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Study: Senate can repeal Obamacare's regulations through reconciliation, with only 51 votes

Michael F. Cannon

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President Trump pledged during the presidential campaign to deliver legislation that "fully repeals Obamacare." By forcing the House to a vote on a bill that does not repeal the health insurance regulations that are the driving force behind the Affordable Care Act's skyrocketing premiums and low-quality coverage, Republican leaders are abandoning the president's pledge. The leadership bill would only modify those regulations. As a result, the Congressional Budget Office projects, it would increase premiums 15-20 percent above their already-high levels and leave more people uninsured than full repeal would.

House leaders claim Senate rules require a 60-vote supermajority to repeal the regulations, which Republicans do not have. So they crafted a bill they say can pass the Senate with a simple, 51-vote majority.

That explanation holds less water than a leaky bucket.

The leadership bill would modify those regulations, so, according to their own theory, it too would require 60 votes.

The House leadership is just wrong. Senate rules indeed allow repeal of the Obamacare's regulations with just 51 votes.

The Obamacare's health insurance regulations are "terms and conditions" of government spending. Senate rules allow the Senate to repeal the terms and conditions attached to government spending, along with that spending, by a simple majority. If the Senate removes all Obamacare spending from the federal budget, Senate rules allow it to remove those regulations as well.

Even as applied to health plans that do not qualify for exchange subsidies, those regulations enable and regulate government spending. Indeed, every relevant authority agrees that those regulations and that spending are not severable statutory provisions but parts of a single, integrated program — what the Supreme Court calls the ACA's "comprehensive national plan to provide universal health insurance coverage."

Indeed, the regulations are terms and conditions of government spending even when applied to health insurance plans that are ineligible for exchange subsidies. The CBO found the Obamacare's comprehensive overhaul of private health insurance plausibly transforms those markets into a government program, and transforms all private health insurance expenditures into government expenditures.

When all spending is governmental, all regulations are terms and conditions of government spending. Republicans, in particular one soft-spoken fly-fisherman from Wyoming, can make the federal budget reflect that these regulations are, in all cases, terms and conditions of government spending.

Simple vs. super

Senate rules require a simple, 51-vote majority to pass bills. But *getting* to a vote on final passage requires ending debate on a bill, which usually takes 60 votes. Since Republicans hold just 52 seats, Senate Democrats can generally filibuster any bill they want.

So-called "budget reconciliation" bills, in which Congress approves the government's budget, are different. Debate over these bills ends automatically, so there can be no filibuster. Budget reconciliation bills can therefore pass the Senate with just 51 votes.

But this exception comes with a catch. Every provision in a budget-reconciliation bill must produce a change in revenues or outlays, and those changes cannot be "merely incidental to the non-budgetary components of the provision." If the Senate parliamentarian rules a provision's effect on revenues and outlays are merely incidental to its primary effect, the provision typically falls.

Last year, the Senate parliamentarian ruled senators can repeal the ACA's spending, and effectively repeal its individual and employer mandates, via reconciliation with a simple majority. The parliamentarian has not ruled on whether the Senate can repeal the regulations in a reconciliation bill with a simple majority.

"Terms and conditions"

Another well-established Senate rule allows a reconciliation bill that eliminates government spending to repeal the "terms and conditions" attached to that spending, also by a simple majority.

Last year, for example, the Senate approved a reconciliation bill that would have eliminated funding for Obamacare's expansion of the Medicaid program. The parliamentarian ruled that because the bill eliminated that spending by a simple majority, it could likewise repeal the terms and conditions federal law attaches to that spending by a simple majority. (President Barack Obama vetoed the bill.)

The parliamentarian has ruled the Senate may repeal, with just 51 votes, the billions of taxpayer dollars the ACA sends to private insurance companies participating in Obamacare's health insurance exchanges. As with the Medicaid expansion, the ACA imposes explicit "terms and

rules" on this spending. In particular, the federal government may only issue subsidies to insurers who comply with the all the ACA's health insurance regulations.

For example, exchange subsidies are available only for "qualified health plans," which must conform to all of the ACA's various health insurance regulations. Indeed, the sole purpose of the "qualified health plan" designation is to create a category of health plans that qualify for federal subsidies—i.e., to establish terms and conditions for federal spending. Every regulation federal law imposes on qualified health plans is, therefore, a "term and condition" imposed on government spending.

Those terms and conditions include regulations requiring qualified health plans to cover certain "essential" health benefits; to limit cost-sharing as specified in the statute; to conform to specified actuarial values; to notify enrollees if the plan covers abortion services; to "ensure a sufficient choice of providers"; to avoid "marketing practices or benefit designs that have the effect of discouraging … enrollment … by individuals with significant health needs;" and to meet other requirements.

Compliance with these regulations is a condition for certification as a qualified health plan, and that certification is a condition the ACA imposes on federal spending. Obamacare's health insurance regulations are therefore explicit terms and conditions Congress imposes on federal outlays. Senate rules, therefore, permit a simple majority to repeal those regulations along with that spending.

Regulating government spending

But if these regulations are merely terms and conditions of government spending, why do they also apply to unsubsidized qualified health plans sold on the exchanges, through the law's small-business exchanges, and on the non-exchange individual market? And why do some regulations apply to further categories of unsubsidized plans, including so-called "grandfathered" individual-market plans and large-employer plans?

To the casual observer, the fact that these regulations also apply to plans that do not qualify for exchange subsidies might make it seem that the regulations, and legislative provisions repealing them, are not budgetary in nature. Yet the application of these regulations to unsubsidized plans enables and regulates outlays on subsidized plans. It is an integral part of the system of exchange subsidies because it controls the budgetary impact of, and thereby enables and sustains, those subsidies.

Consider just one of the "terms and rules" the ACA imposes on exchange subsidies. The ACA requires insurers who sell qualified health plans on an exchange to charge identical premiums on the off-exchange individual market. The purpose of applying this price control to unsubsidized, off-exchange plans is to contain federal spending on subsidized, exchange plans.

Absent this price control, insurers could trigger adverse selection against exchange plans by using lower premiums to attract healthy enrollees to off-exchange plans. Risk pools within the exchanges would become sicker, and premiums would rise. Federal spending would also rise, because exchange subsidies automatically rise along with premiums. Already, this one relatively

minor regulation shows both that the ACA's health insurance regulations have more than a merely incidental impact on government spending, and that they regulate government spending.

Yet the budgetary impact of this one minor regulation is greater still. Absent this price control, exchange subsidies could disappear.

As premiums for exchange plans rose, additional healthy consumers would leave the exchanges, until adverse selection ultimately drove out all of the insurers. Without any carriers offering qualified health plans on the exchange, there can be no subsidies. This relatively minor regulation is thus essential to the existence of the ACA's exchange subsidies.

What is true of this minor pricing regulation is even truer of the ACA's major regulatory provisions, including its guaranteed-issue, community-rating, and essential-health-benefits requirements. The ACA imposes these regulations on unsubsidized plans because adverse selection would otherwise make subsidies impossible.

Proof has emerged in east Tennessee, where, despite all these regulations, adverse selection has driven every last carrier from the exchanges in 16 counties. Some 43,000 current exchange enrollees now have no exchange plan options at all for 2018. Were it not for the ACA's application of these regulations to unsubsidized plans, the exchanges would have collapsed earlier and in more areas. Whether or not it works, the primary purpose of applying the regulations to unsubsidized plans is to enable federal subsidies by reducing adverse selection.

None of this is news to the ACA's architects. They knew that subsidizing exchange plans requires regulating unsubsidized plans. They regulated subsidized and unsubsidized plans alike for that purpose.

An obvious counterargument arises. The purpose of regulating non-exchange plans, one might argue, is not to facilitate subsidies but to provide protections to consumers enrolled in unsubsidized plans. Yet the counterargument illustrates the point.

Applying the regulations to unsubsidized plans prevents adverse selection by requiring healthy consumers to buy protections they would prefer to trade away in exchange for lower premiums. Prohibiting such trades leaves healthy enrollees worse off, not better off. This counterargument ironically argues against itself, because it demonstrates the primary purpose of regulating unsubsidized plans is not to benefit enrollees in unsubsidized plans but rather to facilitate subsidies. If there are any benefits that enrollees in unsubsidized plans enjoy, they are, to borrow a phrase, merely incidental.

The primary purpose of the ACA is to subsidize patients with expensive medical conditions. The primary purpose of its health insurance regulations is to enable those subsidies and to impose terms and conditions on federal spending. Senate rules allow repeal of those regulations with a simple majority because repeal eliminates rules enabling and governing federal subsidies.

A single, integrated program

Indeed, it is a mistake to regard these regulations as severable legislative provisions. The ACA's authors, advocates and even the Supreme Court have long maintained they are the inseverable component parts of a single, integrated program.

The ACA's authors famously did not include language allowing courts to sever the regulations from other elements of that program. The statute itself explains the regulations are inextricably connected to the whole when it says the mandate "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold."

Many of the ACA's authors — including Sens. Harry Reid, D-Nev.; Tom Harkin, D-Iowa; Dick Durbin, D-Ill.; Patty Murray, D-Wash.; Chuck Schumer, D-N.Y.; and Ron Wyden, D-Ore.; and Reps. Nancy Pelosi, D-Calif.; John Conyers, D-Mich.; Steny Hoyer, D-Md.; and Henry Waxman, D-Calif. — went so far as to file a brief before the Supreme Court in which they explained that the law's subsidies, "the individual mandate[,] and the insurance reforms ensuring coverage of pre-existing conditions, preventing arbitrary terminations, and addressing other well-known insurance industry abuses" were all part of one "interdependent statutory scheme." They flatly rejected the idea that the regulations are, or that they intended the regulations to be, regarded separately from the rest of that scheme.

The Obama administration filed a brief with the Supreme Court that explained regulations are part of an "interdependent," "interlocking" and "integrated" set of measures that are "designed to function together" as "a comprehensive program." Years later, another Obama administration brief reaffirmed the regulations are an "inseverable" part of that program.

In 2012, the Supreme Court *ruled* that the ACA's private-insurance overhaul is not a set of separate provisions but a single program that, combined with the Medicaid expansion, creates "a comprehensive national plan to provide universal health insurance coverage." In 2015, a six-justice majority, including all four Democratic appointees, explicitly *rejected* the idea that the regulations are separable from the broader coverage-expansion scheme. The regulations, the court wrote, are part of an "interlocking" and "intertwined" program that "would not work" without each of its component parts. The Court explicitly wrote that it is "implausible" to view the regulations as independent or separable from the exchange subsidies.

A government takeover

The CBo regarded the ACA's private-insurance overhaul as a single, integrated program — so much that the agency very nearly ruled that program turns private health insurance *into* a government program.

In 1994, the CBO determined that a legislative proposal substantially similar to the ACA constituted a government takeover of private health insurance markets. Under a Democratic director named Robert Reischauer, the agency concluded President Bill Clinton's Health Security Act was in effect a government takeover of health insurance — even if markets remained nominally private, even if the bill allowed some individual choice, and even if the public thought it wasn't a government takeover. As a result, the CBO determined that under the Clinton health

plan, all financial transactions involving "private" health insurance should appear in the federal budget.

Given the ACA's similarities to the Clinton health plan, 53 percent of Americans considered it a government takeover at the time Congress enacted it. Yet the ACA's authors carefully gamed CBO scoring rules to avoid that designation. ACA architect Jonathan Gruber would later explain, "This bill was written in a tortured way to make sure CBO did not score the mandate as taxes. If CBO scored the mandate as taxes, the bill dies."

It worked, but only barely.

The CBO found the ACA to be an extremely close call. Just one tiny change, the agency wrote, "would make [health] insurance an essentially governmental program, so that all payments related to health insurance policies should be recorded as cash flows in the federal budget." The CBO stresses its determination is hardly definitive, describing it as "a matter of judgment" as well as "strictly advisory."

A more honest baseline

The CBO's acknowledgment that the ACA is plausibly a government takeover of health insurance points to a way opponents of the law can illustrate that Senate rules allow repeal of the regulations by a simple majority.

Under Senate rules, the chairman of the Senate Budget Committee determines which spending and revenue baselines the chamber will use when considering a reconciliation bill. The chairman, therefore, determines the baseline against which the Senate parliamentarian considers whether legislation repealing the ACA's overhaul of private health insurance is budgetary in nature.

The current chairman, Sen. Mike Enzi, R-Wyo., has the authority to determine the CBO erred in 2009 by not designating ACA as a federal takeover of private health insurance and including all relevant financial flows in the federal budget. Given that the ACA has eliminated the individual market exchange in 16 counties (so far), the case is even stronger now that the ACA is a federal takeover than it was then.

Enzi could then direct the CBO to produce a baseline with "all payments related to health insurance policies…recorded as cash flows" in the federal budget. The Trump administration could jumpstart the process by directing the Office of Management and Budget to treat the ACA the same way in its budget accounting.

Against the backdrop of that more honest baseline, a reconciliation bill provision eliminating the ACA's health insurance regulations obviously would be budgetary in nature: repealing the regulations would be a necessary component of removing those financial flows from the federal budget. Over a 10-year window, the budgetary impact could reach into the tens of trillions of dollars.

Conclusion

That step would make it painfully obvious that legislation repealing the ACA's health insurance regulations is inherently budgetary in nature. But that step should not even be necessary.

Title I of the ACA contains the law's overhaul of private health insurance markets. It is not a list of discrete provisions. It is a complex set of interdependent provisions that work together to create a single, integrated program—a new health insurance system.

The ACA's health insurance regulations are an essential and inseparable part of that new program. They create terms and conditions for on-budget federal spending on exchange subsidies. They enable and regulate federal spending on exchange subsidies by controlling adverse selection within and across health insurance markets. And because, as the CBO acknowledges, the ACA is plausibly a government takeover of health insurance, the Senate can determine they likewise create terms and conditions for off-budget federal revenues and outlays.

The proof is right there in the statute. All sides agree repealing the regulations would produce changes in revenues and outlays. If one considers the regulations discrete provisions, one might imagine the primary purpose of repealing them is to remove restraints on private actors, and that the resulting budgetary effects are merely incidental.

Yet the budgetary effects would be anything but incidental: subsidies for exchange plans would disappear, because there would no longer be any federal definition of qualified health plans could satisfy to become eligible for subsidies. This alone demonstrates the regulations are terms and conditions of government spending.

To claim the Senate may repeal the ACA's spending by a simple majority but not its insurance regulations is equivalent to saying a simple majority may repeal all spending on Medicare or the Medicare Advantage program, but not the rules governing pricing, benefits, and spending in those programs. Not only do Senate rules allow repeal of the ACA's regulations with just 51 votes via reconciliation, but it is the appropriate mechanism for repealing them.

House Republican leaders nevertheless seem determined to make that chamber vote on a bill that does not even attempt to keep President Trump's promise of full repeal. They are giving up on repeal of the ACA's most harmful provisions before even making their case to the Senate parliamentarian, who interprets the rules, or the presiding officer, who decides whether the Senate adopts the parliamentarian's recommendation.

Michael F. Cannon (@mfcannon) is director of health policy studies at the libertarian Cato Institute and coeditor of "Replacing Obamacare" (Cato Institute, 2012).