain a public, freely accessible website that shows (i) the institution's business model and associated material conflicts of interest, (ii) typical fees and charges, (iii) a model BICE contract or its BICE-related terms, (iv) a summary of its BICE-required policies and procedures, (v) products offered in the recommendation that can result in third party payments to the institution, and (vi) summaries of payout and compensation grids for advisors from recommended products. § III(a)-(b)

# The BICE - Proprietary Products

A financial institution can restrict advisors' investment recommendations, partially or completely, made to ERISA plans and to IRAs and use the BICE.

## *Allowed Restrictions*

### ***Proprietary products***

- can use this exception.
- are products managed, issued or sponsored by the institution.  
*§ IV(a), § VIII(l)*

Products that generate ***third party payments*** to the financial institution or advisor (or affiliates)

- can use this exception.
- are charges not directly paid by the plan or IRA, which include revenue sharing payments, 12b-1 fees, distribution, solicitation or referral fees (and other examples) *§ IV(a), § VIII(q)*

# The BICE - Proprietary Products

*Additional Requirements* (which apply equally to both exceptions)

Transactions under these circumstances will be deemed to satisfy only the best interest standard, if the following are completed by the time of the transaction.

- Inform the investor “clearly and prominently” about which of the two restrictions is involved and the limits the involved restrictions put on the universe of possible recommendations. Using “may” is not allowed.
- Inform the investor “fully and fairly” about material conflicts of interest.
- Satisfy the BICE's separate disclosures requirements.
- Document the financial institution's imposed limits on restrictions, material conflicts of interest and services to be provided in exchange for third party payments.

# The BICE - Proprietary Products

*Additional Requirements* (which apply equally to both exceptions)  
(con't.)

- The institution must reasonably conclude the limits and conflicts will not result in excessive compensation or recommending imprudent investments and document the reasons why.
- Adopt and monitor policies, procedures and incentive compensation practices that meet the BICE's standards.
- Ensure the compensation received from these conflicted transactions is no more than reasonable compensation.
- Ensure the recommendations are in the investor's best interest.

§ IV(b)

# 84-24

Prohibited Transaction Exemption 84-24 (“84-24”) was amended and restated in the guidance released with the BICE.

- 84-24 can protect insurance agents, brokers, insurance companies, pension consultants, investment companies, certain principal underwriters and investment advisors. *84-24, § 1(b)(1)-(6)*
- It provides relief from all of the Internal Revenue Code's and ERISA's prohibited transactions. *84-24, § 1(b)* In this respect alone, it is better than the BICE.
- It allows payments of insurance commissions, mutual fund commissions and other consideration that would be, or would arise from, otherwise prohibited transactions, and it allows certain purchases and one kind of sale that would otherwise be prohibited transactions. *84-24, § 1(b)(1)-(6)*



# 84-24

After it is fully effective, it will no longer apply to -

- A purchase of “investment company securities” by an IRA.
- A purchase of a “variable annuity contract, indexed annuity contract or similar contract” by an IRA or by an ERISA plan. It does not define these terms. 84-24, § 1(c)

# 84-24 Conditions

When acting as an investment advice fiduciary,

- (1) the fiduciary must act in the best interests of the ERISA plan or IRA; and
- (2) the fiduciary's statements must not be materially misleading when made. *84-24, § II*

When generally using 84-24,

- (1) the transaction must be effected in the ordinary course of business;
- (2) the transaction must be on terms at least as favorable as an unrelated, arm's length transaction; and
- (3) the total of all fees and compensation received cannot exceed reasonable compensation. *84-24, § III(a)-(c)*

When using 84-24 to protect against the first 4 of the transactions it allows, additional conditions must be satisfied. *84-24, § IV* Those using 84-24 also have recordkeeping requirements to meet. *84-24, § V*

# 84-24 Covered Transactions

Only these transactions can be protected under 84-24:

- #1:** Receiving an insurance commission when an IRA or ERISA plan buys an insurance contract or fixed rate annuity contract.
- An insurance commission is a sales commission paid by the insurer for services related to causing the purchase and includes renewal fees and trailers, but excludes revenue sharing payments, administrative fees and marketing payments. 84-24, § 1(b)(1), VI(f)
  - Only insurance agents, brokers and pension consultants can use.
- #2:** Receiving a mutual fund commission when an ERISA plan buys investment company securities.
- A mutual fund commission is a “commission or sales load” paid for services related to causing or executing the purchase, but excludes 12b-1 fees, revenue sharing payments, administrative fees and marketing fees. 84-24, § 1(b)(2), VI(i)
  - Only a principal underwriter can use. 84-24, § 1(b)(2), VI(m)
  - An investment company must be registered under the Investment Company Act of 1940.

# 84-24 Covered Transactions

Only these transactions can be protected under 84-24 (con't.):

- #3:** Causing the purchase of an insurance contract or fixed rate annuity contract with assets of an IRA or an ERISA plan or the purchase of investment company securities with assets of an ERISA plan. *84-24, § 1(b)(3)*
- Only an insurance agent, broker or pension consultant can use this relief as part of buying insurance or an annuity.
  - Only a principal underwriter can use this relief as part of buying investment company securities.
- #4:** Buying an insurance contract or fixed rate annuity contract from an insurance company with assets of an IRA or an ERISA plan. *84-24, § 1(b)(4)*
- Includes consideration paid to the insurance company.

# 84-24 Covered Transactions

Only these transactions can be protected under 84-24 (con't.):

- #5:** Buying an insurance contract or a fixed rate annuity contract from an insurance company using ERISA plan assets. *84-24, § 1(b)(5)*
- The insurance company must be a fiduciary or service provider for the plan only because it sponsors a master or prototype plan. *84-24, § 1(b)(5), VI(g)*
- #6A:** Buying investment securities from an investment company or principal underwriter using ERISA plan assets. *84-24, § 1(b)(6), VI(j)*
- The investment company, principal underwriter or an investment advisor must be a fiduciary or service provider for the plan only because it sponsors a master or prototype plan or is a nondiscretionary trustee.

# 84-24 Covered Transactions

Only these transactions can be protected under 84-24 (con't.):

**#6B:** Selling investment securities owned by an ERISA plan to an investment company or principal underwriter. *84-24, § 1(b)(6)*

- The investment company, principal underwriter or an investment advisor must be a fiduciary or service provider for the plan only because it sponsors a master or prototype plan or is a nondiscretionary trustee.

# 84-24 Controversy

Unexpectedly, amended and restated 84-24 limited the annuity products that can be within the exemption's relief.

- 84-24 has been the standard exemption for 21 years for sales and purchases of annuity contracts and related commission payments that would be prohibited by the ERISA or the Internal Revenue Code.
- New 84-24 provides relief only for annuity contract transactions involving a “Fixed Rate Annuity Contract.” 84-24, § 1(b)(1)
- “**Fixed Rate Annuity Contract**” is a fixed annuity contract (immediate or deferred) issued by an insurance company (i) that “satisfies applicable state standard nonforfeiture laws” at issue date, or in the case of only group fixed annuities, “guarantees return of principal net of reasonable compensation and provides a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in [the] state,” and (ii) the benefits of which do not vary based on investment experience of the insurer's separate account or accounts or investment experience of an index or investment model. 84-24, § 1(b)(1), VI(k)

## 84-24 Controversy

- A variable annuity, an indexed annuity and a “similar annuity” is not a fixed rate annuity. These terms are not defined in 84-24.
- “[T]raditional annuities, declared rate annuities, [and] fixed rate annuities (including deferred income annuities)” are fixed rate annuities eligible for 84-24, according to the preamble to 84-24. The Department believes each provides payments that are predictable.



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# Disruptors to the International Business of Insurance

June 8, 2017

# Panelists



**Jodi Adolf**

Partner  
Dentons, moderator



**Martin Mankabady**

UK Partner  
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**John Huff**

Immediate Past Director, Missouri  
Department of Insurance, Immediate Past  
President  
NAIC



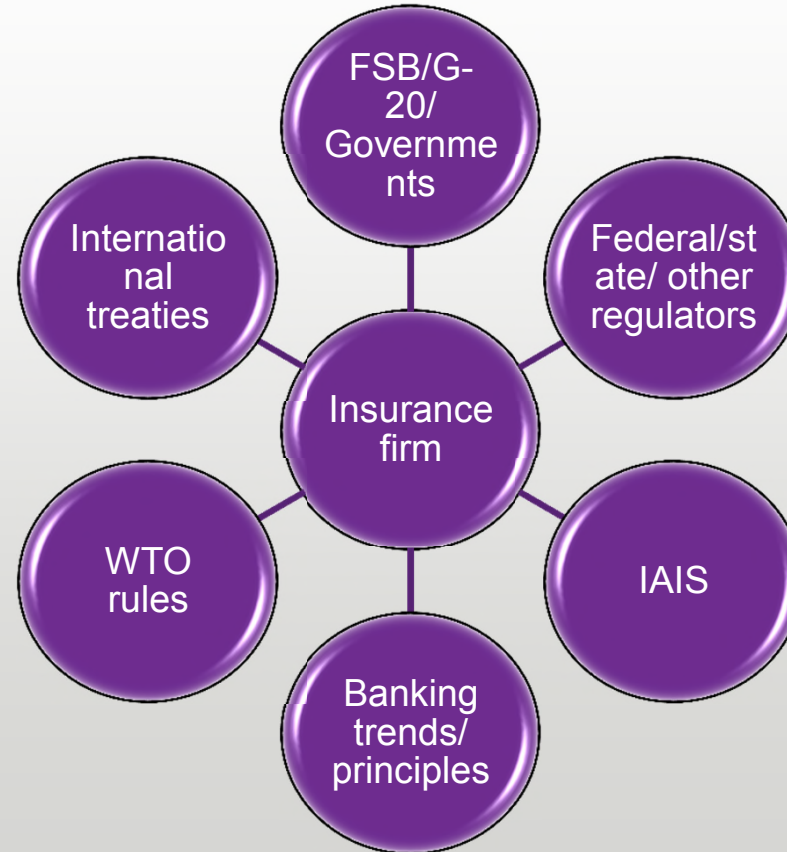
**Dana Wiele**

Senior Vice President and Associate  
General Counsel  
RGA Reinsurance Company (RGA)

# Introduction

- Trend towards closer regulatory harmonization
- Still a number of big regulatory "gaps"
  - e.g. Multinational programs
- Issues
  - How has this been achieved so far?
  - Has the high-water mark been reached?
  - Will there be more protectionism and less globalization going forward?

# Global insurance regulation



# Covered agreement

- Bilateral trade agreement between US and EU
- Agreed January 2017 but not yet ratified
- Covers reinsurance, group supervision and insurance supervisor co-operation
- Should remove a number of barriers
- Issues
  - If ratified, does this mean US has been granted "equivalence" under Solvency II?
  - Could the agreement result in FIO pre-empting US state law if not compliant?
  - Will US and EU regulators share firms' ORSAs and other information?

# Brexit

- If covered agreement ratified, what are implications for UK if and when there is a Brexit?
- UK may seek a similar agreement with US. However, does US favor pursuing multilateral trade deals over bilateral ones (e.g., NAFTA, TTIP)?
- Can UK use WTO rules to bring US to negotiating table?
- What kind of free trade deal might the UK strike with the EU?
- Other implications of Brexit
  - Passporting rights may be lost
  - Unclear if UK will be regarded as being Solvency II equivalent
  - What will the impact be on the London market

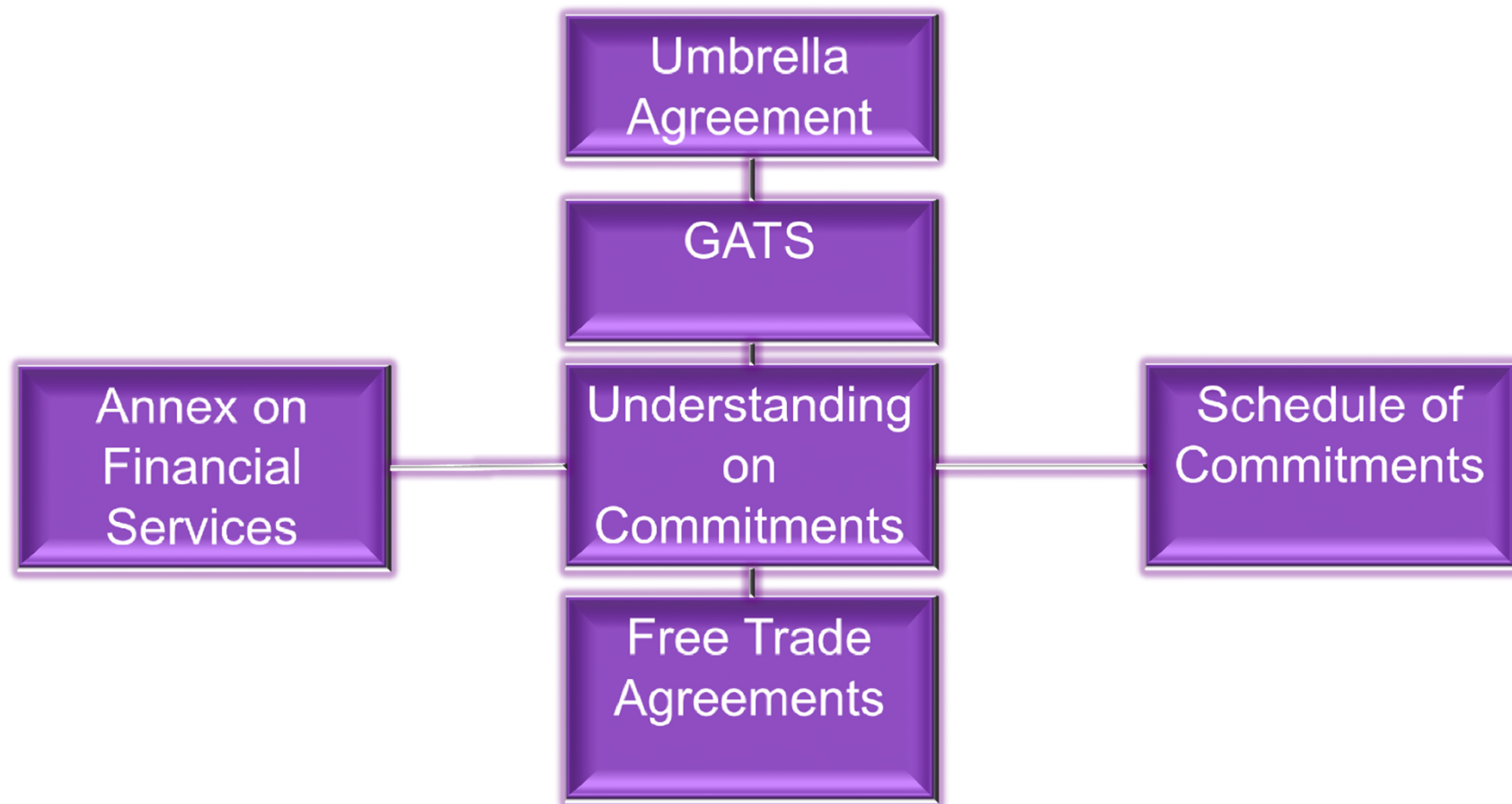


# WTO

- Inter-governmental organization
- Objective to "help trade flow smoothly, freely, fairly and predictably"
- "Most favoured nation" provisions
  - Cannot discriminate
  - Certain exemptions
    - "Substantial sectoral coverage" agreements
  - Prudential carve-out
  - Schedule of specific commitments
    - Terms and conditions of market access
    - Understanding



# WTO framework: Financial services



# Other trade deals

- Can potentially unlock overseas markets
- Number of barriers that these deals could overcome
  - E.g., around data access/protection
- Tend not to focus on prudential issues
- Issues
  - What deals might be in the pipeline?
  - Has the UK been pushed to the back of the US queue?
  - Is IAIS a more effective forum for achieving harmonization?



# International regulation

- International Association of Insurance Supervisors seeking to develop global capital standards
- Voluntary organization consisting of insurance supervisors
- Recently IAIS focus on G-SIIs and IAIGs
- Developed ComFrame following financial crisis
- US has expressed some concerns on its initiatives
- Also, Financial Stability Board, which seeks to provide early warning of macroeconomic and financial risks

# Regulatory co-operation

- Increasing use of supervisory colleges
- Increasing sharing of information (e.g., potentially ORSAs)
- Key focus is on identifying key risks/assessing impact on solvency and strategic planning
- Emerging risks harder to assess
- Issues
  - If more information is shared, is there likely to be increased supervisory action?

# Thank you

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# The Future of the Trump Administration: What's ahead and Where is it going?

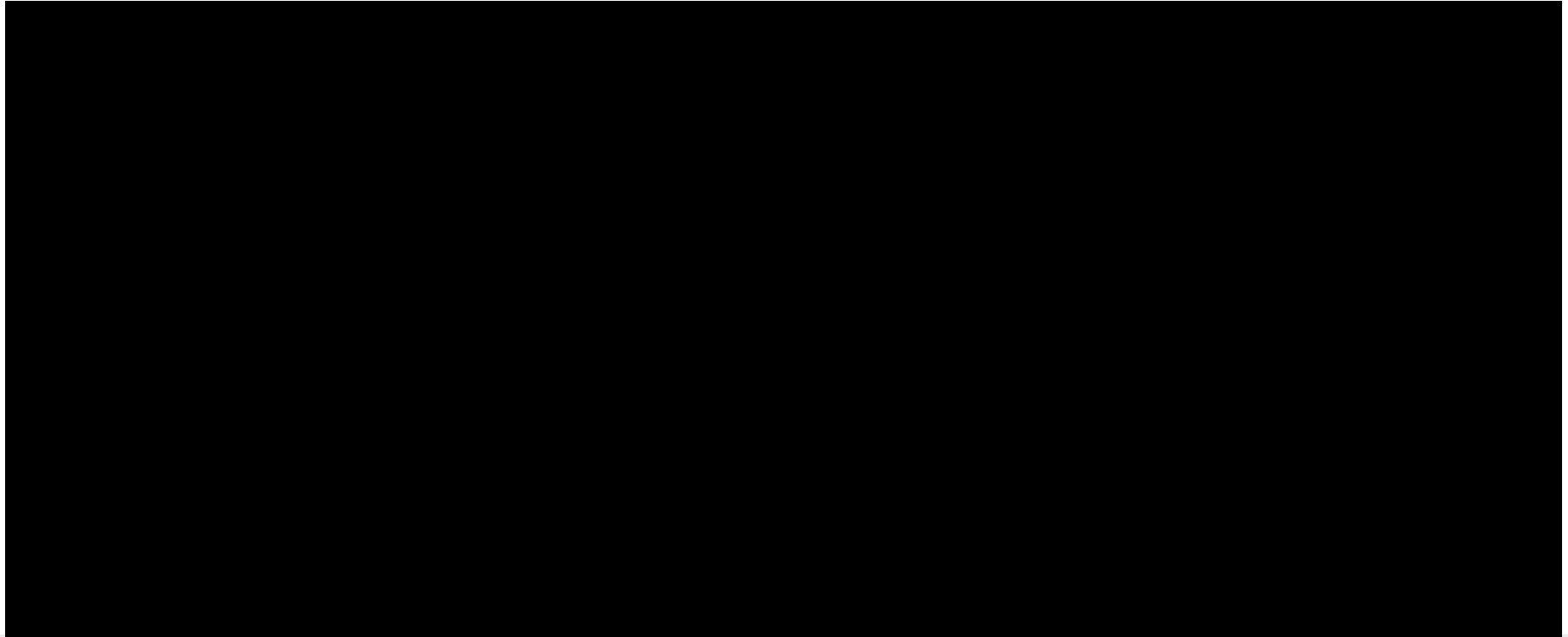
June 8, 2017

# Trump's First 100 Days and What Happens Next



**Randy Evans**  
Partner, Dentons

J. Randolph ("Randy") Evans is a partner at Dentons, the largest law firm in the world. He is a litigator, author and columnist, and is proficient in handling complex matters involving high-profile, high-exposure challenges for clients around the world. Currently, he serves as co-chairman of the Georgia Judicial Nominating Commission, the chairman of the Republican National Lawyers Association and the Georgia committeeman for the Republican National Committee. Randy has also been appointed to serve as a member of the ABA's Standing Committee on Governmental Affairs.



# What the President's Budget Tells Us?



# What Does Trump's Latest Proposed Budget Tell Us?

## March: Trump proposed Discretionary Budget Proposal:

- Of the 27% of federal budget allocated to discretionary funding, The President had proposed that the following agencies reduced funding:
  - The Environment Protection Agency (- 31%)
  - State Department (- 29%)
  - Department of Agriculture (- 21%)
  - Labor Department (- 21%)
  - Department of Health & Human Services (- 18%)

## May 5: Trump signs \$1.1 Trillion spending bill to keep government open through September




- Cuts DOL discretionary spending allotment \$83 Million, dramatically down from \$2.5 Billion proposed cut
- Holds EEOC and NLRB budgets steady
- Allows caps to be raised on visas
- Shores up retirement benefits for 23,000 coal miners

# What Does Trump's Latest Proposed Budget Tell Us?

## May 23: President sends Congress a \$4.1 Trillion Spending Plan

- Cuts federal spending by \$4.5 Trillion to balance budget over next 10 years
- Leaves Social Security and Medicare mostly untouched but cuts Medicaid by over \$600 Billion over next 10 years
- Similar to March Trump proposal: reducing spending of many federal agencies while shifting resources to military and infrastructure projects
- Envisions overall tax cuts, relying on 3% annual growth (nearly \$600 Billion a year) in added revenue attributable to aggressive revenue growth forecasts

# Winners & Losers in Proposed Trump Budget

-  Non-defense spending would fall 1.5% by end of next decade well below lowest level in records going back to 1962
-  Defense spending up \$50 Billion to \$640 Billion
-  20% cut in overall DOL budget
  - Shrinks Job Corps - workplace training for **disadvantaged youth**;
  - Decreases federal funding for **job training and employment service grants** and **reallocates the funding** to states, localities and employers
  - Eliminates "less critical" technical assistance grants to **disabled workers**, launching an "early intervention" project under which states would test programs to help the disabled return to the labor market
  - Cuts spending to DOL's Employment and Training Administration and makes changes to **unemployment benefit** system

# Trump's Proposed DOL Budget Down By 20%

- Refocuses to enhance "program integrity" the Bureau of International Labor Affairs from ensuring employees around the world are treated fairly to ensuring that **US trade agreements** are enforced for American workers
- Raises nearly \$15.9 Billion over 10 years to improve Pension Benefit Guaranty Corporation's solvency, while separately offering to accelerate agency premium payments paid to pension plan sponsors
- Adds a new \$25 Billion nation-wide parenting leave program of six weeks paid leave for new and adopting parents
- \$13 Billion in additional unemployment insurance revenues from employers who have high employee turnover rates
- Social Security Disability Insurance payments cut by \$72 Billion
- Proposed merger of EEOC and OFCCP

# Trump's Proposed Department of Justice Budget

- DOJ budget (- 3%) shifted toward:
  - 300 new federal prosecutors to combat violent crime and immigration violations
  - Adds \$100 Million for national security priorities including cyber agents
  - Adds \$75 Million for 450 new positions to process backlog of immigration court cases including 75 new immigration judges
  - Adds \$2.6 Billion on border security including \$1.6 Billion for southern border wall

# Department of Education cut \$9.2 Billion

- Largest cuts to
  - College work study programs
  - Student loans
  - Teacher training
  - After school programs
- \$1 Billion shifted from poverty level schools to open enrollment and \$400 Million granted for charter schools and vouchers
- Cuts deepest to federally funded biomedical and aerospace research

# Bottom Line

- Expect months of vigorous debate in Congress, including opposition from both sides of the aisle
- Budget debate likely to create employment uncertainty regarding:
  - Employee health care
  - Unemployment eligibility
  - Increased unemployment tax rates for employers with high turnover
  - Federal parenting leave coordination with existing state family leave laws
  - Workplace training for seniors, disadvantaged youth and disabled
  - Pension Plan revisions
  - Increased immigration enforcement
  - Decreased immigration labor pool
  - Proposed merger of EEOC and OFCCP
  - R&D government contracts and grants
- Staff reductions likely to reduce DOL personnel and impact claim review

# Good News: Bad News



- Decline in US unemployment to 28-year low:

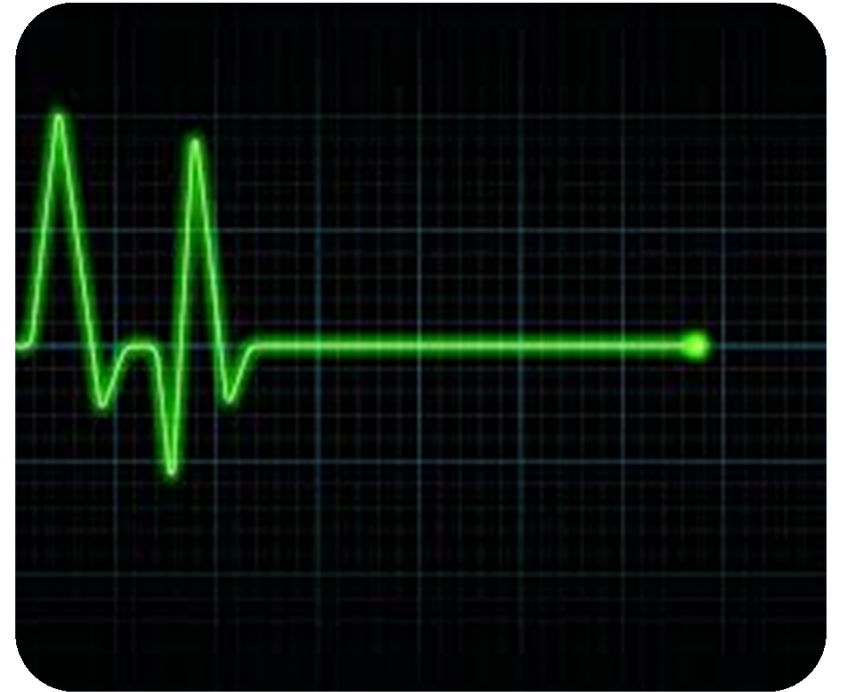
As of 5/15/17	4/15/17	5/15/16
4.4	4.5	5.0

- According to ADP Research Institute:
  - 63% of US workers open to leaving for another job
  - 13% would move for better pay
  - 46% would move for same or less pay for better career path, better work-life balance, etc.
  - 27% of responding workers had switched jobs in the past year
  - Baby boomers leaving the market, not offset by immigration
  - Challenge: Achieving 3% annual GNP growth goal while workforce remains basically flat



# Health Care:

- American Health Care Act (AHCA) passes House by 1 vote on May 4, 2017
- Most controversial provisions:
  - Allows states to request a waiver for a number of ACA provisions, including:
    - Charging different premiums (including for pre-existing conditions)
    - Allowing individual plans to define own core set of essential health benefits
  - Increase rate ratios for seniors
  - Substantially reduces premium subsidies
  - Scales back and eventually phases out of Medicaid expansion funds by 2020
- Senate will introduce its own bill



# Wellness Programs

- In May 2016, EEOC specifically stated that ADA insurance safe harbor did not apply to wellness programs
- EEOC raised issues about financial incentives for voluntary participation
- The House Committee on Education and the Workforce has proposed a bill to reverse in part the May 2016 EEOC rules, including:
  - Maintaining an insurance safe harbor
  - Financial incentives already set out in the Public Health Care Act

**Bottom Line: Wellness Programs are still a moving target**

# Immigration Policy and Enforcement

- The Border Wall
- Travel Ban Do Over
- Hire American Executive Order
- H1B Professional Visa
- Border Searches
- EB5 Immigrant Investor Program
- Comprehensive Immigration Reform



# The Border Wall

- No funding from Congress
- No funding from Mexico
- No new wall construction started



# Travel Ban Do Over

- Executive Order creating a temporary ban on US entry and visa benefits to citizens of 6 predominately Muslim countries
  - Temporary 90 day ban
  - Does not impact dual citizens, green card holders, and visa issued before the original Executive Order in January 2017
- Blocked by federal district courts in Maryland and Hawaii
- Fourth and Ninth Circuit Court of Appeals heard oral argument
  - Fourth Circuit Court of Appeals ruling upholds lower court preliminary injunction on travel ban

# Hire American Executive Order

- Executive Order issued April 18, 2017
- No change in current law or regulation
- Broad language without specifics, as contrasted with the Buy American Executive Order
- Calls on federal agencies to propose new rules and regulations
  - Includes specific request for suggested reforms to ensure H-1B visas are awarded to the most-skilled or highest-paid foreign nationals
  - Includes specific instruction to issue proposals and guidance to prevent fraud or abuse.

# H-1B Professional Visa



- Demand for new H-1B visas down for FY2018, but quota still exhausted during first 5 business days.
- Changes in agency policies expected, with some regulations changes possible, but Congressional action less likely.
  - H-1B for jobs offering DOL level one wage is an example
  - Increased audits and worksite visits expected
  - Change in random selection process for quota subject petitions likely
- 15 day premium processing continues to be suspended
- Authority is INA101(a)(17)(H) and 8 CFR 214.2(h)

# Border Searches

- Increased funding for agents
- Customs and Border Protection agency report increase in searches of electronic devices between October 1, 2016, and March 31, 2017.
  - 14,993 searches
  - Huge increase from prior 12 months
- Top reasons:
  - Travel documents incomplete
  - Lack proper documents or visa
  - Previous violations with CBP
  - Name matches person of interest
  - Random selection
- Authority includes 8 USC 1357 and 19 USC 1499, 1581 and 1582





# EB5 Immigrant Investor Program

- The expiration date for the pilot program for regional centers is extended to September 30, 2017.
  - Another extension is expected.
- Legislation introduced in Congress to repeal EB5
  - Unlikely to be passed.
- Legislation introduced in Congress to amend EB5
  - Outlook unknown.
  - Includes increased investment requirements.
- Proposed regulations issued by US Citizenship and Immigration Services to amend EB5
  - Date of final regulations unknown / Likely impacted by Congressional action.
  - Includes increased investment requirements.
- Authority is INA 203(b)(5)

# Comprehensive Immigration Reform

- Outlook uncertain
- Action by Trump Administration more likely than Congress
  - Same as Obama and Bush Administrations
- Various immigration proposals before Congress, but none is comprehensive
- Possible changes under consideration
  - Increase enforcement
  - Change to points-based system
    - Decrease in family reunification immigration
    - Larger allocation to skilled immigration and short supply labor markets
    - Watch for changes in agricultural sector

# The Big Picture - A Summary

- Companies should conduct trainings and have affirmative audits of compliance records for I-9, PERM and H-1B to prepare for expected increase in enforcement actions.
- Likely changes in H-1B professional visa regulations and policies will impact employers' use of this important visa, so it's important to keep current on changes and not be caught off-guard.



# Department of Labor Changes

- DOL
  - New Labor Secretary Alexander Acosta is confirmed
  - But no Wage & Hour Division Administrator yet
    - Rumored leading candidate: Alexander Passantino
      - Former WHD Administrator in the final year of G.W. Bush Administration
      - Opposed the Overtime Rule to raise exemption salary levels while at Seyfarth Shaw
- Wage & Hour Division Budget
  - Shows 2018 budget to hold steady with a slight increase to \$233 million over 2017's \$230 million



# DOJ/DOE Transgender Retreat



- The DOE and DOJ withdrew their joint "Dear Colleague" letter interpreting Title IX as requiring transgender kids to have access to the restrooms and locker rooms corresponding with their gender identity
  - The DOJ did not say that such an interpretation of Title IX was improper. It simply withdrew the guidance indicating it wasn't prepared or promulgated with sufficient legal analysis and support
  - There has been no further movement from the DOJ. The DOJ's lawsuit against North Carolina has been withdrawn because the HB2 bill was withdrawn by the North Carolina legislature
  - The DOJ has not withdrawn its interpretation of Title VII to include gender identity within the definition of "sex," as was set forth in a December 2014 memo by former AG Eric Holder

# Religious Liberty Executive Order



- The DOJ considers how to implement the Religious Liberty executive order signed by President Trump on May 4
- The order has language instructing the DOJ to provide guidance to all agencies on "interpreting religious liberty protections in Federal law" - specifically application of the Religious Freedom Restoration Act in a number of contexts of federal law, including employment discrimination



- In what contexts can the Religious Freedom Restoration Act exempt an employer from adhering to requirements of federal law?

# Sex in the Courts

- 7th Circuit interpreted Title VII to include sexual orientation protections
- The 2nd Circuit rejected the same interpretation
  - But resurrected a gay ad exec's discrimination suit by using the Supreme Court's gender stereo-typing precedent, i.e., sexual orientation discrimination claim was not viable but a gender stereo-typing claim was. *Christiansen v. Omnicom Grp*
- Like the Second, the Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh and D.C. Circuits have all previously held sexual orientation is not a protected category
  - But the Second Circuit was recently asked to revisit its precedent applied to the *Christiansen v. Omnicom Grp* case
  - N.Y. federal judge recently ruled that Title VII does include sexual orientation protections, arguably forcing Second Circuit reconsideration. *Philpott v. State of New York*





# DOL Fiduciary Rule

- The rule mandates financial professionals who service individual retirement accounts, including IRAs and 401(k) plans, to serve the "best interest" of the savers & disclose conflicts of interest
- The DOL has delayed yet again implementation of its April 2016 Fiduciary Rule
  - In April 2017, the DOL announced implementation would be delayed to June 9, 2017
    - ***May 22, 2017, Sec. Acosta advised DOL will not further delay the rule as set to go into effect June 9, but will do so with "phased implementation" and a "Temporary Enforcement Policy"***
    - Meanwhile, the Fifth Circuit continues its consideration of an appeal to the DOL's having won summary judgment as to its authority under ERISA to promulgate the rule
      - Arguments against include:
        - Violation of free speech (commercial versus professional speech considerations)
        - DOL assumed rule-making authority that Congress expressly forbade the SEC via Dodd-Frank





# Federal Insurance Office & The Covered Agreement

- The Federal Insurance Office (FIO)
  - Created by Dodd-Frank in 2010
  - Director Mike McRaith resigned January 20
  - No replacement yet
  - States and other Lawmakers calling for the elimination of the FIO
- The US-EU Covered Agreement
  - Negotiated by McRaith & the USTR, and presented to Congress on January 13, prior to Trump's Inauguration
  - Would eliminate reinsurance collateral requirements for EU Reinsurers doing business in the US and reduce trade barriers for US Re/insurers doing business in the EU
  - All that's left to do is for Treasury Secretary Mnuchin to sign
  - But there's strong opposition from the States, the NAIC, and key members of Congress

# Thank you

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# Cyber Risk Management & Insurance

June 8, 2017

# Panelists



**Maria Filipakis**

Former Regulator, NY Department of  
Financial Services



**Jennifer McAdam**

Legal Counsel  
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# Agenda

- **Cyber Security Background**
  - Managing basic cyber risks
  - Classifying cyber threats
  - Consumers expectations
  - Managing business risks
- **Regulating Cyber Security**
  - NAIC
  - NYDFS
- **Underwriting cyber insurance**
  - Unique risks for property & casualty insurers
  - Information collected by regulators

# Managing basic cyber risks

- Study by IBM & the Ponemon Institute
- \$7.01 million is the average total cost of a data breach
- \$221 is the average cost of a lost or stolen record
- The biggest financial consequence is LOST BUSINESS
- The longer it takes to detect, the more costly it is to resolve
- Regulated industries have the most costly data breaches
  - Fines and the higher-than-average rate of lost business
  - Healthcare and financial services











# Managing basic cyber risks

## Benchmarked companies: Per capita cost of a lost or stolen record by industry sector (Ponemon Institute)

Health	\$402
Financial	\$264
Transportation	\$247
Education	\$220
Retail	\$200
Media	\$177
Hospitality	\$148

# Managing basic cyber risks

Top 10 Healthcare Data Breaches 2015

Organization	Records Breached	Type of Breach
 Anthem	78,800,000	Hacking / IT Incident
 PREMIERA	11,000,000	Hacking / IT Incident
 Excellus	10,000,000	Hacking / IT Incident
 UCLA Health	4,500,000	Hacking / IT Incident
 mie	3,900,000	Hacking / IT Incident
 CareFirst	1,100,000	Hacking / IT Incident
 DMAS	697,586	Hacking / IT Incident
 GEORGIA DEPARTMENT OF COMMUNITY HEALTH	557,779	Hacking / IT Incident
 BEACON HEALTH SYSTEM	306,789	Hacking / IT Incident
 DJO GLOBAL	160,000	Laptop Theft
2015 Total	111,022,154	(almost 35% U.S. population)



# Classifying cyber threats

- Common cyber risks
  - Identity theft
  - Business interruption
  - Reputational damage
  - Damage or theft of valuable assets
  - Malware
  - Human error
  - Cost of credit monitoring services
  - Trademark or copyright infringement

# Classifying cyber threats

- Identity theft
  - Unauthorized use or attempted use of an existing account
  - Use of personal information to open a new account
  - Misuse of personal information for a fraudulent purpose
- Malicious software (malware)
  - Trojans
  - Worms
  - Viruses
  - Botnet

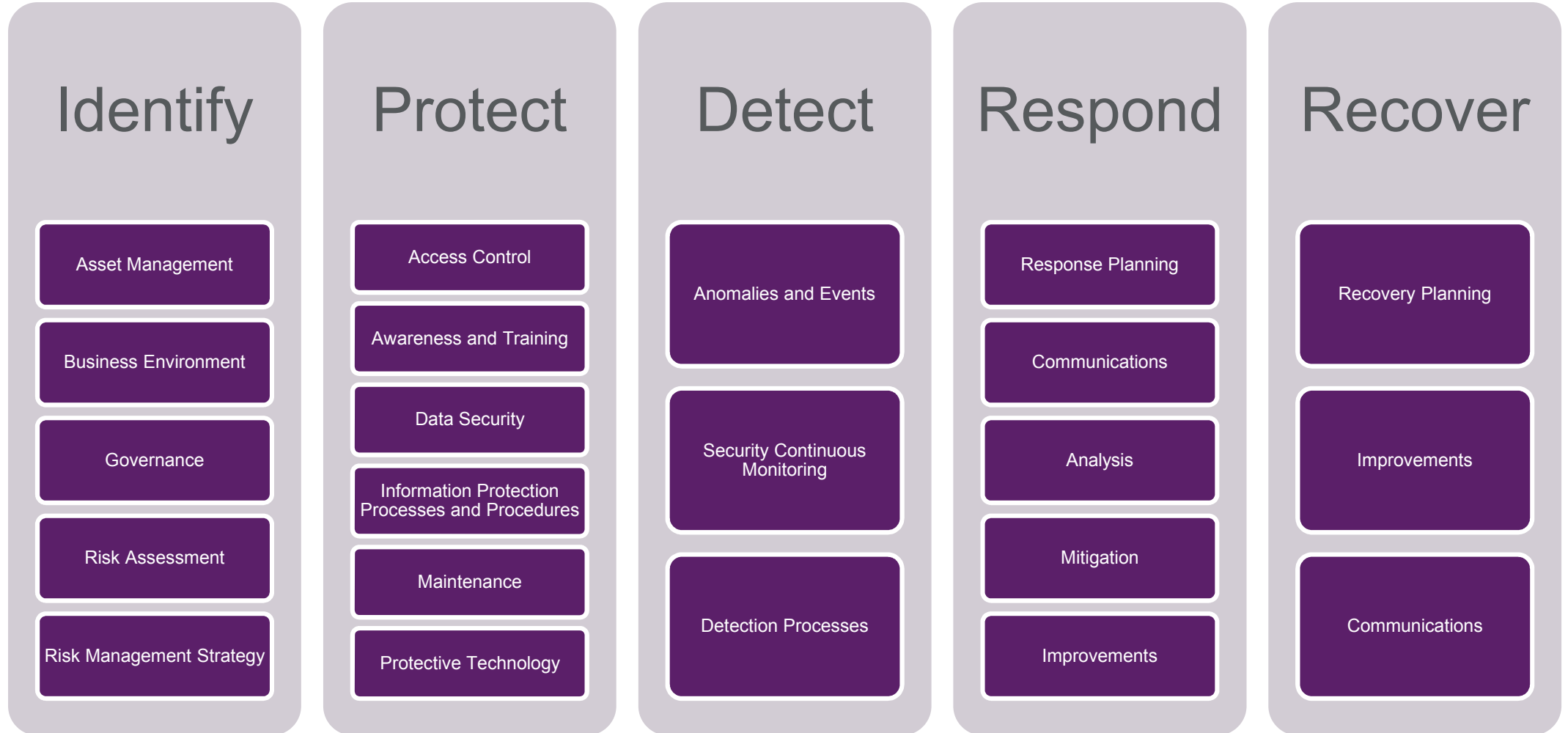
# Classifying cyber threats

- Cyber crime perpetrators
  - Nation states
  - Organized criminals
  - Lone wolf criminals
  - Hacktivists
  - Hobbyists for fun or practice

# Consumer expectations

- Consumers expect business or government will:
  - Protect the information consumers provide to them
  - Provide information on what they collect
  - Tell consumers who has access to their information
  - Provide consumers access to their privacy policy
  - Be notified in the event of a breach
  - Be informed about remediation efforts
  - Receive help in protecting themselves from identity theft or fraud

# Managing Risks: NIST cybersecurity framework



# Regulating cybersecurity

- NAIC Cybersecurity Working Group
  - *Principles for Effective Cybersecurity Insurance Regulatory Guidance* (April 2015)
  - Annual Statement Supplement for Cybersecurity (June 2015)
  - IT Exam Working Group adopted new cybersecurity guidance (June 2016)
  - *Roadmap for Cybersecurity Consumer Protections* (December 2015)
  - *Insurance Data Security Model Law* (first draft exposed March 2016)

# Regulating cybersecurity

- NAIC Insurance Data Security Model Law (v. 4)

([http://www.naic.org/documents/cmte\\_ex\\_cswg\\_170509\\_model\\_law\\_v4\\_clean.pdf](http://www.naic.org/documents/cmte_ex_cswg_170509_model_law_v4_clean.pdf))

- Implement an Information Security Program based on Licensee's size/complexity and scope of activities and sensitivity of Nonpublic Information
- Perform Risk Assessment: (1) designate one or more employees responsible for Information Security Program; (2) identify and assess threats; (3) assess safeguards; and (4) manage threats
- Based on Risk Assessment, determine appropriate security measures
- Board of Directors oversees Information Security Program
- Develop procedures to ensure security of data held by Third-Party Service Providers
- Evaluate and adjust Information Security Program as needed
- Investigate Cybersecurity Events
- Notify Commissioner of Cybersecurity Events (72 hours) with all known information
- Exceptions based on number of employees, compliance with HIPAA data security requirements, and employees/agents of Licensees that are also Licensees

# Regulating cybersecurity

- New York State Department of Financial Services
  - Regulation: *Cybersecurity Requirements for Financial Services Companies* (first draft released September 2016 / effective March 1, 2017)



# Regulating cybersecurity

- NY Cybersecurity Requirements for Financial Services Companies

(<http://www.dfs.ny.gov/legal/regulations/proposed/rp500t.pdf>)

- Based on a Risk Assessment, Covered Entities establish a Cybersecurity Policy to protect Information Systems and Nonpublic Information stored on Information Systems
- Designate a Chief Information Security Officer (CISO) who reports annually to Board of Directors
- Perform annual penetration testing
- Use audit trails to detect and respond to Cybersecurity Events
- Limit access privileges
- Develop procedures to ensure security of applications developed in-house and externally
- Perform regular Risk Assessment
- Train staff on cybersecurity issues
- Develop procedures to ensure security of data held by Third-Party Service Providers
- Utilize multi-factor authentication
- Create data retention policies
- Encrypt Nonpublic Information
- Establish incident response plan
- Notify Superintendent of Cybersecurity Event (72 hours) & submit annual statement of compliance
- Exemptions based on number of employees, gross annual revenue and year-end total assets

# Regulating cybersecurity

Provision	New York Reg. (final)	NAIC Model (draft)
Cybersecurity / Information Security Program	X	X
CISO or other employee	X	X
Regular system testing	X	X
Audit Trails	X	X
Restrict access privileges	X	X
Application Security	X	X
Risk Assessment	X	X
Train Staff	X	X
Third-Party Oversight	X	X
Multi-Factor Authentication	X	X
Data Retention Policy	X	X
Encrypt Nonpublic Information	X	X
Incident Response Plan	X	X
Notify Superintendent / Commissioner (72 hrs.)	X	X
Exceptions for smaller entities	X	X

# Underwriting cyber insurance

- The origin of cyber insurance
  - Errors & omissions (E&O) coverage
    - E&O coverage for tech companies covered network crashes, data breach, loss or destruction of data and similar events
  - Professional liability coverage for businesses
- Cybersecurity as a separate peril
  - May 2014: The first cyber exclusion appears in an Insurance Services Office, Inc. Commercial General Liability policy form
    - No coverage for “[a]ny access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information.”
    - Exclusion applies to both Coverage A (bodily injury) and Coverage B (personal and advertising injury)

# Underwriting cyber insurance

- Overview of cyber insurance coverage in the US
  - Liability for security or privacy breaches
  - Costs associated with a privacy breach
  - Costs associated with restoring business assets
  - Business interruption and extra expense
  - Liability associated with libel, slander and copyright infringement
  - Expenses related to cyber extortion and terrorism
  - Coverage for expenses related to regulatory compliance

# Underwriting cyber insurance: First-party losses

- Data breach expenses
  - Cost of forensic investigation
  - Cost of legal advice to determine notice and remediation requirements
  - Cost of notice and remediation, such as credit monitoring or credit freezes
  - Cost of public relations services
  - Data restoration or replacement
  - Business interruption losses
  - Extortion payments

# Underwriting cyber insurance: Third-party losses

- **Privacy liability:** Liability to consumers affected by data breach
- **Network security liability:** Damage from your network's failure to protect customer information or intellectual property of others
- **Technology services liability:** Damages from your failure in delivering technology services
- **Media liability/content liability:** Claims for copyright/trademark infringement or defamation
- **Social media liability:** Claims based on statements or disclosures made in social media

# Underwriting cyber insurance

- Other considerations when purchasing a cybersecurity insurance policy
  - Expert assistance to review your security program
  - Expert assistance in evaluation of an attack
  - Threat actor identification
  - Identification and assistance evaluating state data breach notification and remediation laws
  - Expert assistance managing consumer notice and remediation efforts

# Underwriting cyber insurance

- Importance of risk management
  - Insurers will evaluate the adequacy of the businesses' cyber risk management
  - Evaluation of the disaster response plan:
    - Networks
    - Website
    - Physical assets
    - Intellectual property
  - Employees' access to data systems
  - Antivirus and anti-malware software
  - Frequency of system and software updates
  - Effectiveness of firewalls



# Underwriting cyber insurance

- Other ways to cover cyber risk exposure
  - Financial institutions bonds
  - Commercial crime coverage
  - Errors and omissions (E&O) coverage
  - Directors and officers (D&O) coverage

# Unique risks for P&C insurers

- Property and casualty insurers face two distinct cybersecurity risks
  - Ordinary business risks
  - Added financial exposure from offering cybersecurity insurance and risk management products

# Info collected by regulators

- Cybersecurity and identify theft insurance coverage supplement
- Information filed April 1 each year
- First data collection was April 1, 2016, for 2015 data year
- Initial results:
  - Roughly \$500 million in stand-alone policies
  - Approximately \$1billion in package policy premiums

# Info collected by regulators

- Stand-alone cybersecurity insurance policies
  - Number of claims reported
  - Direct premiums written and earned
  - Direct losses paid and incurred
  - Adjusting and other expenses
  - Defense and cost-containment expenses
  - Number of policies in force
- Similar information collected for identity theft insurance

# Resources

- **NAIC Cybersecurity Working Group**  
([http://www.naic.org/cmte\\_ex\\_cswg.htm](http://www.naic.org/cmte_ex_cswg.htm))
- **NIST Cybersecurity Framework**  
(<http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214.pdf>)
- **National Conference of State Legislatures listing of state data breach and notification laws** (<http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx>)
- **SIFMA Small Firm Cyber Guidance & Checklist**  
(<http://www.sifma.org/issues/operations-and-technology/cybersecurity/guidance-for-small-firms/>)

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# Voices From the Heartland: Insurance Regulation in Missouri and Kansas

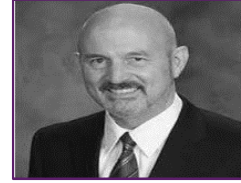
June 8, 2017

# Panelists



**Bruce Baty**

Partner  
Dentons



**Commissioner, Ken Selzer**

Kansas Insurance Department



**Director Chlora Lindley-Myers**

Missouri Department of Insurance



# Missouri

- A New Administration, A New Beginning
- Growing and Strengthening Missouri's Insurance Market
- Disaster Relief
- Missouri's Health Marketplace
- Consumer Protection
- What We Follow at the NAIC
- Initiatives - What's to come



# Kansas

- The Kansas Insurance Market
- Market Conduct: Protecting Kansas Consumers
- Health Insurance for Kansans
- What We Follow at the NAIC
- What's Next





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Insurance  
Department

# Kansas Insurance Department

## Heartland Insurance Symposium

June 8, 2017

**Ken Selzer, CPA**  
*Commissioner of Insurance*  
Kansas Insurance Department



Home



Long-Term Care



Health



Medicare  
supplement



Auto



Life

# Kansas City insurance department

- History
- Employees
- Budget
- Direction
  - Efficiency
  - Productivity
  - Responsiveness
  - More competition



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Department





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Insurance  
Department

# Department responsibilities

- **Educate and Advocate for consumers**
  - 30,000 copies of 40+ different booklets
  - Handle many inquiries, complaints and recoveries
  - 800 fraud cases annually
- **Regulate the industry**
  - 1,500 companies licensed to sell policies in Kansas
  - Collect \$200 million from taxes, fees and fines
- **License agents**
  - 23,000 resident agents
  - 100,000 nonresident agents



**Kansas  
Insurance  
Department**

# New initiatives

- Innovation—easier to use and more interesting website
  - Live chat feature
  - Life policy locator service
  - NerdWallet recognition
  - Many more examples
- Global Financial Summit
- Don't Text #JustDrive pledge contest
- Insurance education



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Insurance  
Department

# High profile insurance issues

- Kansas budget, sweep settlement
- Cybersecurity
  - Many legislative successes, including
  - Fingerprinting of new agents
- Merge of Securities Commission into Insurance Dept.
- Efficiency measures, other programs
- ACA modification and potential for replacement

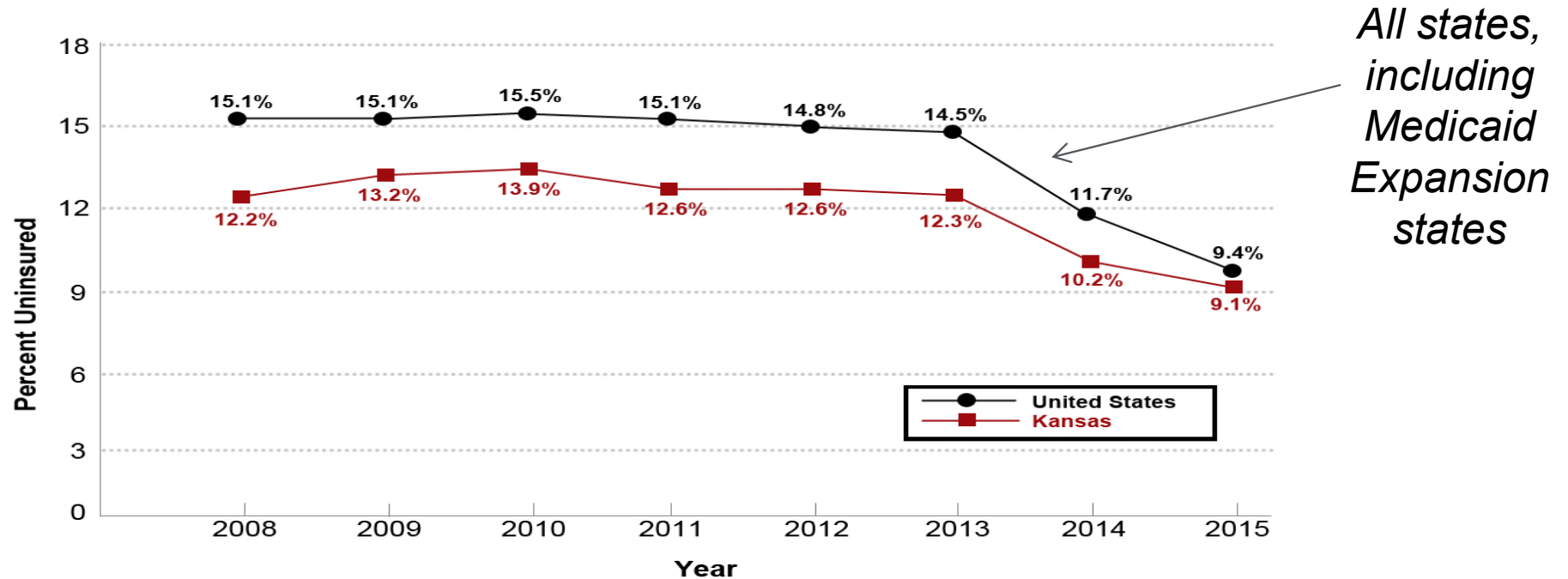


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# Uninsured rates – Kansas vs. National

Uninsured Rates for Kansas and the United States, 2008 - 2015



Sources: U.S. Census Bureau's American Community Surveys; Kansas Health Institute



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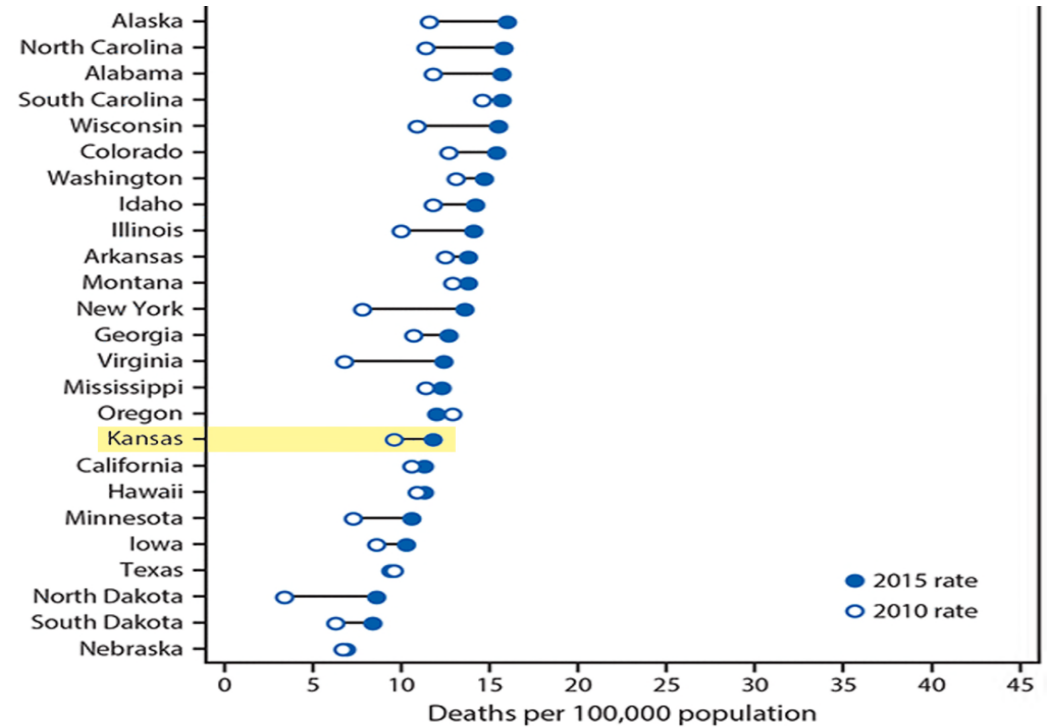
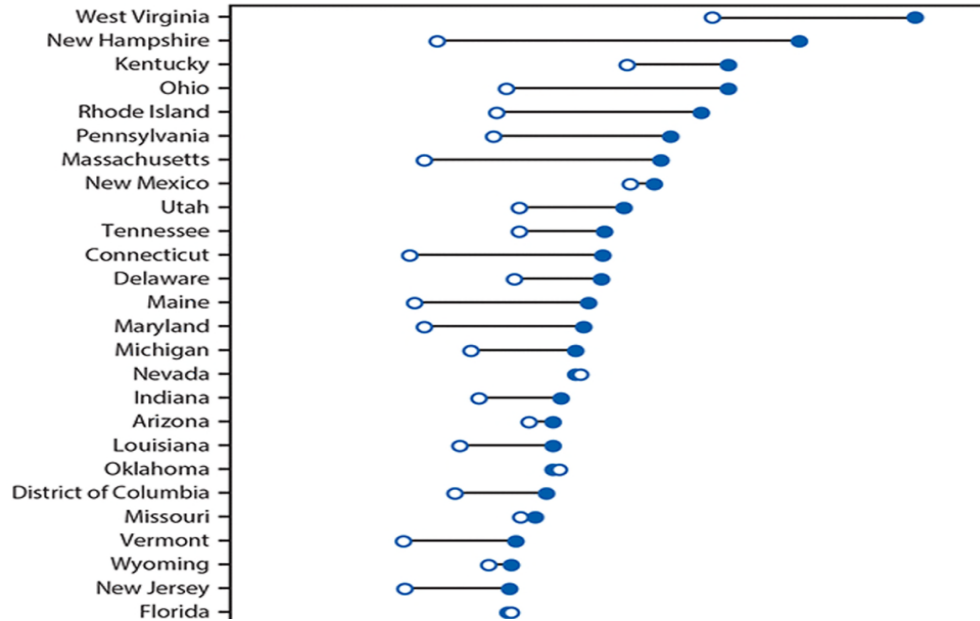
# Individual health coverage under the ACA

- Sources of coverage in Kansas
- ACA Marketplace participation in Kansas
- Distortions created by the ACA (guaranteed issue, special enrollment periods, grace periods, rates not based on full risk, policy churn, misuse of coverage, etc.)
- Rate increases
  - On and off exchange
  - Group plans
  - Upcoming changes
- Possible AHCA changes



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# Opioid deaths



# Kansas Insurance Department

**Ken Selzer, CPA**

**Commissioner of Insurance**

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Topeka, KS 66612  
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Fax: (785) 296-7805

[www.ksinsurance.org](http://www.ksinsurance.org)  
[commissioner@ksinsurance.org](mailto:commissioner@ksinsurance.org)

Consumer Assistance Hotline:

**1-800-432-2484**



# Missouri's Insurance Market: At a Glance

Chlora Lindley-Myers, Director

June 8, 2017



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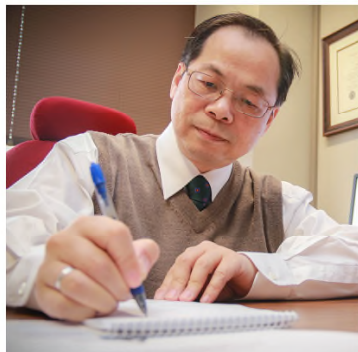
# Overview

- Introduction and Background
- State of Missouri's Insurance Markets
- Growing and Strengthening the Market
- A Summary of the 2017 Missouri Legislative Session
- A Missouri View of the NAIC and its Activities
- Departmental Initiatives and What's to Come?



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# State of Missouri's insurance markets



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# Missouri: At a Glance

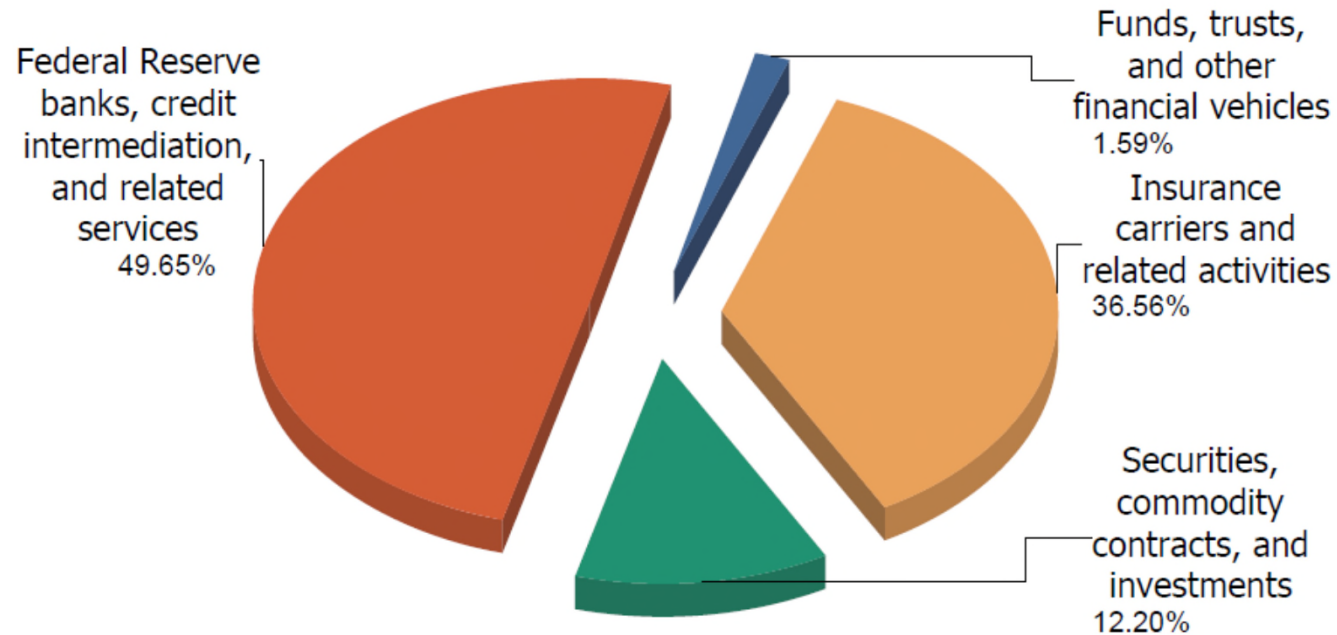
- 18<sup>th</sup> largest state (by population) = 6.1 Million Missourians (2017)
- 2 major metropolitan areas (St. Louis and Kansas City,)
  - Nationally ranked as the 20<sup>th</sup> and 30<sup>th</sup> MSAs, by population
- Home to 2 Federal Reserve Banks and the National Association of Insurance Commissioners
- Geographic diversity -- 1/3<sup>rd</sup> of Missourians live in rural areas



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# Financial Services Sector in Missouri



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# 2015 New Business Formations in Missouri



## Top Ten Business Formations

1. Individual and Family Services
2. Professional, Scientific, Technical Services
3. Restaurant and Other Eating Places
4. Wholesale Electronic Market Agents and Brokers
5. Private Households
6. Residential Building Construction
7. Services to Buildings
8. Employment Services
9. Insurance Agents, Brokers and Others
10. Repair and Maintenance

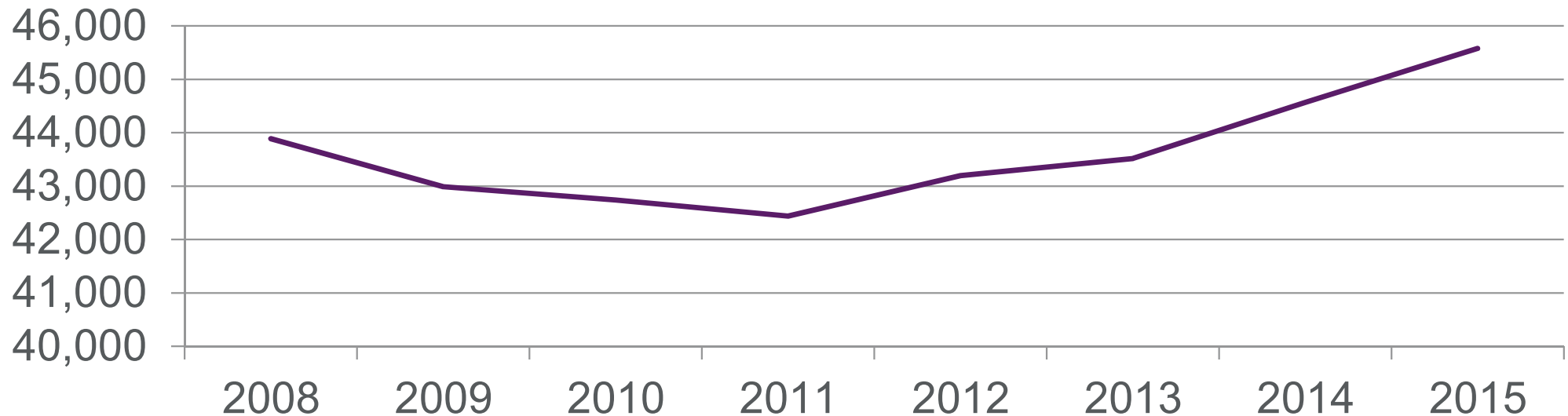


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# Insurance Industry Employment in Missouri

## Insurance Companies and Related Activities

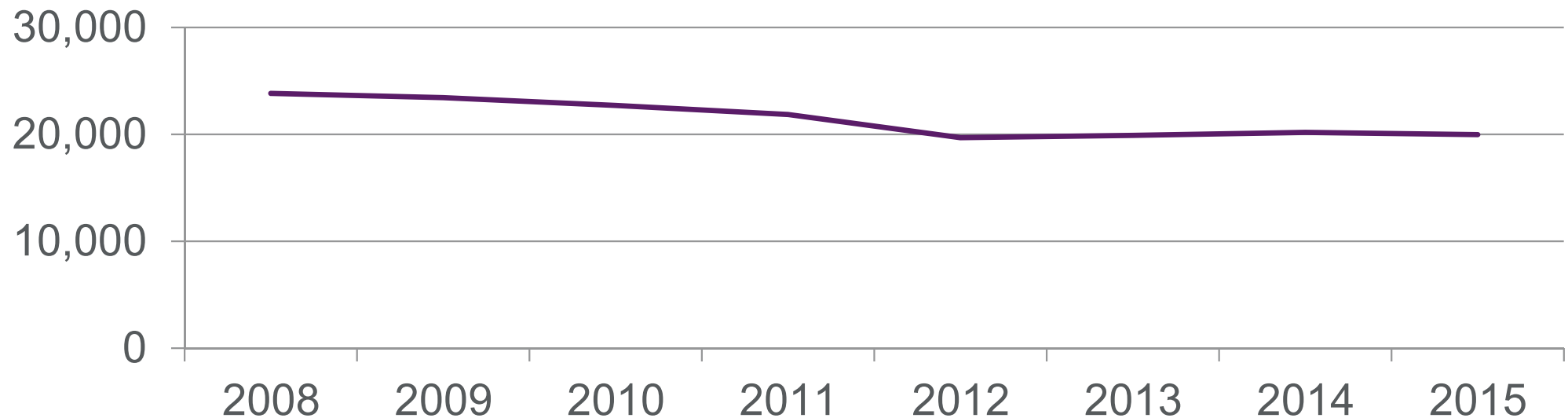


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# Insurance Industry Employment in Missouri

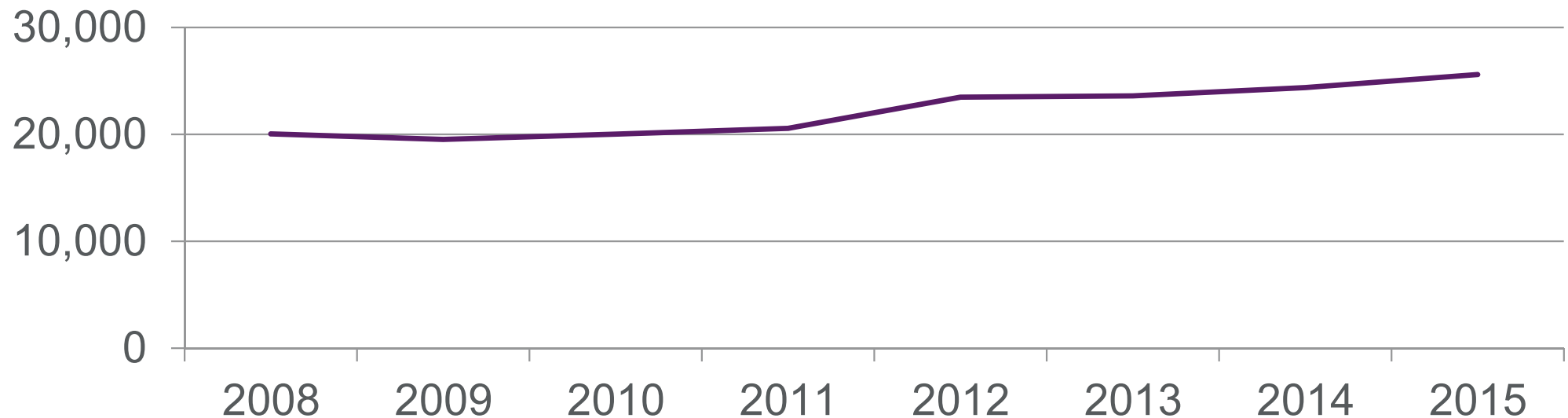
## Insurance Companies' Missouri Employment



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# Insurance Industry Employment in Missouri

## Agents and Brokers



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# Missouri's Insurance Market

- \$36.1 Billion in written premium
- Missouri is the world's 36<sup>th</sup> largest insurance market, by written premium
- Missouri is the 19<sup>th</sup> largest US insurance market
- Ranked 9<sup>th</sup> in terms of licensed domestic insurers (173)
- Ranked 15<sup>th</sup> in terms of licensed domestic and foreign insurers (1,656)

From State Insurance Regulation in Missouri: Key Facts and Market Trends, National Association of Insurance Commissioners 2015



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# Insurance Market Overview

Line of Insurance	Number of Companies	Total 2016 Written Premium
Life and Annuity	404	\$11,124,724,969
Workers' Compensation	334	\$933,615,745
Private Passenger Automobile	173	\$3,606,547,016
Homeowners'	121	\$1,923,297,569





# Market Deep Dive: Auto Insurance

- Auto is largest line of business in Missouri by premium: \$3.5 Billion earned premium
- 173 companies in the private passenger market (2016)
- Missouri 12<sup>th</sup> / 14<sup>th</sup> lowest rates in the country
- When adjusted for inflation, 2015 rates were lower than 2003 rates
- Rate pressure on the horizon:
  - Industry loss ratio: 72.74% (2016)
  - Increase from 2015 industry loss ratio (67.90%)



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# Market Deep Dive: Homeowners' Insurance

- Homeowners' is 2nd largest line of business: \$1.8 Billion in earned premium (2016)
- 121 companies in the homeowners' market (2016)
- Industry loss ratio: 55.6% (2016)
- Steady loss ratio: 2015 = 55.67%
- Rate activity for 2017 = +1.7%
- Overall, rates have increased by 25.5% since 2011 (Joplin Tornado was 5/2011)



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# Market Deep Dive: Health Insurance

- Health insurance is and has historically been least competitive insurance market in Missouri
- Continued uncertainty at the federal level is driving recent market actions and announcements which are further eroding the fragile stability of the individual health insurance market
- The small employer group market remains quite fragile but steady for the moment
- Market and new product developments continue to drive health as leading consumer complaint for DIFP



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# Individual Health Insurance Market

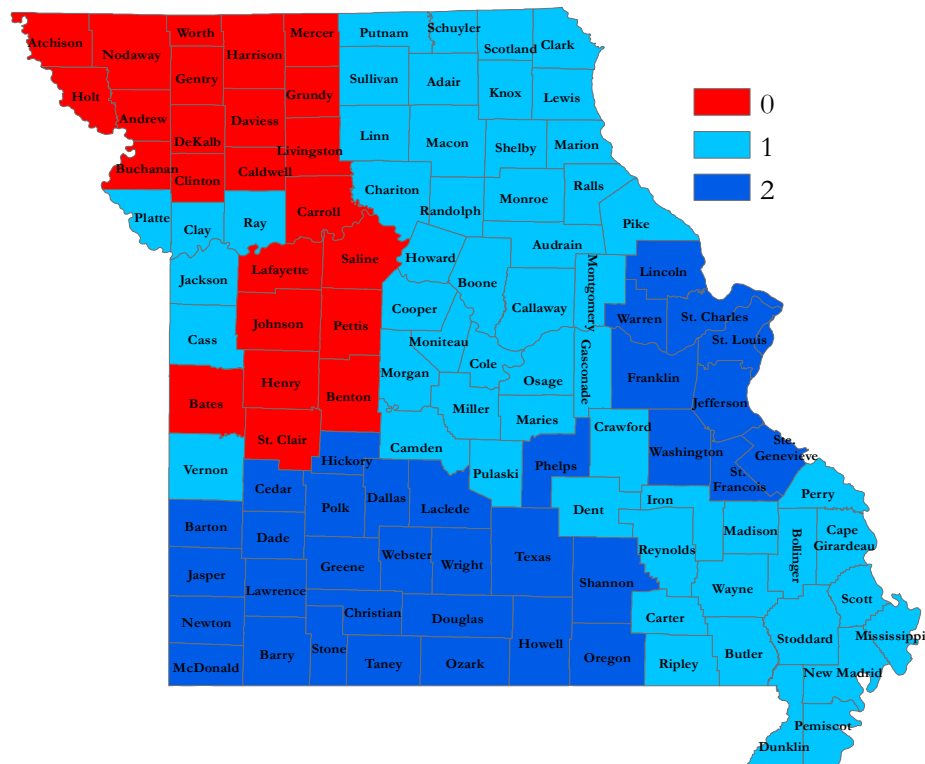
- Nearly 100,000 new Missourians found health insurance in the individual market between 2014 and 2015
- Total number of Missourians buying individual health insurance in 2016: 335,310



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# 2018 Individual Health Insurance Market



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# Small Employer Group Health Insurance

- There are currently 9 health insurers in this market
- Total written premium in 2016: \$1.15 Billion
- 869,547 Missourians were insured in this market in 2016



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# Growing and Strengthening Missouri's Insurance Markets

June 8, 2017



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# Missouri as an insurance Home

- Centralized location, with two major financial centers in Kansas City and St. Louis
- Close proximity to the National Association of Insurance Commissioners
- Positive regulatory environment with extensive in-house insurance regulatory knowledge and experience



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# 2017 Insurance Legislation in Missouri

June 8, 2017



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# Legislative Highlights

- Session concluded May 12<sup>th</sup>
- Large focus on tort reform measures
- Collateral Source Rule – Senate Bill 31
- Health Care Provider Liability – House Bill 452
- Judiciary Bill – Market Conduct Consumer Restitution Interest Rate – Senate Bill 128
- Suicide Exclusions in Life Insurance – House Bill 336



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# Legislative highlights, cont'd

- NAIC Accreditation Model Law Update
  - Corporate Governance Model 305
  - Model Audit Law Model 205
  - Holding Company Model Act 440
  - Credit for Reinsurance Model 785
- Deadlines of 2020
- Also working on the NAIC model on Group Supervision



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# A Missouri View of the NAIC

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# Missouri – Fully engaged in the NAIC

- Committee membership
  - Property and Casualty (C) Committee
  - Examination Oversight (E) Committee
  - Financial Regulation Standards and Accreditation (F) Committee



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# Task Force initiatives

- Financial Stability Task Force
- Innovation and Technology (EX) Task Force
- Principle-Based Reserving Implementation Task Force




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# Flood Recovery Efforts

FEMA/SEMA damage estimates for Missouri's historic 2017 flooding:

**\$58 MILLION** in damage to public infrastructure and emergency response costs 

**\$28 MILLION** in damage to housing and other individual and family losses

**369**   
houses destroyed

**848**   
houses with major damage



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# Litigation Ethics vs. Litigation Antics: Where is the line?

June 8, 2017

# Panelists



**Randy Evans**

Partner  
Dentons



**Shari L. Klevens**

Partner  
Dentons

# Introduction

- What separates the top-tier lawyers who act within the rules of ethics from the rest?
- Employing litigation tactics to bring about a successful resolution
- What is the boundary?
- Recognize those approaches when used by opposing counsel

# 1. Define "win"

- A "win" can differ depending upon the circumstances, e.g., win on merits, vindicate reputation, clear up record, public relations, dismissal, survival, resolution of uncertainty, etc.
- Varies among business entities and individuals, plaintiffs and defendants, governments and private interests
- Helps set client expectations
- In legal malpractice cases, the definition of the "win" may have moving goalposts

## 2. There are no rules (unless there is a rule)

- Know the boundaries of acceptable conduct; may depend on who you are
- Be aware of all extra-judicial circumstances and details—what else is going on?
- 1/14"
- The ability to articulate a holistic view that takes into account all applicable factors can come down to things that have nothing to do with the merits of the case
- When preparing within the boundaries of ethics and professionalism, that extra level of detail can make the difference
- Adapt to the circumstances

### 3. Preparing for Murphy's Law and snake-bit effect

- Cases that are out of tilt or heading in the wrong direction
- Direct correlation between such cases and the quality or competence of the other side's attorney
- Shoot straight with the client
- Take a step back and ask yourself: Is there something we can do differently to change the trajectory of the case?
- Can reevaluate strategy, counsel, value of case
- Screening

## 4. Opposition research is as important as merits research

- Know everything you can know
- Look at all other dynamics that relate to the litigation (including the parties)
- Create Google alerts to learn about bankruptcies, retirements, zonings or other factors that might impact the representation
- Docket searches for other litigation involving client or others; you may learn something before the client does



## 5. Pleadings and drafts: What difference do they make?

- The record reads cold
- Forensic visualization
- Beware of waiver in affirmative defenses and other pleadings
- At the end of the case, go back to your adversary's pleadings: What's missing? What have they failed to prove?
- Shape future discovery requests or motions *in limine*

## 6. Discovery, information requests and due diligence: Sequencing makes all the difference

- Use of discovery to identify pressure points
- What to do with the information gathered
- Building a case brick by brick
- Cases often become about things other than the ultimate merits: asset discovery, completeness of production, truthfulness at deposition, uncovering information that leads to additional claims or counterclaims

## 7. Trials and closings: "All the world's a stage, and all the men and women merely players"

- Jury trial lawyers have unique skills
- Balance between performance and genuineness
- What is the most common mistake that a lawyer makes in closing argument for a jury trial? Don't exaggerate!
- How to prepare for trial and closing

## 8. Hostile judges and difficult opponents: How to make friends and influence enemies

- Opposing counsel and their clients: Your adversary may have something to prove
- Never mislead judge as to facts or law
- Litigation and deal-making can become personal: How to overcome slighted feelings and other issues that can impede professionalism?
- Difficult judges
- Talking to opposing counsel to smooth ruffled feathers

## 9. Motion practice and tactical negotiations: Losing battles to win wars

- The role of momentum
- Returning to "what is a win?"
- Courts are wary of personalized disputes, but eager to enforce rules of professionalism
- Crafting motions that increase the pressure to settle
- Tactical decision to leave some issues for trial

# 10. Clients and juries: They're smarter than you think

- What do jurors want? The closest thing to the truth.
- Use of jury consultants: judge credibility of witnesses, tell hard truths to clients
- Regional views of lawyers: Can a "My Cousin Vinny" moment happen in real life?
- Home cookin'

# Thank you

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