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Another ObamaCare Glitch

Congress made a legal mistake while rushing through the health law. Now it's come back to haunt the administration.

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Even if ObamaCare survives Supreme Court scrutiny next spring, its trials will be far from over. That's because the law has a major glitch that threatens its basic functioning. It's so problematic, in fact, that the Obama administration is now brazenly trying to rewrite the law without involving Congress.

The Patient Protection and Affordable Care Act offers "premium assistance"—tax credits and subsidies—to households purchasing coverage through new health-insurance exchanges. This assistance was designed to hide a portion of the law's cost to individuals by reducing the premium hikes that individuals will face after ObamaCare goes into effect in 2014. (If consumers face the law's full cost, support for repeal will grow.)

The law encourages states to create health-insurance exchanges, but it permits Washington to create them if states decline. So far, only 17 states have passed legislation to create an exchange.

This is where the glitch comes in: ObamaCare authorizes premium assistance in state-run exchanges (Section 1311) but not federal ones (Section 1321). In other words, states that refuse to create an exchange can block much of ObamaCare's spending and practically force Congress to reopen the law for revisions.

The Obama administration wants to avoid that legislative debacle, so this summer it proposed an IRS rule to offer premium assistance in all exchanges "whether established under section 1311 or 1321." On Nov. 17 the IRS will hold a public hearing on that proposal. According to a Treasury Department spokeswoman, the administration is "confident" that offering premium assistance where Congress has not authorized it "is consistent with the intent of the law and our ability to interpret and implement it."

Such confidence is misplaced. The text of the law is perfectly clear. And without congressional authorization, the IRS lacks the power to dispense tax credits or spend money.

What about congressional intent? Law professor Timothy Jost suggests that since ObamaCare requires all exchanges to report information about premium assistance, and it would be silly to impose that requirement on federal exchanges if their enrollees were not eligible, that shows Congress could not have intended anything but to provide assistance in federal exchanges. At least, he argues, there's enough ambiguity here about Congress's intent that federal courts will permit the administration to resolve it.

Not so fast. The Supreme Court has increasingly limited such deference to cases where the text of the law—rather than Congress's intent—is ambiguous. In this case the language of the law is clear, as even Mr. Jost admits.

The health law's authors in Congress deliberately chose to pass the bill with known imperfections and to use the reconciliation process to make only limited amendments. Writing a perfect bill would have required too many votes and risked failure. If what they passed was an imperfect bill with no premium assistance in federal exchanges, then that is what Congress intended.

And there are plausible reasons why Congress may have wanted to limit assistance to state-run exchanges—including encouraging states to create exchanges so that the federal government doesn't have the burden.

Supporters of ObamaCare, including George Washington University's Sarah Rosenbaum, have argued that nobody will have standing to challenge the IRS rule in court. That's not the case.

Under the law, employers must pay penalties when their employees receive premium assistance—a measure designed to encourage employers to keep offering coverage. Any employer whose employees receive premium assistance through a federal exchange would therefore suffer harm from the IRS rule and would have standing to challenge these illegal tax credits and outlays.

Public-interest lawyers could file suit as soon as the IRS rule becomes final and they find an employer that will be harmed. Any firm that doesn't offer health benefits and that employs lots of full-time, low-skilled, young workers in a state that fails to create an exchange should suffice. A successful challenge would block the law's employer mandate in that state.

In addition, under the Congressional Review Act, a simple (filibuster-proof) majority vote in each chamber of Congress could send to President Obama's desk a resolution blocking this IRS rule. Even if Mr. Obama vetoed the resolution (taking personal responsibility for this assault on the rule of law), a future president could still rescind the

rule. Quite a perilous situation in which to leave the president's signature accomplishment.

Like the rest of the nation, the Obama administration wants a different health-care law than the one we got. But that doesn't give it the authority to rewrite the law by fiat.