



THE CHALLENGE OF PASSING HEALTH CARE THROUGH RECONCILIATION

12 March 2010

Background

The Democratic Majority plans to use a two-bill strategy to enact their health care overhaul. The first bill would be the 2,700 page bill that the Senate passed on December 24th. The House would take up this bill, without change, pass it, and send it to the President for his signature to become law. The second bill (a “corrections” bill) would modify the first bill, presumably to make the changes the President proposed, plus possible other changes, to secure the votes necessary to pass the first bill in the House. The House Budget Committee plans to mark up this second bill on Monday, March 8, and it will be considered under budget reconciliation rules.

Last year’s budget resolution (S.Con.Res. 13) included reconciliation instructions to produce \$1 billion in deficit reduction for the period FY 2010-2014.¹ Committees were to submit legislation to the Budget Committees by October 15, 2009. Two House committees submitted legislation to the House Budget Committee last year. No committee in the Senate has submitted legislation to the Senate Budget Committee.

While the Budget Act provides expedited procedures for consideration of a reconciliation bill (limits on debate and amendments), it also applies the Byrd Rule to reconciliation bills in the Senate. The Byrd Rule prohibits the inclusion of “extraneous” provisions in a reconciliation bill. If a Byrd Rule point of order is raised and sustained, it takes a three-fifths vote in the Senate to waive that point of order. If the point of order is not waived, the provision is stricken from the bill. The point of order applies to bills, amendments between houses, and conference reports.

If reconciliation is used to achieve this two-bill strategy, it raises a number of questions. Enacting a second health care bill under reconciliation – nearly a year after the budget resolution was adopted – to facilitate the enactment of a 2,700 page bill that creates a new \$1-trillion health care entitlement as part of a sweeping overhaul of the entire health care sector is new territory for reconciliation.

¹ S.Con.Res. 13 included two reconciliation instructions in the House to produce one bill. Section 202 (a) includes reconciliation instructions under “health care reform” for three committees to produce \$1 billion in deficit reduction for the period FY 2009-2014. Section 202(b) includes a reconciliation instruction under “investing in education” for the Education and Labor Committee to produce \$1 billion in deficit reduction for the same period. Both instructions call for Committees to submit their legislative recommendations to the House Budget Committee by October 15, 2009.

The following questions and issues are just some that likely to need to be addressed for both bills to be enacted. Most of the answers to these questions will be determined by the presiding officer in the Senate, following the guidance of the Senate Parliamentarian. The Senate Parliamentarian will look to the Budget Act, Senate rules, and Senate precedent to advise the presiding officer of the Senate. The following raises key questions and attempts to provide information in response to these questions.

Questions and Additional Information

Can the Senate pass the reconciliation bill first so that the House can be assured that it sees the changes to the Senate bill before it passes it and sends it to the President to become law?

Since the reconciliation bill almost certainly will include revenue provisions, the Constitution stipulates that it must originate in the House. If the Senate attempts to take another revenue bill and try to convert it to a reconciliation bill, it will not enjoy reconciliation status in the Senate. If the reconciliation bill includes revenue changes, it will need to originate in the House (according to Senate Budget Committee Chairman Conrad).²

Can reconciliation be considered before the Senate health reform bill has been enacted?

It is difficult to see how. Since the reconciliation bill would amend the Senate bill, which has not become law yet, it would not amend current law. The reconciliation instructions in the budget resolution (Sections 201 and 202) call on the committees to “report changes in law.” Senate Budget Committee Chairman Conrad has stated that he does not see how a reconciliation bill can be considered in the Senate before the Senate-passed bill becomes law.³ There have been numerous press reports that the Senate Parliamentarian has advised that the Senate-passed health care bill must become law before the Senate can consider the reconciliation bill under the Budget Act’s expedited procedures.⁴

There are also budget scoring issues when considering the reconciliation bill before the Senate-passed health care bill is sent to the President and becomes law.

Under the Byrd Rule, provisions in a reconciliation bill must have a budgetary impact. Since the reconciliation bill will amend the Senate-passed health care bill, until that bill is cleared for the

² “House Democrats: Obama’s Support Could Lead to Final Passage of Health Care Bill,” Washington Post, February 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/26/AR2010022605492.html>

³ “Parliamentary Hurdle Could Thwart Latest Health Care Overhaul Strategy,” New York Times, March 10, 2010, <http://www.nytimes.com/2010/03/10/health/policy/10health.html?scp=3&sq=conrad%20reconciliation&st=cse>

⁴ See: “Parliamentary Hurdle Could Thwart Latest Health Care Overhaul Strategy,” New York times, March 10, 2010, <http://www.nytimes.com/2010/03/10/health/policy/10health.html>; “Parliamentarian's ruling deals blow to Democrats' healthcare reform chances,” Roll Call, March 11, 2010, <http://thehill.com/homenews/senate/86377-ruling-deals-blow-to-reform-chances->; “Democrats Eye Health Care Finish,” Roll Call, March 3, 2010, http://www.rollcall.com/issues/55_97/news/43762-1.html?page=2.

President's signature, the Congressional Budget Office [CBO] will score the legislation relative to current law. And because the reconciliation bill will amend a bill that has not become law yet, CBO is likely to score the reconciliation bill with no budgetary impact (unless it amends current law and not the Senate bill).

As a result, prior to the House passing the Senate bill and clearing it for the President's signature, a reconciliation bill that amends the Senate-passed bill will probably be scored as having no budgetary impact, making all of its provisions vulnerable to the Byrd Rule. So, the Senate probably could not take up the bill until the House had passed the Senate-passed health care bill and sent it to the President to become law.

Can certain provisions from the Senate health reform bill, such as the abortion provision and citizenship requirements, be amended by a reconciliation bill or would such provisions be subject to the Byrd Rule?

The Senate Parliamentarian would make this judgment. For provisions that deal with issues not directly related to the budget, the Senate Parliamentarian views these issues with heightened skepticism. While there may be an effort to draft language to have a budgetary impact, these provisions are likely to still be vulnerable to Byrd Rule points of order. The Byrd Rule envisioned such an effort and provides a point of order under section 313(b)(1)(D) of the Budget Act against any provision producing budgetary changes that are "merely incidental" to the non-budgetary components of the provision.

Since the Senate bill was scored by CBO as reducing the deficit by \$118 billion, can't the reconciliation bill claim some of these savings to meet the \$1 billion deficit reduction instruction?

Not if the two bill strategy is followed. Once the Senate bill is passed by the House, it will be considered current law for the purposes of CBO scoring. This means that the aggregate affect of the reconciliation bill must lead to net deficit reduction of at least \$1 billion for FY 2010-2014 beyond what the Senate bill produced.⁵ Any provision in the bill that reduces the savings in the Senate bill would be scored as increasing the deficit. If the reconciliation bill did not produce \$1 billion more in deficit reduction than the Senate bill for FY 2014-2019, then any provision that increases the deficit would be vulnerable to a Byrd Rule point of order.

The President has not put his Blair House proposal into legislative language and CBO has not scored it yet. However, it seems likely that the President's proposals that would increase cost (e.g., increasing subsidies, increasing Medicaid, closing the "donut hole," reducing and delaying the tax on plans) would exceed the savings from the President's proposals that would reduce the cost of the

⁵ S.Con.Res. 13, the concurrent resolution on the budget for FY2010, included an additional instruction to the Education and Labor Committee to reduce the deficit by another \$1 billion from changes in education programs (section 202(b) of S. Con. Res. 13)."

Senate bill (higher fees and higher taxes). If the resulting reconciliation bill fails to achieve \$1 billion in deficit reduction for FY 2010-2014, any provision in that bill that has a cost would be vulnerable to a Byrd Rule point of order.

Can this problem be solved by delaying provisions that cost money outside the window?

Probably not. The Byrd Rule prohibits inclusion of provisions that increase the deficit in the out-years if the net effect of such title is to increase the deficit in an out-year. In the case of this reconciliation bill, an out-year would be any year after FY 2014. As a result, if such title increases the deficit in any year after 2014, any provision that increases the deficit in an out-year in that title would be subject to a point of order. The other option would be to sunset provisions that cost money, but this would disrupt a key objective of the bill to expand subsidies for health care and to cover the uninsured.

To what extent are the Senate parliamentarians willing to provide clear guidance in advance of a bill being considered in the Senate as it relates to the Byrd Rule on certain provisions?

Some in the House are suggesting that a letter signed by 50 Senators, committing to vote for a specific reconciliation bill, is necessary before they'll vote for the Senate health care bill. Fifty Senators cannot protect the reconciliation bill from Byrd Rule points of order. That will take 60 votes. If a Byrd Rule point of order is sustained, it has the effect of amending the reconciliation bill. Forty-one Senators have written to Senator Reid that they will uphold any Byrd Rule point of order sustained on a reconciliation bill dealing with health care.⁶ In the past, the Senate Parliamentarian has refrained from giving prospective rulings on a given provision of a bill until a Byrd point of order has been raised on a provision in the bill and he has had a chance to hear the arguments for and against whether it should be sustained or not.

How does the new statutory pay-as-you-go requirement affect these two health care bills?

The Congress included a new statutory pay-as-you-go mechanism as part of legislation to increase the debt limit, which was signed into law on February 12, 2010. Both the health care bill and the reconciliation bill will be subject to this new statutory pay-as-you-go (pay-go) requirement. If legislation causes a net on-budget deficit increase under this law over a 5 and 10 year period, it will result in an across-the-board reduction ("sequester") in non-exempt mandatory spending programs to eliminate any deficit increase.

There are a number of issues that arise under statutory pay-go and the health care legislation. First, the budget impact of any program that is off-budget is not taken into account under statutory pay-go. The Senate bill achieves \$6 billion over five years and \$52 billion over ten years in deficit

⁶ The letter can be found at: http://house.gov/budget_republicans/press/2007/pr20100304byrd1.pdf

reduction in off-budget programs (primarily Social Security) that will not be credited to the bill under the pay-go law. Second, statutory pay-go does not allow the crediting of any net deficit reduction from the Community Living Assistance Services and Supports Act (CLASS Act). CBO estimates that the CLASS Act provisions of the health care bill will reduce the deficit by \$29 billion over five years and \$72 billion over 10 years. Third, statutory pay-go does not allow the use of “timing shifts” to generate savings. Because the text of the reconciliation bill has not been provided yet, it is unclear to what extent timing shifts will be used to ensure compliance with the reconciliation instruction and avoid Byrd Rule points of order. To the extent timing shifts are used, they cannot be credited as savings for statutory pay-go.

Just making the adjustments for off-budget savings and the CLASS Act, the Senate-passed bill would increase the deficit by \$5 billion through FY 2019, according to CBO’s cost estimate (CBO has not produced an estimate for FY 2020). As a result, it would lead to a sequester (across-the-board reduction) of \$500 million in non-exempt mandatory spending programs fourteen days after Congress adjourns for the year.

Finally, to ensure that OMB uses CBO cost estimates for the purpose of the pay-go law in a manner that meets Constitutional muster, the statutory pay-go law calls for the incorporation of a CBO cost estimate by reference into the relevant bill. If a CBO cost estimate is not included, OMB is required to develop a cost estimate of the legislation. Because the Senate passed the health care bill before the pay-go bill was enacted, there is no provision incorporating the CBO cost estimate. If the reconciliation bill includes a provision incorporating the CBO cost estimate, it is likely to be vulnerable to a Byrd Rule point of order because the provision on its own would not have a budgetary impact (change outlays or revenues). If a CBO estimate is not incorporated into these two bills, OMB will determine the deficit impact of the legislation for the purposes of statutory pay-go.