



New for 2015: Obamacare insurers' opt-out clause

By [Dan Mangan](#)
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These insurers will sell you some Obamacare—at least as long as the government is footing the bill for most of their customers.

Insurers doing business on [HealthCare.gov](#) will be allowed to terminate their health plans if there's a halt on federal tax credits that help most Obamacare customers buy the coverage, according to [new language](#) for 2015 contracts.

The language giving insurers the new opt-out does make clear, however, that individual state laws still may force insurers to continue the coverage.

Insurers must sign the new contracts by the end of Wednesday or they will not be allowed to sell insurance on the federal exchange. The language was inserted amid ongoing legal challenges to the tax credits, also known as subsidies, for HealthCare.gov customers in at least 36 states. The Supreme Court [has been asked to decide whether the subsidies are legal](#).

People sit with an insurance agent from Sunshine Life and Health Advisors as they try to purchase health insurance under the Affordable Care Act at the Mall of the Americas in March 2014 in Miami.

And the clause suggests that the Obamacare plans being offered by insurers starting Nov. 15 might not make good business sense if they relied on getting customers who would have to pay retail price, as opposed to the often sharply reduced premiums that many pay. People are qualified for the subsidies if they have low or moderate incomes.

The language in these contracts was first reported by [Inside Health Policy](#), which noted that insurers had requested the clause from the Centers for Medicare and Medicaid Services, the federal agency that oversees HealthCare.gov.

"I'm not surprised that at a certain point companies that have money riding on the outcome of these lawsuits have protected themselves," said Michael Cannon, director of health policy studies at the libertarian Cato Institute.

Cannon also said the opt-out language reflects the fact that because CMS wants "the insurers participating on the exchange, they're really at the insurers' mercy."

And in [a Forbes.com post](#), he called the clause the first indication Obamacare supporters are worried the ... cases [challenging the subsidies] could actually succeed."

Cannon is one of the intellectual godfathers behind the challenge to the premium subsidies, which more than 85 percent of Obamacare enrollees receive. A sizable number of lower-income enrollees also receive so-called [cost-sharing reduction payments](#) to help offset co-payments, deductibles and other out-of-pocket medical expenses not covered by their plan. Those challenges, which hinge on a close reading of the Affordable Care Act, threaten to gut much of Obamacare if they prevail.

And the language in the contracts, without saying so overtly, recognizes that there is a chance that those challenges could succeed.

The ACA explicitly says the federal subsidies for premiums and for out-of-pocket health costs can be issued through a health-insurance exchange established by a state. But it does not explicitly say those subsidies can be issued through an exchange set up by the federal government, such as HealthCare.gov.

Four different federal lawsuits were filed to challenge the validity of the subsidies in different states served by HealthCare.gov, noting the ACA's language on the issue.

Those lawsuits received little or no attention for some time. Obamacare advocates were dismissive of them, saying the focus on several paragraphs trumped the overall intent of the ACA, which was to provide affordable health coverage to the uninsured.

But last summer, the federal appellate circuit for the District of Columbia [jolted the Obama administration with a 2-1 vote](#) saying the subsidies for HealthCare.com enrollees were illegal.

That ruling threatened to yank the subsidies for nearly 5 million enrollees on HealthCare.gov, and leave them facing monthly premium payments that on average would be [around 76 percent higher](#) than with the tax credits.

The ruling was effectively overturned—for the moment—because of [the decision to have the entire judicial lineup of the D.C. appeals circuit rehear the case](#). But the U.S. Supreme Court is weighing a request that it take up the issue, [raised by another case](#) and resolve the dispute once and for all.

The Supreme Court could decide whether to take that second case by the end of October. But the insurers' plans will be in effect by January, months before the high court would be likely to rule. However, if the court did take the case, it could conceivably rule the subsidies were illegal during the same year the plans are in effect.

The language in the new contract due Wednesday recognizes the possibility of the Supreme Court invalidating the subsidies.

"CMS acknowledges that [a health plan issuer] has developed its products for [HealthCare.gov] based on the assumption that [subsidies for premiums and out-of-pocket expenses] will be available to qualifying Enrollees," the contract says. "In the event that this assumption ceases to be valid during the term of this agreement, CMS acknowledges that Issuer could have cause to terminate this Agreement subject to applicable state and federal law."

Several big health insurers asked about the language by CNBC, including [Cigna](#), [WellPoint](#) and Independence Blue Cross, referred questions to the insurance industry trade group America's Health Insurance Plans.

Clare Krusing, an AHIP spokeswoman, said only, "This provision just recognizes that health plans' exchange products are based on current assumptions relating to premium tax credits and cost-sharing reductions."

A CMS spokesman had no comment.

Dan Mendelson, CEO of the Avalere Health consultancy, said, "My view is that the insurers participating in the exchange have to prepare for all eventualities. So it's not surprising that they have thought this through."

Mendelson added, however, that the "chances that a drafting inconsistency brings the whole bill down are very small."

"I don't think anyone believes otherwise," he said.

And the language of the clause suggests that insurance plans will have to continue providing coverage to their customers who signed up for 2015 under state and federal law.

But whether many of those customers would be able to afford that coverage without the subsidies remains a large open question.