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A Weak Defense of an Illegal Fix to an ObamaCare Glitch

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In [this November 16 op-ed](#), Jonathan Adler and I explain how the Obama administration is trying to save [ObamaCare](#) (“the Affordable Care Act”) by creating tax credits and government outlays that Congress hasn’t authorized. (The administration describes this “premium assistance” solely as tax credits.) This week, the administration tried to reassure everybody that no, they’re not doing anything illegal.

Here’s how IRS commissioner Douglas H. Shulman [responded](#) to [a letter from two dozen members of Congress](#) (emphasis added):

The statute includes language that indicates that individuals are eligible for tax credits whether they are enrolled through a State-based Exchange or a Federally-facilitated Exchange. Additionally, neither the Congressional Budget Office score nor the Joint Committee on Taxation technical explanation of the Affordable Care Act discusses excluding those enrolled through a Federally-facilitated Exchange.

And here is how HHS [tried](#) to dismiss the issue (emphasis added):

The proposed regulations issued by the Treasury Department, and the related proposed regulations issued by the Department of Health and Human Services, are clear on this point and supported by the statute. Individuals enrolled in coverage through either a State-based Exchange or a Federally-facilitated Exchange may be eligible for tax credits. ...Additionally, neither the Congressional Budget Office score nor the Joint Committee on Taxation technical explanation discussed limiting the credit to those enrolled through a State-based Exchange.

These statements show that the administration’s case is weak, and they know it.

When government agencies say that a statute *indicates* they are allowed to do X, or that their actions are *supported by* that statute, it's a clear sign that the statute does not explicitly authorize them to do what they're trying to do. If it did, they would say so. (A Treasury Department spokeswoman [offers](#) a similarly worded rationale.)

In [our op-ed](#), Adler and I explain why the statutory language to which these agencies refer does not create the sort of ambiguity that might enable the IRS to get away with offering premium assistance in federal Exchanges anyway. (Nor does the fact that the CBO and the JCT misread portions of this 2,000-page law create such ambiguity.) That's because *there is no ambiguity in that language*. There is only a desperate search for ambiguity because the law clearly says what supporters don't want it to say.

Finally, the fact that these two statements are so similar shows that the administration considers this glitch to be a serious problem and wants everyone on the same page.

Washington & Lee University law professor Timothy Jost is an ObamaCare supporter and a leading expert on the law. He is also too honest for government service, for he has acknowledged that ObamaCare "[clearly](#)" does not authorize premium assistance in federal Exchanges, and that it is only "[arguable](#)" that federal courts will let the administration get away with offering it. (Again, in [our op-ed](#), Adler and I explain why that argument falls flat.)

After reading the administration's statements, Adler writes, "If that's all they got, they should be worried."