



INSURANCE

TRUMP, THE ELECTION, AND THE FUTURE OF THE AFFORDABLE CARE ACT (ACA)

By Seth Denson

As I lay awake watching the returns roll in, I thought about all the doing that would need to be undone.



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On Christmas Eve, 2009, in the hours following the Senate's passage of the ACA and the certainty that passage in the House of Representatives would follow, I remember having the same feeling, and thinking through all the ways the healthcare market and my industry would change. I put my thoughts to paper as I wrote a message to all of my clients, encouraging them to take a deep breath, as the details of what just occurred would make themselves known over time. While it's now 2016, and many of the players are different, the message is still the same – hold on, the details are always the most important part. Let's see what plays out as the dust settles.

My father has a saying – “it's hard to put toothpaste back in the tube.” Once that West Texas “ism” sinks in you too might realize that while campaign promises make for good messaging, and while commitments most likely will be kept (in aspects), it's not as simple as waiving a wand and magically changing the law of the land.

In March of 2010, the Affordable Care Act was made law with massive resistance and not a single Republican legislator voting for it. It has gone through challenges within the Supreme Court and dozens of congressional repeal votes only to be either blocked by the Senate or vetoed by President Obama. It took over a year to have its first provisions put into place, and almost five years to have the majority of its components implemented – some of which, have still not been enacted. With all that, should we really expect that the law would be repealed in the first 100 days of a President Trump administration? (Even as I write that sentence, I pause before typing President Trump.)

With all political opinions aside and a complete anti-partisan approach, here is what we know about how the Affordable Care Act is written, how a law is made (and repealed) and what has been done, that might be undone:

1. While the Republicans control both legislative houses and the executive branch, they do not have a supermajority in the Senate. Why is that important – because without a ‘supermajority’ a filibuster could still prevent a complete repeal and replacement of the ACA.
2. Without a supermajority, there's nothing to prevent Democrats within the Senate from blocking a complete repeal of the law. Without this complete repeal, the likely option to make changes would be done through budget reconciliation; however, there are still many facets of the ACA that can not be repealed via this process. Portions of the law such as specific reforms to Medicare, provisions that eliminate insurers ability to deny access to coverage for pre-existing conditions, and the section of the law that allows children to remain on their parents plans up to age 26 all cannot be eliminated via reconciliation. Given that the entire law was written with certain aspects meant to stabilize other portions – such as the employer and individual mandate and tax subsidies, eliminating these provisions could result in a much higher level of instability within the marketplace and chaos within the healthcare sector.
3. Like it or not, there are an estimated 20,000,000 (yes those are 6 zeros) people insured today that may not have been without the Affordable Care Act. When I last looked at the returns, the President Elect was actually

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down in the popular vote, even though he shored up the Electoral College. That being said, while Mr. Trump may not be your normal 'politician', he most definitely is one now—and disrupting 20,000,000 people (a significant number of them being of voting age) may not be the best political decision.

4. Private entities write insurance policies, not the federal government. While the laws are made at a federal level and oversight is as the state level, in the end companies like Blue Cross Blue Shield, United Healthcare, Aetna, Cigna, etc. are who underwrite and administer health insurance policies. Since the passage of the ACA, the 'Big Four' insurers (as they are known) have seen triple digit stock price increases, so don't expect them to just roll over without significant influence.
5. It took the insurance market years to create plans that provided the provisions required by the ACA. Once the plans were created, pricing and premiums then had to be factored and calculated. And finally, once the plans and their pricing were finished, everything then had to be approved by each individual state's Department of Insurance. Changing those plans and their pricing would at the very least take time — and maybe even more of it than it took to originally create them.

With regards to the Affordable Care Act, it would be very difficult to outright take away pieces of the law without providing some sort of replacement. Republicans and Mr. Trump have long stated that the intent would be to both repeal AND replace. And as for the replacement of the law, should Republicans be able to get that accomplished, they would most likely do so with similar provisions found in the bill passed by both the Senate and the House of Representatives last year – “The Restoring Americans' Healthcare Freedom Reconciliation Act.” Within this bill, which was ultimately vetoed by President Obama, were provisions that eliminated programs that provided Medicaid coverage near or below the federal poverty line, eliminated tax penalties for the uninsured, as well as, taxes created by the law to fund various programs within the ACA. In its original draft, the bill was written to be implemented after two years following its signage, so regardless of what happens next to the ACA and whatever might replace it, we should expect that will take some time to go into effect. Whatever happens, given the years of increased cost within the healthcare market in the decade that preceded the Affordable Care Act, going back to the way things were prior to the ACA is not a solution.

In the aftermath of this unprecedented election season, when you set aside all the rhetoric, political banter, and emotion — the reality is that just as when the ACA was originally passed and in the years it took to implement it, so too should we expect that it will take time to figure out the next steps. The key to success through these ongoing turbulent times is being strategic and nimble, not shortsighted and abrupt in decisions. Yes, toothpaste is hard to put back into tubes and that which has been done sometimes cannot be completely undone. Stay calm, take a deep breath and prepare for the next chapter of healthcare in the United States. ■