Trump Tax Bill Signals the Swan Song for Obamacare's Individual Mandate

By Sean Donnelly

Background

The "tax" bill that Congress passed in late December was somewhat of a wolf in sheep's clothing from a health care perspective. It certainly overhauled the tax code and instituted tax cuts for corporations and many American taxpayers, but it also doubled as a thinly-veiled health care bill through its repealing of Obamacare's individual mandate.

Authors of the tax bill postulated that such a repeal could save the federal government more than $330 billion over the next decade as fewer Americans will end up receiving subsidies or Medicaid, savings that could then be used to finance the bill's tax cuts and lower tax rates.[1]

The tax bill was not the complete eradication of Obamacare that the Trump administration had set its sights on during the first year of Trump's presidency, but the dismantling of the individual mandate marks the first removal of a key pillar in the Obamacare foundation.

The individual mandate, one of the linchpins of the Affordable Care Act, required Americans who did not otherwise qualify for an exception to obtain minimum essential health coverage. Those Americans who did not have minimum essential health coverage for any month during the year were required to pay a penalty during tax season.

This mandate was essential to pressure younger and healthier Americans to purchase insurance coverage, thereby bringing balance to the risk pools and stabilizing the health insurance marketplace.

The concept of the individual mandate was actually spawned by conservative policymakers who posited that health coverage should be mandatory in order to produce a sustainable insurance pool with the right balance of healthy and sick individuals to properly spread the risk.

The underlying theory was that by compelling healthier Americans to enter the marketplace and obtain coverage, premiums would begin to decrease across-the-board as the influx of healthier participants would help to absorb the costs of those less healthy and more expensive participants. In 2006, Mitt Romney, Massachusetts' Republican governor, was able to convince the largely Democratic state to adopt an individual mandate as part of its health care overhaul.

The relative success of the mandate's Massachusetts audition eventually paved the way for then-President Obama to include an individual mandate as a vital component of the 2010 Affordable Care Act. Even as the Trump tax bill begins to take effect this year, the individual mandate will still remain in effect in 2018.

The repeal of the individual mandate won't actually take effect until 2019. Accordingly, the mandate's penalties will continue to be levied in 2018 unless the Trump administration otherwise attempts to have them waived.

A Short and Bumpy Ride

The individual mandate faced intense partisan scrutiny both before and after the passage of the Affordable Care Act. Republicans viewed the mandate as an unconstitutional scheme to coerce Americans to participate in a commercial activity, an act that they argued amounted to an impermissible overreach of Congress' powers to regulate commerce. Following the enactment of the Affordable Care Act, a total of twenty-seven states challenged the law's constitutionality in federal court.[2]

In the seminal case of *National Federation of Independent Business v. Sebelius*[3], the Supreme Court agreed with the Republican position and held that the individual mandate was outside of the scope of Congress' authority to regulate commerce because the Constitution's Commerce Clause does not afford Congress the power to force people to engage in commerce.

However, the individual mandate ultimately managed to withstand judicial scrutiny as the Supreme Court held in its 5-4 decision that the mandate penalty amounted to a permissible tax that Congress could lawfully levy under its taxing and spending power.

Even though the mandate survived its main Constitutional challenge, it nonetheless sustained a shellacking in the court of public opinion. A tracking poll conducted by Kaiser Health[4] just a week after the presidential election in November 2016 found that sixty-three percent of Americans viewed the individual mandate as "very unfavorable" or "somewhat unfavorable." Comparably, only thirty-five percent of Americans viewed the mandate as "very favorable" or "somewhat favorable." A whopping sixty-one percent of Republicans polled perceived the individual mandate as "very unfavorable."

The Heritage Foundation, the conservative think tank that many credit as the originator of the concept of the individual mandate, renounced any affiliation with Obamacare's iteration of the mandate and opposed it as an unconstitutional anachronism no longer considered necessary to achieve universal coverage.[5]

Notable among those who continued to champion the repeal of Obamacare and its individual mandate in the wake of the *Sebelius* decision was Mitt Romney, the very same architect behind the individual mandate's debut in Massachusetts. The mandate was branded by its challengers as an un-American and officious overreach of government authority, a pariah in the land of free people, free markets, and free choice.

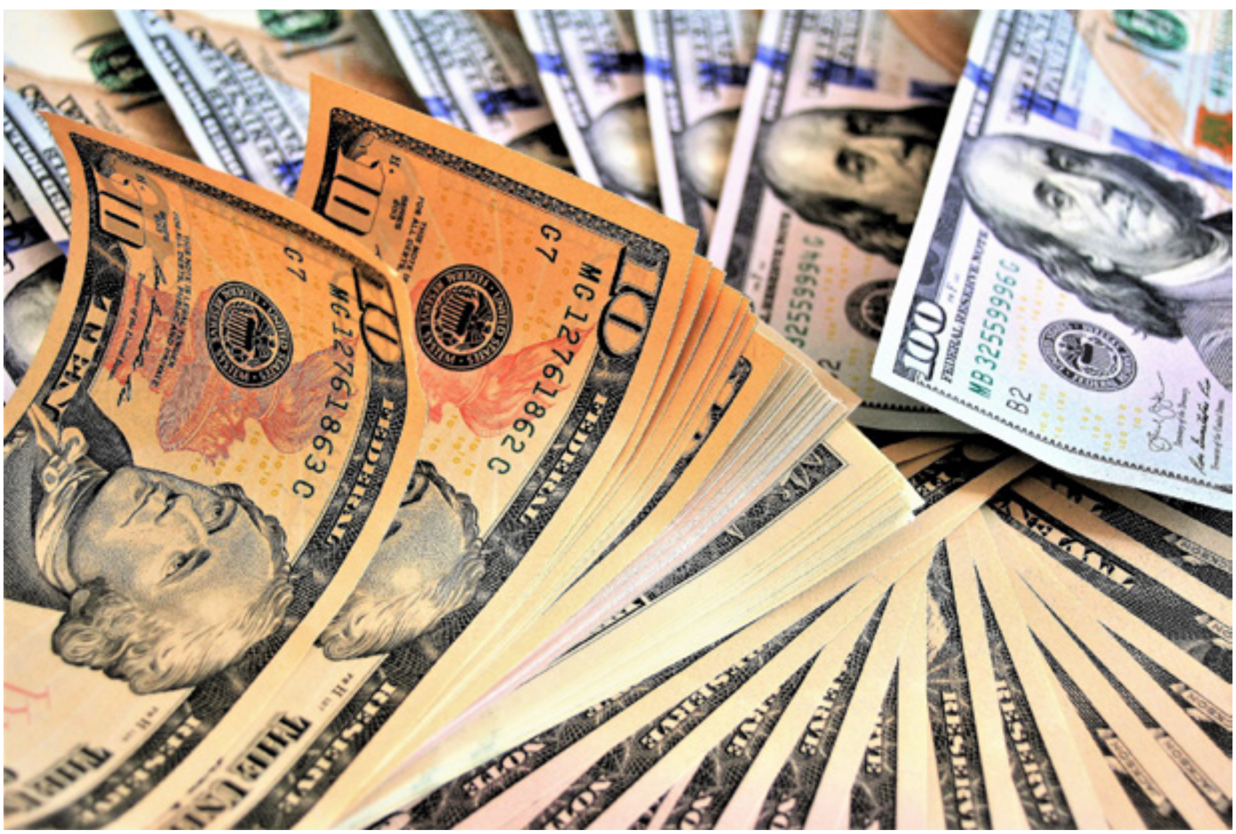
Broad Implications of the Repeal

Despite President Trump's pronouncement that the tax bill "essentially repealed Obamacare," 1 the Affordable Care Act will continue to be the law of the land. Left untouched in the wake of the tax bill are the federal income-based subsidies intended to assist American consumers with purchasing individual policies, the expansion of Medicaid for low-income adults, the prohibition against denying coverage to consumers with pre-existing health conditions, and the edict that insurers must cover those health benefits deemed "essential" by the Department of Health and Human Services.

Also surviving is the employer mandate, which requires certain employers to provide affordable health care coverage to their employees or else face a penalty. However, the repeal of the individual mandate will undoubtedly trigger some significant shifts in the health care landscape.

The majority of Americans won't be personally impacted, since most people already obtain health insurance either through their employer or through a public program such as Medicare, and thus were never really at risk of being subjected to the individual mandate penalty.

Nevertheless, for those Americans who do not receive health insurance from an employer or public program and who instead purchase coverage from an Obamacare health exchange, such individuals are now free to forego their coverage entirely without fear of having to pay a penalty.



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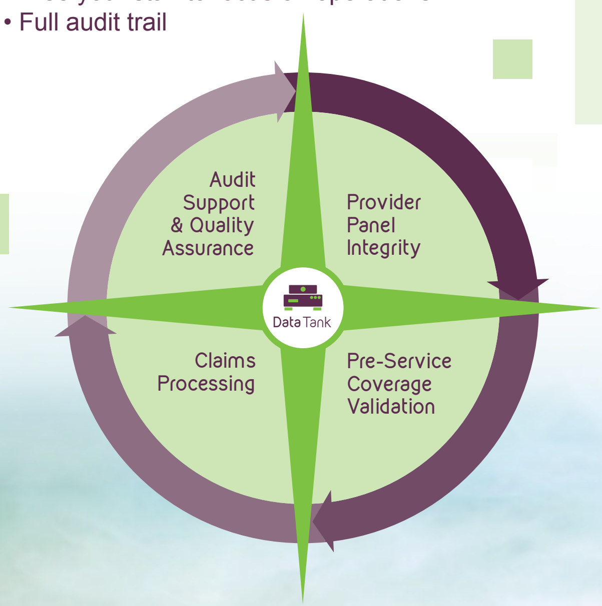

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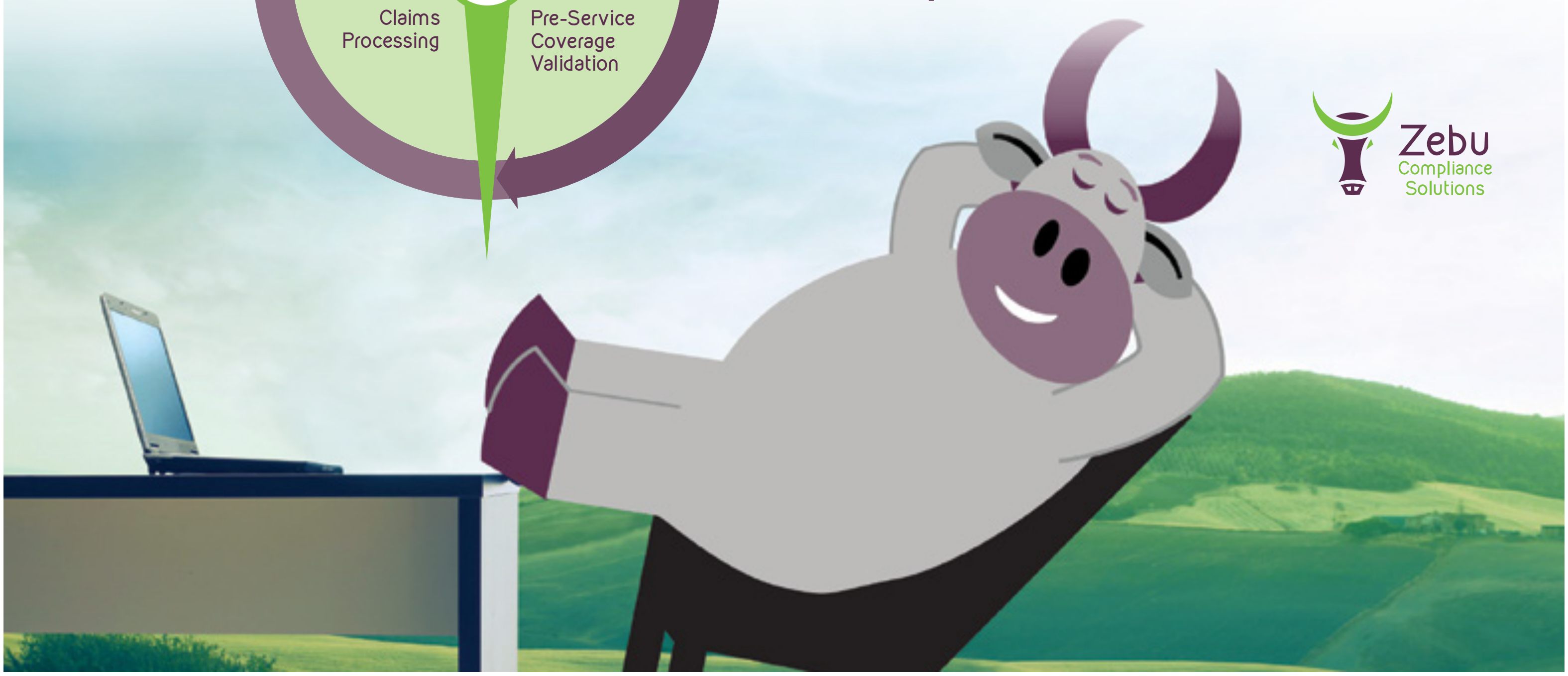

Those who are completely healthy and those who are financially well-off may now decide to ditch their health coverage as being needless or expendable. Comparably, even those who are sick or less financially stable may ultimately decide not to carry health insurance without the looming threat of the penalty to force them into action.

Consequently, the Congressional Budget Office (CBO) is estimating that the individual mandate repeal will result in thirteen million fewer Americans being insured within the next decade.[6] The CBO is also forecasting that the premiums for coverage obtained on the health exchanges will rise approximately ten percent per year over the next decade due to healthy participants scattering from the markets without fear of the penalty and leaving the sicker participants behind to overburden the risk pools.

Some health policy experts are expecting that the removal of the individual mandate will simultaneously give rise to increased premiums and decreased coverage rates, ultimately leading to a market collapse.[7] In order to head off this potential outcome, lawmakers in states such as California are already looking to push legislation that would adopt versions of the individual mandate as state law, à la Massachusetts.

Overtones for Employer-Sponsored Plans

As a result of the repeal of the individual mandate, the CBO is projecting that fewer employees will be joining their employer's self-funded plans with the mandate's penalty no longer in play. Specifically, the CBO anticipates that the removal of the individual mandate will result in three million fewer Americans having coverage through their employer over the next decade.[8] Accordingly, employers may begin to experience a decline in health plan enrollees.

As noted earlier, however, the Affordable Care Act's *employer* mandate will remain after the enactment of the Trump tax bill. Employers subject to the mandate, those with fifty or more "full-time equivalent

employees," face penalties if they fail to offer minimum essential coverage that provides minimum value and at least one full-time employee receives a premium tax credit for purchasing individual coverage on the health insurance marketplace.

Timothy Jost, a law professor at the Washington and Lee University School of Law, deduced that if fewer Americans end up seeking coverage through the health care exchange, then it follows that some employers may be able to avoid paying the employer mandate penalties that are only levied if at least one full-time employee receives a premium tax credit through the exchange.

In this way, the individual mandate repeal is somewhat of a double-edged sword; fewer employees may end up enrolling in employer-sponsored plans, but fewer may also look to purchase coverage on the exchange, thereby reducing the risk to their employers who would otherwise be exposed to the strict penalties imposed by the employer mandate. Still, Jost surmises that as over 150 million Americans already have health coverage through their employers, the "effects of the individual mandate repeal on the employer-sponsored market will be marginal."[9]

The repercussions of the repeal will certainly be felt hardest in the individual market, but employer-sponsored plans will likely experience some fallout as healthier, lower-risk employees begin to question if it might make more financial sense to withdraw from their plans entirely. As these healthier, less expensive employees begin to disenroll, the all-important balance each plan seeks to achieve will be disrupted as the scales start to tilt back towards the sicker, higher-risk and more expensive employees.

A resulting risk pool made up of a disproportionate number of the costliest employees is the kiss of death for an employer-sponsored plan. As employees are no longer "mandated" to enroll in the plans offered by their employers, self-funded plans will need to devise more alluring and increasingly innovative methods to retain their healthiest participants. With the individual mandate repealed, the driving force of the mandate's penalty can no longer be relied upon to funnel low-risk lives towards enrollment. Employer-sponsored plans will need to fill this void by offering more comprehensive benefits, designing more creative incentive programs, and prioritizing enrollee engagement in order to secure these vital, low-cost lives.

Sean Donnelly joined The Phia Group, LLC in 2013 and currently serves as Corporate Counsel. In his role as Corporate Counsel, Sean is primarily responsible for handling the drafting, negotiation and enforcement of The Phia Group's contracts and agreements. He also serves as a key advisor to The Phia Group's management on legal and regulatory compliance issues, business governance issues and internal policies and procedures. Sean earned his B.A. in Political Science with Distinction from the University of Michigan and his J.D. from Boston College Law School.

(Endnotes)

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