



Reconciliation & Health Reform

Prepared for NIHCM

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What is Reconciliation?

Section 310 of the Congressional Budget Act of 1974 (P.L. 93-344), as amended

- Purpose:
 - **Reduce the deficit** through spending reductions or revenues increase
 - Spending reductions or increases or revenue increases or decreases
- Process
 - Reconciliation Instructions included in Budget Resolution
 - Floor Consideration of Reported Legislation



Byrd Rule



Section 313 of the Budget Reconciliation Act of 1974 (P.L. 93-344), as amended

- Purpose:
 - Strike **extraneous matter** in reconciliation
- Process:
 - Point of Order
- Exceptions:
 - Motion to Waive the Point of Order
 - Motion to appeal the ruling of the Chair
 - Both require a vote of three-fifths of the Members

Key Senate Considerations



- **Material Impact on Revenues or Spending**
- **Budget Window:**
 - Sunsetting policies at the end of 2014
- **Committee Jurisdiction:**
 - Each must meet their savings target
 - HELP provisions move to Finance report
- **Creative Drafting:**
 - Example – Establish a Health Insurance Exchange under the CHIP program, but open it to additional markets.

Byrd Rule – Key Players



- **Arbiter:**
 - Chair (any Member of the Majority Party or the Vice President)
- **Advisor:**
 - Senate Parliamentarian (Alan Frumin)
- **Drafters:**
 - Committee Members and Staff
 - House and Senate Legislative Counsel
- **Scorers:**
 - Congressional Budget Office









Byrd Rule Applicability to Key Policies

Insurance Market Reforms	Outlay or Revenue Impact	Not Merely Incidental
Individual and Employer Mandates	✓	?
Rating Restrictions, Pre-Existing Condition Exclusions and Guarantee Issue	✗	✗
Creditable Coverage	✓	✓
Benefit Requirements	?	?
Health Insurance Exchanges and Co-operatives	?	?

Byrd Rule Applicability to Key Policies

Insurance Market Reforms	Outlay or Revenue Impact	Not Merely Incidental
Government-run Plan	✓	✓
Government-run Plan Trigger	?	?
Subsidies	✓	✓
Medical Loss Ratio Requirements	?	?
Establishment of New Regulator	?	?

Byrd Rule Applicability to Key Policies

Other Provisions	Outlay or Revenue Impact	Not Merely Incidental
Medicaid Expansion		
Medicare/Medicare Advantage Cuts		
Medicare Demonstrations or Pilots		
Tax Increases		

Process in the Senate



Committees

- Report legislation prior to October 15; then
- Senate Budget Committee Compiles the bills for the floor

Initial Senate Floor Consideration

- Privileged Motion – avoiding filibuster on the motion to proceed:
 - Take up the Senate Bill (privileged, not subject to a motion to proceed); OR
 - Take up the House bill and amend it with the Senate legislation
- Debate is limited to 20 hours
- Floor Amendments
 - Deficit neutral; or
 - Motion to strike
 - Subject to all other budget rules (e.g. may not exceed a Committee's budget allocation); and
 - Germane



Appendix

Senate Instructions



TITLE II—RECONCILIATION

SEC. 201. RECONCILIATION IN THE SENATE.

(a) COMMITTEE ON FINANCE.—The Senate Committee on Finance shall report changes in laws within its jurisdiction to **reduce the deficit by \$1,000,000,000** for the **period of fiscal years 2009 through 2014**.

(b) COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS.— The Senate Committee on Health, Education, Labor, and Pensions shall report changes in laws within its jurisdiction to **reduce the deficit by \$1,000,000,000** for the **period of fiscal years 2009 through 2014**.

(c) SUBMISSIONS.—In the Senate, **not later than October 15, 2009**, the Senate committees named in subsections (a) and (b) shall submit their recommendations to the Senate Committee on the Budget. Upon receiving all such recommendations, the Senate Committee on the Budget shall report to the Senate a reconciliation bill carrying out all such recommendations without any substantive revision.

House Instructions



SEC. 202. RECONCILIATION IN THE HOUSE.

(a) HEALTH CARE REFORM.—

(1) The House Committee on Energy and Commerce shall report changes in laws to **reduce the deficit by \$1,000,000,000** for the **period of fiscal years 2009 through 2014**.

(2) The House Committee on Ways and Means shall report changes in laws to **reduce the deficit by \$1,000,000,000** for the **period of fiscal years 2009 through 2014**.

(3) The House Committee on Education and Labor shall report changes in laws to **reduce the deficit by \$1,000,000,000** for the **period of fiscal years 2009 through 2014**.

(b) **INVESTING IN EDUCATION**.—The House Committee on Education and Labor shall report changes in laws to reduce the deficit by \$1,000,000,000 for the period of fiscal years 2009 through 2014.

(c) **SUBMISSIONS**.—In the House, **not later than October 15, 2009**, the House committees named in subsections (a) and (b) shall submit their recommendations to the House Committee on the Budget. Upon receiving all such recommendations, the House Committee on the Budget shall report to the House a reconciliation bill carrying out all such changes without any substantive revision.

Byrd Rule



Definition of **Extraneous Matter**:

1. Does not change outlays or revenues, unless it is a **necessary term or condition** of another provision that does change outlays or revenues
2. Makes a change in outlays or revenues which is **merely incidental** to the non-budgetary components of the provisions
3. Increases spending or decreases revenues for a fiscal year **beyond the budget window** covered by the budget resolution
4. Recommends changes in Social Security
5. Is outside the jurisdiction of the Committee that submitted the provisions
6. Produces an increase in spending or a reduction in revenues if the net effect of the Committee product that contains the provision fails to achieve the reconciliation instruction to the Committee.

Byrd Rule Applicability to Key Policies



Individual and Employer Mandates and Associated Penalties:

While mandates themselves do not have any budgetary impact, individual and employer mandates would most likely pass a challenge under the criteria #1 because they could be made a necessary condition of the mandate and penalties provisions could be drafted to be inextricably linked. That said, while employer penalties are estimated to be quite substantial under existing health reform proposals, the individual penalties may be less so. Thus, the individual penalties, and by extension the associated individual mandate, could be vulnerable to a challenge under #2 that the revenue effect of the penalty is merely incidental to the individual mandate provision.

Byrd Rule Applicability to Key Policies



Rating Requirements, Pre-Existing Condition Exclusions & Guarantee Issue:

These provisions could not withstand a Byrd rule challenge on their own because they do not have a direct impact on revenues or outlays. However, like most of the health insurance market reform provisions, they do have an indirect effect on the revenue/outlay implications for other provisions. For example, age rating bands that are narrow (e.g., 2:1) may have the effect of increasing federal outlays for the subsidies for low-income individuals. That is, the narrower the band, the higher the premium and thus the amount of the subsidy for young adults, who comprise a notable share of the uninsured and may be more likely to qualify for subsidies. This raises a question of severability. Each of the provisions (e.g., subsidies and age rating) can stand alone – one isn't a necessary provision of the other though there is interaction between them. Therefore, the Parliamentarian would likely recommend that these provisions be stricken from health reform under reconciliation.

Byrd Rule Applicability to Key Policies



Creditable Coverage:

While this provision on its own would not withstand a challenge, we believe that it could be written into a mandate/penalty provision in such a way that it would be deemed a necessary condition. Expanding on the example above, the provision could be written, “Individuals without creditable health insurance coverage are subject to a penalty of \$X.” By extension, the definition (and related benefit requirements) of creditable coverage could also be included because they would then be a necessary part of the permitted provision.

Byrd Rule Applicability to Key Policies



Benefit Requirements:

Certain benefit requirements, beyond those included in the definition of creditable coverage may withstand a challenge if they have a direct budgetary impact that rises above the level of “merely incidental.” This would likely exclude most requirements for qualified health benefit plans as those provisions generally do not extend to Medicare, Medicaid, or the Federal Employees Health Benefits program. However, any benefit requirements that extend to these federally-funded programs (e.g., coverage for preventive services) would likely have a budgetary impact. It is unclear whether, if challenged, those provisions that extend to both qualified plans and federally-funded programs would be considered in their entirety, or if pieces of the provision (e.g., requirements for qualified plans) could be challenged separately and stricken from the bill. Benefit requirements raise the issue of the severability of the reform provisions. That is, the more generous the benefit requirements for plans in the exchange, the greater the premiums and thus the low-income subsidies will be. However the existence of one of these provisions is not dependent on the existence of the other.

Byrd Rule Applicability to Key Policies



Health Insurance Exchange and Co-ops:

Although these two elements of health reform are very different, the Byrd rule considerations for them are similar. Both exchanges and co-ops would have a budgetary impact due to the federal government's provision of seed money/start-up funds for their implementation. Over time, however, the expectation is that both would be self-sustaining; the co-op through premiums and the exchange through user fees. Thus, a key question is one of magnitude – will the Parliamentarian rule that the impact of the start-up funds is merely incidental and thus strike the exchange and co-op provisions from the bill. Another important consideration is whether the start-up funds are mandatory or discretionary funding; if the latter, then they could not be considered under reconciliation.

Byrd Rule Applicability to Key Policies



Government-run Plan:

The government-run plan is quite likely to withstand a Byrd rule challenge (assuming some funding via mandatory funds). However, it is unclear whether all of the associated provisions that do not have an independent budgetary impact – e.g., eligibility rules and operating rules – would be deemed a necessary term or condition of the public plan provision. It appears some of those could be vulnerable to a challenge.

Government-run Plan Trigger:

A government-run plan that would only be triggered if certain conditions are met, may or may not survive a Byrd rule challenge. If the trigger is drafted so that the government-run plan is unlikely to be started, then it would not have a budgetary impact.

Subsidies:

Subsidies for individuals and employers will likely pass a Byrd rule challenge, assuming they are funded with mandatory spending, since they clearly require government funding.

Byrd Rule Applicability to Key Policies



Medical Loss Ratio (MLR) Requirements:

A strict MLR requirement that includes penalties or rebates payable to the federal government, although politically unfeasible, is most likely to pass a Byrd rule challenge. Absent some form of penalty/rebate or other means to change federal revenues, MLR requirements appear vulnerable to a challenge.

Establishment of New Government Entity to Oversee Health Reform:

The establishment of a new government entity to oversee health reform would clearly require government funding. However it's not clear whether, or what share of, that funding would be mandatory and thus applicable under reconciliation. Further, we generally believe that the roles and responsibilities of such a new entity would pass the "necessary term or condition" test, since the government is unlikely to approve funds without a purpose. But it is less clear at what point more detailed or lower level provisions on its functions might be deemed extraneous.

Byrd Rule Applicability to Key Policies



Medicaid Expansion, Medicare/Medicare Advantage Cuts, and Tax Increases:

Expanding Medicaid, reducing Medicare outlays, and increasing tax revenues would all clearly withstand a Byrd rule challenge.

Medicare Demonstrations/Pilots:

Medicare demonstrations or pilot projects that are budget neutral or deficit neutral would not meet the requirements of reconciliation and could be struck through a Byrd rule point of order. However, if Congress drafts them to have a budgetary impact that is more than merely incidental, they are likely to survive such a challenge.