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Rewriting The Obama Health Law Through Regulation?

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If the health law withstands the Supreme Court challenge, two physician legislators in Congress want to make sure the Obama administration doesn't get away with its attempt to rewrite the law to fit its larger agenda.

Reps. Scott DesJarlais and Phil Roe, both physicians and both Tennessee Republicans, are focused on an important issue that involves the controversial health insurance [exchanges](#). States are called to set up these massive new exchange bureaucracies to gather information on citizens' family status, income, and other vitals to determine their eligibility for federal taxpayer subsidies for their health coverage.

Many states are refusing to cooperate in setting up the exchanges. The health overhaul law anticipated this and set up a default mechanism so the federal government could move in and create the exchanges if the states don't. The key parts of the health law are Section 1311 which instructs state governments to set up an exchange. If a state refuses, section 1321 calls for the federal government to establish an exchange in the state.

But the way the health law is written – and enacted – people who buy health insurance through a *federally* run exchange are not eligible for the insurance premium subsidies. The law states that the tax credits are available to people who are enrolled in an “an exchange established by the state under (Section) 1311.” It makes no mention of people enrolled in federal exchanges under Section 1321 being eligible for the tax credits.

The statutory language is a major problem for the Obama administration, so it is trying to get around by rewriting the statute through regulation. The final regulation on exchanges, published in May, says the premium subsidies will be available if the taxpayer is enrolled in a plan “established under section 1311 or 1321” of the law.

This “contradicts the explicit statutory language describing individuals’ eligibility for receipt of these tax credits,” Dr. DesJarlais and more than 20 of his colleagues wrote in a letter to the Commissioner of Internal Revenue, which is charged with implementing this part of the health law. “Our Constitution is clear in stating that Congress has the sole power to enact legislation. Clearly, the actions taken by the IRS in promulgating this rule blatantly violate our separation of powers,” according to Dr. DesJarlais.

“A proposed rule relating to the federal health insurance premium tax credits, included in the president’s health care law, contradicts the explicit statutory language describing individuals’ eligibility for receipt of these tax credits,” Dr. Roe added. “This only adds to the confusion surrounding the law, and it is another example that the health care bill was rushed through Congress by Democrats on a partisan basis.”

The IRS regulation effectively changes the statute. Administration officials call it a glitch, but critics see it as an example of the administration trying to overrule Congress.

Congress has authority to review and veto regulations under the Congressional Review Act, which allows it to block a regulation finalized by the administration with majority votes in both Houses and a presidential signature.

If the CRA challenge passes Congress but the president were to veto it, it would take a two-thirds majority in both houses to override his veto – a high hurdle. But this would certainly tee up the issue for a vigorous public debate. If the health law survives the Supreme Court — all or in part — we can expect more rifle-shot bills such as this.

The next step would likely be federal court challenges to the IRS rule, dragging the law back into court for yet another round.

My colleagues [Michael Cannon](#) of the Cato Institute, [Avik Roy](#) of the [Manhattan Institute](#), and [John Graham](#) of the Pacific Research Institute have more detail, information, and insights on this issue. They argue that if states don’t set up the exchanges, they could block a big part of implementation of the law.

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