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Warning: Side Effects of Special Congressional Health Handout May Include Lawsuits

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Abstract

Due to the hurried nature of its drafting and passage, the Patient Protection and Affordable Care Act (Obamacare) contains a number of provisions that, had Congress read the bill more carefully, might have been rejected. For example, one section mandates that Members of Congress and their staff should lose their current government-sponsored premium support for health insurance. The Office of Personnel Management has issued a final rule allowing Members of Congress and their staff to continue to have their taxpayer-funded health insurance. Yet this new ruling is likely unlawful. The scheme is therefore threatened by potential lawsuits by Members of Congress and their staff.

"[W]e have to pass the bill to find out what's in it."
—Speaker of the House Nancy Pelosi[1]

On the long, strange road to passage of the Patient Protection and Affordable Care Act (Obamacare), the August 2009 death of Senator Ted Kennedy (D–MA) proved to be a decisive moment. By signaling the possible end of the Senate Democrats' filibuster-proof supermajority, Kennedy's passing, by extension, threatened the future of health care reform: Passage of Obamacare was no longer guaranteed.[2] In order to ensure passage of the bill while the supermajority was intact, Senate Majority Leader Harry Reid (D–NV) sidelined ordinary processes in the Senate. Following a series of rushed, secretive drafting sessions, the Senate passed Obamacare on December 24, 2009. Then-Speaker of the House Nancy Pelosi (D–

Key Points

- Due to the hurried nature of its drafting and passage, Obamacare contains a number of provisions that, had Congress read the bill more carefully, might have been rejected.
- One section mandates that Members of Congress and their staff should lose their government-sponsored premium support for health insurance.
- The Office of Personnel Management has issued a final rule authorizing premium support for Members of Congress and their staff—a rule that contradicts the plain language of both the Federal Employees Health Benefits Program statute and Obamacare.
- Individual employees should sue if and when they are injured by this scheme.
- Should this final rule ultimately be found to be unlawful, it will put Congress in a difficult position: Amend Obamacare and open the legislative floodgates, or stand idly by while Members and their staff grapple with paying out-of-pocket to go onto the Obamacare exchanges.

This paper, in its entirety, can be found at **http://report.heritage.org/lm117**

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CA) held the legislation for three months to round up Democratic votes to pass the Senate-passed version of the bill in the House, which she finally accomplished on March 21, 2010, followed by presidential signature on March 23, 2010.

Not only was this new law drafted in secret, but it was long: At 906 pages, numerous provisions were signed into law without full analysis of their complicated legal ramifications. As then-Speaker of the House Nancy Pelosi (D–CA) noted, "[W]e will have to pass the bill to find out what's in it."[3] Consequently, numerous provisions entered into force that, had Congress read the bill more carefully, might have been rejected.

One such provision is Section 1312(d)(3)(D), which reads: "Notwithstanding any other provision of law ... the only health plans that the Federal Government may make available to Members of Congress and congressional staff ... shall be health plans that are ... created under this Act ... or ... offered through an Exchange established under this Act...."[4] Under this provision, it is clear that Members of Congress and their staff should lose their current employer-sponsored health insurance program.[5]

Last summer, some Members of Congress began to appreciate the ramifications of this provision, prompting one Democratic Member, who chose to remain anonymous, to opine: "This was a stupid provision that never should have gotten into the law."[6] Yet some feared that a partial repeal of Obamacare would be political suicide: Not only would it embarrass Members of Congress who would be accused of greed, but a successful amendment to Obamacare could open the floodgates to further amendments—or even outright repeal.

As has been reported, President Barack Obama, in a closed-door meeting, promised the Democratic caucus that he would devise an administrative fix to the problem.[7] Subsequently, on October 2, the Office of Personnel Management (OPM) issued a final rule amending the Federal Employees Health Benefits (FEHB) Program regulations to authorize "Government contribution for 'health benefits plans....'"[8]

Were this final rule legal, it would allow Members of Congress and their staff to breathe a sigh of relief: They would continue to have their health insurance largely paid for by the federal government. Such a rule is not only flatly contrary to law,[9] but also politically unpopular. The proposed rule drew over 60,000 public comments, the vast majority in opposition.

Without question, OPM's attempt to exempt Congress from the Obamacare statute cried out for legal challenge. In order to satisfy the Article III standing requirement, however, any challenge would likely have to come from Members of Congress who themselves object to having to deviate from express statu-

1. Speech of Speaker of the House Nancy Pelosi before the National Ass'n of Counties (March 9, 2010).
2. Emily Smith, *Timeline of the Health Care Law*, CNN, June 28, 2012, http://www.cnn.com/2012/06/28/politics/supreme-court-health-timeline/.
3. *See supra* note 1.
4. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119–1025, *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111hr3590enr/pdf/BILLS-111hr3590enr.pdf.
5. Robert E. Moffitt, Edmund F. Haislmaier & Joseph A. Morris, *Congress in the Obamacare Trap: No Easy Escape*, The Heritage Foundation Backgrounder No. 2831 (Aug. 2, 2013), *available at* http://www.heritage.org/research/reports/2013/08/congress-in-the-obamacare-trap-no-easy-escape.
6. Robert Pear, *Wrinkle in Health Law Vexes Lawmakers' Aides*, N.Y. Times, July 29, 2013, *available at* www.nytimes.com/2013/07/30/us/politics/wrinkle-in-health-law-vexes-lawmakers-aides.html.
7. *Congress's ObamaCare Exemption,* Wall St. J., Aug. 5, 2014, *available at* http://online.wsj.com/news/articles/SB10001424127887324635904578644202946287548.
8. Federal Employees Health Benefits Program: Members of Congress and Congressional Staff, 78 Fed. Reg. 60653-01 (Aug. 8, 2013) (to be codified 5 C.F.R. 890).
9. John Malcolm & Andrew Kloster, *A Nation of Men, Not Laws: President Promises Congress that Obamacare Will Not Apply to Them*, Executive Branch Review, Aug. 7, 2013, *available at* executivebranchproject.com/a-nation-of-men-not-laws-president-promises-congress-that-obamacare-will-not-apply-to-them/John.

tory language in order to provide health coverage for their families and themselves.[10] Consistent with this approach, on January 3, 2014, Senator Ron Johnson (R–WI) and one of his staff members filed suit challenging the OPM rule.[11]

FEHB and the New Health Care Law

In brief, Section 1312(d)(3)(D) of Obamacare provides: "Notwithstanding any other provision of law ... the only health plans that the Federal Government may make available to Members of Congress and congressional staff ... shall be health plans that are ... created under this Act ... or ... offered through an Exchange established under this Act...."[12] This section is administered by the Department of Health and Human Services (HHS), and the only available plans are those approved by HHS.

By contrast, the FEHB Program is administered by OPM in accordance with Chapter 89 of Title 5 of the United States Code. Strictly speaking, OPM does not provide a "subsidy" to Members of Congress or their staff; rather, it contracts with health insurers, negotiates rates and benefits with health insurers, and makes sure that the premiums of the competing private health plans participating in the FEHB Program bear a "reasonable relationship" to their annual benefit offerings.[13]

Federal agencies, and the Congress with respect to its Members and staff, provide from their appropriations in the form of a premium support to the private plans chosen by federal workers. The amount of the government payment to health plans is determined each year by a process of competitive bidding among health plans for the provision of health benefits. Thus, the government payment reflects the real market conditions of supply and demand for health benefits within, and only within, the FEHB Program.

Under the existing formula, the FEHB Program pays 72 percent of the cost of any given plan's premium up to a fixed dollar amount. By contrast, under the OPM rule, the agency will be paying 72 percent of premiums based on Obamacare exchange data, which is entirely irrelevant to FEHB Program rates, benefits, or data and which, as a practical matter, will almost surely cause unforeseeable overpayments or underpayments relative to the value of the new congressional health care plans.

Concerning Congress and congressional staff, the most plausible reading of the health care statute is that it repealed the FEHB Program for them. Indeed, OPM acknowledged that the Obamacare exchanges are not a part of the FEHB Program when, in its final rule, the agency noted: "[P]ursuant to its authority under chapter 89 of title 5, OPM will have no role in 'contracting for' or 'approving' health benefit plans that are offered through the Exchanges."[14] Contrary to OPM's protestations, the only plans contemplated by 5 U.S.C. §§ 8905 and 8906 are those that have been approved by OPM: specifically, those defined in 5 U.S.C. §§ 8903 and 8903a.[15]

10. Article III of the Constitution limits the federal judicial power to specified "cases" and "controversies" and, unless the complaint a party brings to court falls within the legal definition of a case or controversy, the party is said to lack standing under Article III to sue. The U.S. Supreme Court has stated that:

    > Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

    Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and footnote omitted). See *Raines v. Byrd*, 521 U.S. 811 (1997) (discussing situations in which Members of Congress do and do not have standing to sue).

11. Johnson v. Archuleta, No. 14-CV-9 (E.D. Wisc. filed Jan. 6 2013), *available at* http://www.will-law.org/Home/Our-Cases/Johnson-v-OPM/Johnson-Case-Documents.

12. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119-1025.

13. Trade, business, technical, and professional activity costs, 48 C.F.R. § 1631.205-76.

14. *See supra* note 8.

15. It is a tortured reading of "health benefits plan under this chapter" to include health exchanges passed into law decades following the FEHB Program itself. In reaching this conclusion, OPM makes numerous errors of statutory interpretation that cannot be exhaustively listed here; suffice it to say that a good place to look for a definition of "health benefits plan under this chapter," chapter 89, might be chapter 89 itself in the section entitled "Health benefits plans," 5 U.S.C. § 8903.

While it is not widely acknowledged, this creates a legal mess. If the OPM rule is to be believed and the FEHB Program remains unaffected by Obamacare, Members of Congress and their staff might end up with the worst of all possible worlds.

For example, in certain circumstances, Congress could continue to take payroll deductions from Members and staff that are authorized only under the FEHB Program, but it would be unable to make payments until OPM approves the relevant Obamacare exchange for each FEHB beneficiary. Members of Congress and their staff might remain in this regulatory limbo for months, subjected to continuing automatic payroll deductions while at the same time having to pay out-of-pocket health insurance costs or face the stiff tax penalties contained in Obamacare. Since OPM apparently believes it will have "no role" in this process, Members of Congress and their staff might find that the FEHB Program, coupled with Obamacare, charged them twice and paid out only once.

Another absurd consequence of presuming that the FEHB Program is still in effect as to Members of Congress or congressional staff is that the statute that implements the FEHB Program also mandates the collection of payments related to the administrative costs of health plans.[16] The most plausible reading of this provision is that it reimburses OPM for OPM's administrative costs; yet if "health benefits plan under this chapter" includes Obamacare exchanges, Members of Congress and their staff could be on the hook to pay for administrative costs to state-based exchanges. This could lead to additional overwithholding.[17]

Whatever the case, it is clear that treating a part of the FEHB Program as still functional for Members of Congress within the Obamacare framework will likely cause additional regulatory headaches for Members and staff down the line.

Court Action Challenging the OPM Rule

A Member of Congress or congressional staff member enrolled in the FEHB Program should be able to challenge the illegal OPM program in court.[18] As noted, Senator Ron Johnson and a member of his staff have filed just such a lawsuit.[19]

Specifically, an FEHB "beneficiary" could sue in federal district court in any district where he or she is required by Obamacare to purchase health insurance through an exchange,[20] naming the Director of OPM and the Clerk of the House of Representatives (or the Secretary of the Senate) and seeking a declaratory judgment that OPM does not have authority under 5 U.S.C. § 8909 to disburse money from the Federal Employees Health Benefits Fund to an insurer pursuant to an insurance contract entered into through the exchange. The lawsuit would request the court to enjoin the employing agency (the Clerk of the House or the Secretary of the Senate) from deducting the employee's share of the premium from the employee's pay and paying it into the FEHB Fund on the ground that the money taken would do nothing to acquire insurance coverage for the employee.

Those defending the lawsuit would most likely rely on one or both of the following arguments. First, defendants can argue that Obamacare exchanges are anticipated by the language of Section 8909, which states that "The [FEHB Program] Fund is

16. 5 U.S.C. § 8909(b)(1).

17. If FEHB beneficiaries were the sole enrollees in any particular Obamacare exchange, negotiations between OPM and the exchange might lead to pricing where "administrative costs" and other costs were accounted separately. However, the reality of the market will likely lead to administrative costs being "baked in" to the exchange fees, making it difficult or impossible for OPM to determine the value of the mandatory administrative costs withholding accurately.

18. There is an additional question as to which congressional staff fall under Section 1312(d)(3)(D). "Congressional staff" is defined in Section 1312(d)(3)(D)(ii) as "all full-time and part-time employees employed by the official office of a Member of Congress, whether in Washington, DC, or outside of Washington, DC." Whether this includes home office staff, or committee staff, or leadership staff is unclear. The OPM rule contends: "OPM continues to believe that individual Members or their designees are in the best position to determine which staff work in the official office of each Member. Accordingly, OPM will leave those determinations to the Members or their designees...." *See also* Burgess Everett & Jake Sherman, *Democrats split on putting Hill aides on exchanges*, Politico, Oct. 30, 2013, *available at* http://www.politico.com/story/2013/10/nancy-pelosi-staff-health-exchange-99092.html.

19. *See supra* note 11.

20. The cause of action would likely be 42 U.S.C. §§ 1981, 1982, or 1983 and would depend upon, among other things, the extent to which the Obamacare exchanges are state law–based rather than federal law–based.

available ... without fiscal year limitation for all payments to approved health benefits plans," in conjunction with Section 8901(6), which defines "health benefits plans." In other words, defendants would claim that when the FEHB program was created in 1960, the law contemplated making payments to *any* health plan for Members of Congress and their staff, not just health plans overseen by OPM.[21]

This argument, however, stretches the statutory language beyond belief. OPM can make payments *only* to OPM-negotiated health care plans contemplated under the statute. Obamacare exchanges cannot be, in the relevant sense, "approved" by OPM, especially when OPM disclaims any responsibility for the plans.

Such an argument seems at odds both with the language of the statute itself and with the theory of insurance and insurance reserves that are built into the FEHB Program law. Chapter 89 takes care to provide for reserves and arrangements for plan continuity, and the protection of enrollees, in events such as an approved plan's termination, merger, or similar kind of event. OPM has no means to incorporate the non-approved plans (that is, the individual insurance policies to be acquired through the Obamacare exchanges) in the reserve and oversight arrangements that Chapter 89 erects. Further, there is no statutory direction as to how to apply, with respect to the unapproved plans, those portions of the stream of funds into the FEHB Fund that are intended for reserves.

The second, more complicated argument that defenders of the OPM rule would likely make is that when the federal government makes an unlawful handout, no person suffers a legally cognizable injury. Because there is no "taxpayer standing," no one has a real interest in stopping the scheme.[22] This is a more difficult problem and one that characterizes many of the Administration's unlawful decisions; they are often crafted so as to minimize the likelihood that somebody will have standing to mount a legal challenge.

Comptroller General Review

Alternatively, rather than relying on a legal challenge, Congress can send a request to the Government Accountability Office to open an investigation. Pursuant to 31 U.S.C. § 712(1), the Comptroller General of the United States "shall investigate all matters related to the receipt, disbursement, and use of public money," and any individual Member of Congress can request such an investigation.

It is the Comptroller's responsibility to ensure that government money is not being misspent; if FEHB Program payouts are illegal, that is an example of something that would warrant an investigation. In addition, any "committee of Congress having jurisdiction over revenue, appropriations, or expenditures" can require reports pursuant to 31 U.S.C. § 712(4) and § 712(5).

Office of Compliance Review

Finally, Congress can request a report from the United States Congress Office of Compliance pursuant to 2 U.S.C. § 1381(h)(1). The Office of Compliance was created to enforce the Congressional Accountability Act of 1995 and provides information to Members of Congress and staff related to "laws made applicable to them" and to "inform individuals of their rights under laws applicable to the legislative branch...." To the extent that there is confusion or worry about whether OPM is acting within its legal authority or whether Members of Congress and their staff can have deductions taken from their paychecks for no legal purpose, the Office of Compliance can and should be consulted to provide guidance.

The Board of Directors of the Office of Compliance "shall review provisions of Federal law (including regulations) relating to (A) the terms and conditions of employment (including ... benefits ...) of employees...."[23] Under Section 1301(3)(A) and (B), "covered employee" within the jurisdiction of the Office of Compliance includes employees of the House of Representatives and of the Senate; under Subsection (7), "The term 'employee of the House of Representatives' includes an individual occupying a position the pay

21. Interestingly, for the life of the FEHB Program, negotiations between OPM and insurers took place behind closed doors in a sensitive and confidential process that excluded even OMB.

22. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).

23. 2 U.S.C. § 1302(b)(1).

for which is disbursed by the Clerk of the House of Representatives...."; and under Subsection (8), "The term 'employee of the Senate' includes any employee whose pay is disbursed by the Secretary of the Senate...." Those definitions embrace both wings of the Capitol and bring the Obamacare benefits squarely within the purview of the Office of Compliance.

A Member of Congress could ask the Office of Compliance to review the OPM regulations and advise on their legality and functionality. These are uncharted waters, however, as the Office of Compliance is still a relatively young agency whose integrity and independence from the self-serving judgments of its political masters are untested.

Conclusion

The recent OPM final rule to provide subsidies to Members of Congress and their staff contradicts the plain language of both the FEHB Program statute and Obamacare. Representatives who object to having to deviate from the express statutory language in order to provide health coverage for their families and themselves, such as Senator Ron Johnson, should investigate this matter further, and Members of Congress and their staff can and should sue if and when they are injured by this unlawful scheme.

Should this final rule be found to be unlawful, it will put Congress in a difficult position: Amend Obamacare and open the legislative floodgates, or stand idly by while Members and their staff grapple with paying out-of-pocket to go onto the Obamacare exchanges.

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