



# CENTER FOR HEALTH LAW & POLICY INNOVATION Harvard Law School

Web: [www.chlpi.org](http://www.chlpi.org) • Email: [chlpi@law.harvard.edu](mailto:chlpi@law.harvard.edu)

## **Repeal, Reconciliation, and Review: Briefing of Fast-Track Methods Congressional Republicans May Use to Weaken or Repeal the ACA Under the Trump Administration**

The Trump Administration and the new Congress have an ambitious agenda for health care policy in the first several months of 2017. In order to achieve their goals of quickly repealing and replacing the Affordable Care Act (ACA), they must utilize reconciliation, a fast-track process intended to resolve budget challenges. This whitepaper reviews the history, procedure, and limitations of reconciliation and discusses the potential impact Republicans can make on health care policy using reconciliation. This whitepaper also discusses another procedural tool Congressional Republicans may use to undermine the ACA, the Congressional Review Act (CRA). The CRA grants Congress an ability to review and roll-back regulations promulgated by an outgoing Presidential Administration.

### **I. Reconciliation Overview<sup>1</sup>**

Created by the Congressional Budget Act of 1974 (CBA), the purpose of reconciliation was to escape laborious debates over the implementation of budget resolutions by expediting proposed changes in government outlays to conform to proposed budgets. As a result, reconciliation can be used only for proposals relating to: 1) taxes and revenues, 2) spending, and 3) the federal debt limit. Reconciliation is further limited because it can only be applied to mandatory or entitlement spending, not discretionary spending.

#### **A. Invoking Reconciliation**

Reconciliation can only be utilized as part of a budget process, usually initiated by the President. As directed by the CBA, the President formulates and presents a budget to Congress, who are free to disregard his proposal. Originally, the President submitted his

---

<sup>1</sup> For further information on reconciliation, see JUDY SCHNEIDER, MICHAEL L. KOEMPEL & ROBERT KEITH, CONGRESSIONAL DESKBOOK: THE PRACTICAL AND COMPREHENSIVE GUIDE TO CONGRESS 314-41 (TheCapitol.Net, Inc., 6<sup>th</sup> ed. 2012); ROBERT KEITH, CONG. RESEARCH SERV., RL 33030, THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES (2005).

budget proposal by January. In 1990, this deadline was moved to February. This change means that, in a Presidential transition year, the incoming President submits the budget proposal instead of the outgoing one. This means that the Trump Administration, not the Obama Administration, will be submitting the next Presidential budget. In recent years, this timetable has been regarded as a guideline rather than a deadline, leaving the President free to submit a budget proposal later than February.<sup>2</sup>

Under the CBA, the House and Senate are supposed to adopt a budget resolution each year. Budget resolutions are not laws, but a set of instructions to various Congressional Committees to establish an overall budget plan and set guidelines for these Committees on spending and revenue. Budget resolutions are filibuster proof in the Senate, so Senate Democrats cannot prevent a new budget resolution from being passed in early 2017. Once Congress passes a budget resolution with directives to the Committees, the actual process of reconciliation begins.

## **B. Reconciliation Procedure**

The budget resolution passed each year by Congress may include reconciliation directives asking specified Congressional Committees to recommend legislation changing existing law in order to bring spending, revenues, and the debt limit in conformity with the proposed budget. The reconciliation directives specify the amounts of changes to spending and revenues, but do not specify how to modify governmental programs to achieve these numbers. If more than one Committee is subject to reconciliation directives, House and Senate Budget Committees will package the recommendations of their relevant committees into an omnibus bill for consideration by the full House or Senate.

At this point of the process, the House and Senate operate on parallel tracks. The House Committees will submit their recommendations to the House Budget Committee and the Senate Committees will do the same to the Senate Budget Committee. These Budget Committees will package all recommendations into an omnibus bill for consideration by the full House or Senate. The bills containing the recommendations of the Committees are often referred to as omnibus reconciliation bills. The House and Senate initially consider their own reconciliation bills separate from each other, and virtually always pass different versions.

The House and Senate may amend their reconciliation bills, but usually these amendments must be cost neutral. In the Senate, debates on reconciliation bills are limited to twenty hours. Therefore, these bills are filibuster proof and Senate Democrats will not be able to prevent a reconciliation bill from being voted upon until the 2018 midterm elections at the earliest. In the Senate, only a simple majority (fifty one votes) is needed to pass a

---

<sup>2</sup> For a budget process timeline, see Appendix A.

reconciliation bill. The House usually adopts special rules setting forth specific procedures, such as maximum time for debates, for considering its reconciliation bills.

Once both the House and Senate have passed their reconciliation bills, a joint conference committee attempts to harmonize both bills. In order to minimize this step, the Senate will typically consider one or two bills initially but then modify the House reconciliation bill in order to proceed to a conference. If an agreement is reached by the joint conference, both chambers vote on the compromise version. The joint reconciliation bill is then sent to the President, who may veto the bill. Congress can override a Presidential veto with a two-thirds vote in each Chamber. If the President vetoes the measure and Congress cannot override, the process is over and requires a new budget resolution to restart.

## **C. Limits on Reconciliation**

### **1. Timing of Reconciliation**

Congress gets only “one bite at the apple” each year to address spending, revenues, and the federal debt limit through reconciliation. This is because the Senate can consider each reconciliation appropriate topic only once per budget resolution, meaning that it can pass a maximum of three conciliation bills per budget resolution/year.<sup>3</sup> For example, if the Senate passed a reconciliation bill that covered both spending and revenues, but was overwhelming devoted to spending, it would still be barred from passing a revenue focused reconciliation bill that year because it had already visited that topic.

There are suggestions that Congress may attempt to subvert this rule by adopting two budget resolutions during the first several months of the Trump Administration. Last year Congress failed to pass a budget for fiscal year 2017, creating an opportunity for Congress to take the unprecedented measure of adopting two budget resolutions in 2017. The two budget resolutions would yield two reconciliation bills - one for fiscal 2017, the other for fiscal 2018.

Allowing for two reconciliation opportunities would give Congress the opportunity to move quickly on repealing the ACA without foreclosing the opportunity to use reconciliation at a later point to advance other portions of their agenda. The fiscal year 2017 reconciliation bill will likely repeal the provisions of the ACA that are reconciliation appropriate. The fiscal year 2018 reconciliation bill would likely focus on tax reforms. Tom Price, Trump’s future Secretary of the Department of Health and Human Services, has stated that major

---

<sup>3</sup> The Senate can choose to address spending, revenues, and the federal debt limit in the same reconciliation bill or in separate reconciliation bills. So it could pass one bill addressing all three issues, three bills each addressing one issue individuals, or two bills—one addressing two issues and another one addressing the remaining issue.

changes to the current Medicare structure may be part of the fiscal year 2018 budget process.<sup>4</sup>

## 2. The Byrd Rule

The Byrd Rule is an important limitation on reconciliation in the Senate. Named after its sponsor, late Senator Robert Byrd (D-WV), the rule allows senators to block any provisions or amendments to the Senate reconciliation bill that are extraneous to the reconciliation process. This includes anything that does not directly affect spending, revenues, and the debt limit. The purpose of the Byrd Rule is to prevent Senate Committees from adopting provisions unrelated to their budget resolution directives, including provisions that would ordinarily struggle to get passed. The Byrd Rule is not automatic, meaning that a senator must object to an offending provision to get it stricken. Because senators may invoke the Byrd Rule during consideration of the joint reconciliation bill, it can be used to block the House from adding extraneous provisions to the final version of the reconciliation bill.

It is often difficult to determine if a matter is extraneous under the Byrd Rule. The “rule of thumb” is that a measure is extraneous if it does not change spending or revenues, or if the changes to spending and revenues are merely incidental to the policy components of the provision.<sup>5</sup> The Senate Parliamentarian, who is appointed by the majority party in the Senate, advises the Senate’s presiding officer regarding points of order including the Byrd Rule. When Congress attempted to repeal the ACA using reconciliation in 2015, the Parliamentarian determined that a provision repealing the Independent Payment Advisory Board violated the Byrd Rule as a primarily policy-based provision with incidental budgetary effects<sup>6</sup> and it was removed from that reconciliation bill. The Senate Presiding Officer—who can be the Vice President but is often a senator from the majority party—can choose to overrule the Senate Parliamentarian. It is unclear who the Presiding Officer will be during the upcoming reconciliation process and whether he or she will be inclined to overrule the Parliamentarian.

## D. Impacts on the ACA and Access to Care

Republicans used the reconciliation process last year in an attempt to repeal many key provisions of the ACA. President Obama vetoed that reconciliation bill and Republicans did

---

<sup>4</sup> Josh Marshall, *Trump HHS Pick Said Medicare Phaseout Would Pass Next Summer*, TALKING POINTS MEMO (Nov. 29, 2016, 1:44 AM), <https://talkingpointsmemo.com/livewire/trump-hhs-pick-said-medicare-phaseout-would-pass-next-summer>)

<sup>5</sup> A provision is also extraneous where (1) it produces a spending increase or revenue decrease when the instructed committee is not in compliance with its instructions; (2) it is outside the jurisdiction of the committee that submitted it; (3) it would increase the deficit for a fiscal year beyond those covered by the reconciliation measure; or (4) it recommends changes in Social Security. Section 313 of the Congressional Budget Act of 1974; 2 U.S.C. § 644.

<sup>6</sup> Melissa Quinn, *Senate Parliamentarian: House Partial Obamacare Repeal Dead-on-Arrival in Senate*, THE DAILY SIGNAL (Oct. 20, 2015), <http://dailysignal.com/2015/10/20/senate-parliamentarian-house-partial-obamacare-repeal-dead-on-arrival-in-senate/>

not have sufficient numbers to override his veto. The reconciliation bill would have eliminated Medicaid expansion, premium and cost-sharing subsidies by 2018. The bill would have eliminated the penalties associated with the individual and employer mandates. The reconciliation bill would have destabilized the insurance market because it would have kept some key consumer protections, such as guaranteed issue and community health ratings, while eliminating the requirement to obtain health insurance. This would have led to individuals refraining from purchasing health insurance until they were sick, which would have sent premiums skyrocketing to unaffordable heights.

The forthcoming ACA repeal attempt is expected to look similar to last year's reconciliation bill. It will likely phase out Medicaid expansion and the subsidies and remove penalties relating to the individual and employer mandates. Unlike the previous reconciliation attempt, however, it may include components of Congressional Republicans' ACA "replacement" plan. These "replace" changes that may be included in the upcoming reconciliation bill include: restructuring Medicaid via block grants or per capita caps; replacing the subsidies with less generous tax credits or even tax deductions; encouraging health savings accounts through tax-free contributions; establishing state innovation grants and high-risk pool funding; allowing providers to refuse to provide abortions and allowing insurers to refuse to contract with providers who provide abortions. The reconciliation bill may also include Medicare reforms, including allowing Medicare to negotiate drug prices; adjusting reimbursement caps to Medicare Advantage; repealing CMMI and the Independent Payment Advisory Board; readjusting reimbursement to hospitals and DSH funding; and increasing the age requirements for Medicare. Some of these proposals may be questionable under the Byrd Rule, but it is expected that Republicans will be less likely to listen to the Parliamentarian during this reconciliation process.<sup>7</sup>

The Byrd Rule is likely to protect certain components of the ACA, including: the ban on pre-existing conditions exclusions; health status underwriting restrictions; caps on annual and lifetime spending limits; actuarial value requirements; and mandated benefits such as the Essential Health Benefits. The Byrd Rule does not completely protect these components, however. If Congress uses reconciliation to remove the subsidies and the individual mandate, these components are likely to become unworkable as discussed above.

The Byrd Rule is also likely to block certain components of the Republican health care policy agenda. The following Republican proposals are unlikely to be pass a Byrd Rule challenge: allowing insurers to sell across state lines; requiring price transparency from all health care providers, including those who do not contract with Medicaid or Medicare;

---

<sup>7</sup> Brian Blase and Paul Winfree, *How to Repeal Obamacare: A road map for the GOP*, POLITICO (November 11, 2016, 7:31 AM) <http://www.politico.com/agenda/story/2016/11/repeal-obamacare-roadmap-republicans-000230>

reforming prescription drug pricing and allowing for re-importation of pharmaceuticals; reforming the FDA; reforming medical malpractice; and reforming medical licensure. Congress would have to pass these proposals using normal procedures, which means that Senate Democrats would be able to filibuster objectionable proposals and that Republicans would have to find sixty votes for any proposals that did make it to voting.

## II. Congressional Review Act Overview<sup>8</sup>

Congress also has tools to override some components of the ACA established by agency rulemaking as opposed to legislation. The Congressional Review Act<sup>9</sup> (CRA) requires all federal agencies to submit to Congress for review a copy of their final regulations along with reports justifying the reasons for its promulgation. The CRA also establishes procedures for Congress to use to repeal agency regulations it disagrees with. The process established by the CRA is cumbersome and has been used once, in 2001, since its inception in 1996. There is reason, however, to think that the circumstances are right for it to be wielded aggressively and successfully by the upcoming Congress, with the support of President Trump, to undo at least some of President Obama's legacy.

### A. Congressional Review Procedure

The CRA can be used for review of a broad range of agency action. The legislative history and interpretation of the CRA's definition of what constitutes reviewable agency action embraces nearly every statement an agency may make, including interpretive, procedural, and substantive rules, guidelines, and policy proclamations. While Congress may use the CRA to review a wide range of agency action, it is most likely that they will use the CRA to review only major rules. These are defined as having an annual impact on the economy of \$100 million or more, will increase costs and prices for certain constituencies, or will have some other adverse effect on the economy. The Office of Information and Regulatory Affairs in the White House Office of Management Budget determines whether a particular rule is deemed major. Many of the regulations implementing the ACA do have a significant impact on the economy. A good indication of whether a rule is major for the purposes of the CRA is whether it has at least a sixty day period before implementation.

Under the CRA, Congress has up to sixty legislative days to review and overrule a major rule promulgated by a federal agency. Within that period, Congress can introduce a joint resolution of disapproval. The resolution is submitted initially to the appropriate Congressional Committee, but thirty Senators may petition to bring the resolution to the

---

<sup>8</sup> For further information on the Congressional Review Act, see MORTON ROSENBERG, CONG. RESEARCH SERV., RL30116, [CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE](#) (2008).

<sup>9</sup> 5 U.S.C. § 801-808.

full Senate if the Committee takes longer than twenty days to review. If the Senate agrees to review a joint resolution of disapproval, debate is limited to no more than ten hours, no amendments to the resolution or motions to proceed to other orders of business are permitted, and the resolution may pass by simple majority, or fifty-one votes. The joint resolution of disapproval must be signed by the President, or overcome a Presidential veto by two-thirds majority vote in both the House and the Senate. When a joint resolution is passed, it retroactively nullifies the rule and prohibits an agency from promulgating substantially similar rules without Congressional approval.

As in many governmental procedures, the sixty day review period is more complicated than it initially seems. The CRA gives Congress sixty legislative days to consider a regulation, meaning days that either house of Congress is adjourned for more than three days do not count towards this deadline. There is a carryover period for rules that were promulgated less than sixty legislative days before either house of Congress adjourned. These held over rules are treated as if they were published on the 15<sup>th</sup> session day of each house of the next session, dramatically extending the period of review.

## **B. Limits on Congressional Review**

Because it is only rarely used, there is a lot of uncertainty around proper CRA procedures. It is not clear whether Congress can “bundle” together more than one objectionable regulation into a single joint resolution of disapproval, which would expedite the removal of multiple regulations. It is also not clear if Congress can find only one part of a larger regulation objectionable, or if it must strike down the entire regulation its joint resolution of disapproval. Because there are multiple Democratic regulations in the crosshairs of Congressional Republicans, some lawmakers are pushing to clarify the expediting process. Representative Darrell Issa (R-CA) proposed a measure called the “Midnight Rules Relief Act of 2016” to allow Congress to invalidate multiple rules in a single vote,<sup>10</sup> easing the logistical burden of rolling back so many regulations individually. While this proposal passed in the House, Obama is highly unlikely to sign the measure. Issa will likely propose the measure again once the Trump Administration begins and it is more likely to succeed then.

The CRA has only been used to overturn a major rule once since it was implemented in 1996. At the tail end of the Clinton Administration, the Occupational Safety and Health Administration (OSHA) promulgated a controversial regulation designed to curb ergonomic injuries in the workplace. During the new session of Congress following the inauguration of President Bush, a joint resolution of disapproval was passed. Most other

---

<sup>10</sup> Yuka Hayashi, *Republican Lawmakers Eye Freeze on Obama Regulations*, THE WALL STREET JOURNAL (Nov. 18, 2016, 2:15 PM), <http://www.wsj.com/articles/republican-lawmakers-eye-freeze-on-obama-regulations-1479489099>

attempts to use the CRA have been blocked by the need for Presidential approval, because a President who approved a regulation would be unlikely to sign legislation overturning it.

### **C. Impact on the ACA and Access to Care**

While President Obama is in office, any joint resolution of disapproval is unlikely to succeed because President Obama would veto such a resolution and Republicans do not have enough seats to override a Presidential veto. The regulations promulgated by the Obama Administration becomes much more vulnerable to a joint resolution of disapproval once President Trump takes office because he is likely to sign any resolution undoing the work of his predecessor. Unfortunately, a significant number of regulations promulgated by the Obama Administration, including some key health care related ones, may fall under the purview of the CRA during the next Congressional session.<sup>11</sup> Currently, the proposed list does not include the regulations promulgating the Anti-Discrimination protections of Section 1557 of the ACA, but this could change.

The reset period for all major rules can be determined by counting back from the projected adjournment by 60 days of legislative days in each house of Congress using second-session proposed meeting schedules, and then taking the earlier of the two dates. Using this method, the Congressional Research Service estimates that rules submitted after May 30, 2016, will be subject to the renewed review periods in 2017 under the Trump Administration. The second-session proposed meeting schedules are open to changes and it is anticipated that Republican leadership may push to end the second-session as early as possible. This would move even more regulations promulgated by the Obama Administration into the review period allowed by the CRA to the next Congress.

Some legal experts are predicting that, because of the Administration change-over from a Democratic to Republican President similar to 2001, the CRA will once more be successfully used to roll-back controversial regulations. A good gauge of the intent to use the CRA to aggressively strike down Obama Administration regulations will be how much earlier than scheduled Republican leadership chooses to close the current Congressional session, in order to have as many regulations fall under the CRA review of the next Congress.

*For questions or inquiries, please contact Carmel Shachar, Clinical Instructor at the Center for Health Law and Policy Innovation, at [cshachar@law.harvard.edu](mailto:cshachar@law.harvard.edu), or Phil Waters, Clinical Fellow at the Center for Health Law and Policy Innovation, at [pwaters@law.harvard.edu](mailto:pwaters@law.harvard.edu).*

---

<sup>11</sup> For a list of health care related regulations that may fall under CRA review in the next Congress, see Appendix B.

**Appendix A**

<b><u>Budget Process Timeline*</u></b>	
<b>On or Before:</b>	<b>Action to be Completed:</b>
First Monday in February	President submits budget
February 15	CBO submits reports to Budget Committees
April 1	Committees submit views and estimates to Budget Committees (own date frequently set)
April 15	Senate Budget Committee reports concurrent resolution on the budget
May 15	Congress completes action on the concurrent resolution on the budget (not signed by POTUS)
June 10	Annual appropriation bills may be considered in House
June 15	Congress completes action on reconciliation legislation (if resolution includes "reconciliation directives")
June 30	House completes action on annual appropriations bills
October 1	Fiscal year begins
*This table represents the timeline in the Congressional Budget Act of 1974. Recently, Congress has prolonged the budget process and has considered, reported, and aimed to complete action on appropriation bills in the spring and summer months.	

**Appendix B**

The following are major rules that may be subject review under the Congressional Review Act by the next Congress. A rule is defined as a major rule if it will likely have an annual effect on the economy of \$100 million or more, increase costs or prices for consumers, industries or state and local governments, or have significant negative effects on the economy. This is not an exhaustive list, focusing only on health care related regulations. It assumes that the earliest day of the review period was May 30, 2016.

<b>Title of Rule in Federal Register</b>	<b>Agency</b>
ONC Health IT Certification Program: Enhanced Oversight and Accountability	Department of Health and Human Services, Office of the Secretary
Medicare And Medicaid Programs; Reform Of Requirements For Long-Term Care Facilities	Department Of Health And Human Services, Centers For Medicare & Medicaid Services
Child Care And Development Fund (CCDF) Program	Department Of Health And Human Services, Administration For Children And Families
Establishing Paid Sick Leave For Federal Contractors	Department Of Labor, Office Of The Secretary
Emergency Preparedness Requirements For Medicare And Medicaid Participating Providers And Suppliers	Department Of Health And Human Services, Centers For Medicare & Medicaid Services: Medicare And Medicaid Programs
Safety And Effectiveness Of Consumer Antiseptics; Topical Antimicrobial Drug Products For Over-The-Counter-Human Use	Department Of Health And Human Services, Food And Drug Administration
Medicare Program; Hospital Inpatient Prospective Payment Systems For Acute Care Hospitals And The Long-Term Care Hospital Prospective Payment System & Policy Changes & Fiscal Year 2017 Rates; Quality Reporting Requirements For Specific Providers; Graduate Medical Education; Hospital Notification Procedures Applicable To Beneficiaries Receiving Observation Services; Technical Changes Relating To Costs To Organizations & Medicare Cost Reports; Finalization Of Interim Final Rules With Comment Period On LTCH PPS Payments For Severe Wounds, Modifications Of Limitations On Redesignation By The Medicare Geographic Classification Review Board, & Extensions Of Payments To MDHS And Low-Volume Hospitals	Department Of Health & Human Services, Centers For Medicare & Medicaid Services
Medicare Program; Prospective Payment	Department Of Health And Human Services,

System And Consolidated Billing For Skilled Nursing Facilities For FY 2017, SNF Value-Based Purchasing Program, SNF Quality Reporting Program, And SNF Payment Models Research	Centers For Medicare & Medicaid Services
Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System For Federal Fiscal Year 2017	Department Of Health And Human Services, Centers For Medicare & Medicaid Services
Medicare Program; FF 2017 Hospice Wage Index And Payment Rate Update And Hospice Quality Reporting Requirements	Department Of Health And Human Services, Centers For Medicare & Medicaid Services
Medicare Program; FY 2017 Inpatient Psychiatric Facilities Prospective Payment System-- Rate Update	Department Of Health And Human Services, Centers For Medicare & Medicaid Services
Medication Assisted Treatment For Opioid Use Disorders	Department Of Health And Human Services
Medicare Program; Medicare Clinical Diagnostic Laboratory Tests Payment System	Department Of Health And Human Services, Centers For Medicare & Medicaid Services
Medicare Program; Medicare Shared Savings Program; Accountable Care Organizations- -Revised Benchmark Rebased Methodology, Facilitating Transition To Performance-Based Risk, And Administrative Finality Of Financial Calculations	Department Of Health And Human Services, Centers For Medicare & Medicaid Services
For a full list of major regulations at issue, see: <a href="https://www.insidehighered.com/sites/default/server_files/files/Major%20Rules%20Subject%20to%20CRA%20Under%20Carryover%2011-17-2016%20(1).pdf">https://www.insidehighered.com/sites/default/server_files/files/Major%20Rules%20Subject%20to%20CRA%20Under%20Carryover%2011-17-2016%20(1).pdf</a>	