In the wake of Tuesday’s national election, many are asking about the future of the Affordable Care Act under a Donald Trump Presidency. This summary provides a brief overview of the legislative and regulatory process considerations involved in repealing and/or replacing the Affordable Care Act, as well as speculation as to what a replacement health care law might look like (or what elements of the Affordable Care Act could be retained). We should note that this overview should not be construed as legal advice or relied on as a definitive statement of outlook, as we have very few details at this point. And, as Tuesday’s election proved, nothing is certain in politics.

Repeal and Replace

Likelihood: Low

Obstacles:
- Republicans lack congressional supermajority
- Complete repeal absent replacement could result in loss of coverage for 20 million Americans
- No comprehensive replacement alternative in place

Donald Trump and many Republicans running in congressional races campaigned on a platform of immediate repeal of the Affordable Care Act and replacement of the law with a more effective alternative. The problem congressional Republicans will face in these efforts is that this proposal, in its purest sense, would require a congressional supermajority (i.e., control of the house and a filibuster-proof Senate). At present, it appears Republicans will control roughly 51 or 52 seats in the Senate, but they’ll fall short of a 60-vote, filibuster-proof majority.

While there’s a possibility some Senate Democrats could cross the aisle and close the gap, it’s just as possible that the Democrats take a page out of the Republican playbook following President Obama’s election and adopt an obstructionist strategy, forcing Republicans to attempt to accomplish this feat unilaterally. Notably, many high-profile Democratic senators are making preservation of the Affordable Care Act a top priority. Moreover, it has been reported that many Republicans
who voted for repeal during Obama’s presidency have indicated they would not have done so had they believed there was any likelihood the repeal bill would actually pass.

Notwithstanding the foregoing, while Republicans have not collectively agreed on a comprehensive health care overhaul to replace the Affordable Care Act, we can begin to see an overall structure take shape through proposals put forth by Paul Ryan (Speaker of the House) and Donald Trump. Perhaps unsurprisingly, the proposals would retain some of the more popular provisions of the Affordable Care Act. Other provisions would be repealed and replaced with alternatives intended to address certain Republican “wish list” items and other gaps that would be opened in the instance of a complete repeal. The chart below provides a brief summary of these topics and the related proposals. Please note, some of the items listed below could go under various headings - this chart is for informational purposes only and is not intended to express judgment on the intent of any of the proposals.

<table>
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<th>Issue</th>
<th>Retained from ACA</th>
<th>Repealed from ACA</th>
<th>New Proposals (Ryan)</th>
<th>New Proposals (Trump)</th>
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<td>Pre-existing condition limitations*; Ban on rescissions; Ban on lifetime limits</td>
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<td>Expand CDHPs/HSAs; Deduction for individual insurance premiums</td>
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<td>Medicaid expansion</td>
<td>Turn Medicaid into a block grant program; Provide states with more flexibility to define Medicaid eligibility</td>
<td>Turn Medicaid into a block grant program</td>
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<td>Miscellaneous cost controls</td>
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<td>Allow purchase of insurance across state lines; Tort reform</td>
<td>Allow purchase of insurance across state lines</td>
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<td>Marketplaces</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
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*It is unclear from the Ryan proposal whether pre-existing condition exclusions would be banned in their entirety, or if the ban would only extend to individuals who maintain continuous coverage (in either the employer or individual market, or some combination thereof).

**Partial/Piecemeal Repeal**

*Likelihood:* - High  
*Obstacles:* - Requires use of budget reconciliation process  
- Only reaches revenue components of law  
- Does not address “replace” promise from campaign  
- Repeal of individual mandate could disrupt insurance industry  

In the wake of the Democratic Congress’s loss of a supermajority in early 2010, the Democrats were forced to use an archaic, little-known process called “reconciliation” to pass the Affordable Care Act and to avoid the inevitable Republican filibuster. In short, this process allowed Congress to reconcile already-passed House and Senate versions of the law through budgetary/revenue tweaks. The process can only be used to correct budgetary/revenue items though. It cannot otherwise be used to repeal a non-budgetary, substantive provision of the law.

Congressional Republicans used this experience as a roadmap earlier this year to pass a “repeal” of the Affordable Care Act (which didn’t garner much press because it was ultimately vetoed by President Obama). It wasn’t a true repeal because, as noted above, Congress could only repeal budgetary/revenue provisions of the law using this process.

While that effort would not necessarily be reflective of a Republican post-election effort, it is important nonetheless because it offers clues into how the Republican Congress might proceed following Trump’s swearing in, on January 20, 2017. Notably, at that time Republicans seemed aware of the fact that it would be politically unpopular to immediately revoke the subsidy afforded to those persons enrolled in the Marketplace, so instead the law would have delayed repeal of the Marketplace tax credit for two years. Presumably, the rationale here was that this would give Congress the opportunity to arrange for an alternative (or more likely, to force bi-partisan compromise on the issue after this reconciliation bill, which was a “poison pill,” of sorts, passed). Further, certain high-profile surrogates of Trump have already indicated that the law will not be repealed until a suitable replacement is in place.

While not a comprehensive overview, the below chart highlights which provisions would have been impacted under that law (and the proposed effective date).

It remains to be seen whether this process will be readily available to the newly formed Congress. Notably, many members of Congress who voted for this partial repeal have gone on record indicating they may not have voted for the law if they had reason to believe President Obama would not veto it.

Further, as noted above, a repeal of the individual mandate, without further action to incentivize individuals to enroll when healthy, could create a so-called “death spiral” in the health care insurance marketplace where only sick persons enroll, driving up the overall cost of coverage.
Repeal Immediately

- Individual Mandate (retroactive to original effective date)
- Employer Mandate (retroactive to original effective date)
- Transitional reinsurance program fee
- Cadillac tax
- Ban on reimbursement for over-the-counter drugs
- Additional tax on non-medical disbursements from health savings accounts
- $2,500 cap on health flexible spending account deferrals
- Medical device tax
- Health insurer fee
- Limit on deduction for Medicare Part D subsidy
- Additional Medicare tax on high earners

Repeal in two years

- Marketplace Advanced premium tax credits
- Small employer healthcare tax credit

Modifications through Regulatory Action

Likelihood: -High

Obstacles:
- Requires agency regulatory process
- Only reaches interpretive portions of regulations
- Does not address repeal and replace promise from campaign

In addition to Congressional action to repeal all or part of the Affordable Care Act, the Trump administration could work through the regulatory agencies to modify certain interpretive aspects of the law. For example, one identified target that has raised the ire of conservatives is the inclusion of free birth control for women. The Affordable Care Act itself does not specify that contraceptives are a covered expense. However, when the Department of Health and Human Services issued its regulations defining preventive care, they included contraceptive coverage for women. A direction by the Trump administration to his new Secretary of HHS could accomplish this change. We are monitoring other similar changes that could be accomplished without the involvement of Congress.

In sum, the only thing certain following yesterday’s election is that there will be more uncertainty for years to come. For the time being, the Affordable Care Act remains in effect and in full force, so we strongly encourage employers to proceed accordingly unless and until a new law is signed into the books changing that landscape.

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