



To: Interested Parties  
From: Heritage Action for America  
Date: December 5, 2016  
Subject: How to Repeal All of Obamacare by Inauguration

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Republicans have promised voters a full repeal of Obamacare since 2010, when the health care law was first passed. In fact, since Republicans took control of the House in 2011, Congress voted over 60 times to repeal parts or all of the law. Republican congressional leadership and President-elect Donald Trump have all promised to repeal the law.

There are no more excuses to be had. The Republican-controlled Congress has every tool that it needs to overcome any and all obstacles that stand in the way of fully repealing Obamacare. Now that voters have given Republicans control of the House, Senate, and the White House, this campaign promise can and must quickly become reality and the American people should hold them, and President-elect Trump, accountable for delivering on that promise.

In fact, it is entirely possible for the Republican Congress to have a bill fully repealing Obamacare on President-elect Trump's desk *by the time he takes office on January 20*. This memo outlines the path that Congress can take over the next two months to ensure a bill repealing Obamacare is the first thing President Trump signs - and that he signs it on Inauguration Day.

### **Background**

Three years ago, Senate Republicans committed to using the budget reconciliation process to repeal Obamacare. Budget reconciliation is a legislative tool that Congress can use in conjunction with the congressional budget process. When the House and Senate adopt a budget resolution (which does not get sent to the President for signature) they can include "reconciliation" instructions, setting up an expedited process to achieve the savings outlined in the budget resolution. Unlike regular legislation, a reconciliation bill only needs a simple majority to advance in the Senate. With 52 Republican Senators who have promised full repeal to their constituents, Senate passage should be guaranteed.

### **Reconciliation Battle of 2015**

In 2015 the House and Senate passed a reconciliation package (H.R. 3762) that repealed most, but not all, of Obamacare. During the process, [Heritage Action](#) argued that:

“Using reconciliation this year is important because it should be a trial run for 2017, when we will hopefully have a President willing to sign a full repeal bill. If we are short of 60 votes in 2017, then we will need to use the reconciliation process to accomplish this. If we do it now and do it right, we can ensure full repeal is a fait accompli in 2017.”

While the initial, House-passed version of H.R. 3762 in 2015 [fell far short of true repeal](#), the Senate amended the bill to make it a more [robust repeal package](#). However, even the Senate Amendment to H.R. 3762 left the costly insurance mandates in place. H.R. 3762 was ultimately vetoed by President Obama on

January 8, 2016. Heritage Action believed that this effort would 1) help set the terms of the presidential election and 2) prove that the process works:

“First, forcing a presidential veto of a bill repealing Obamacare will cause every presidential candidate to answer a simple question: What would you have done? Without exception, every candidate serious about securing the Republican nomination will answer: "I would have signed it in a heartbeat."

Second, the process of drafting and passing the reconciliation measure through both chambers will serve as a trial run. More importantly, it will reaffirm the Republican-controlled Congress's commitment to sending a bill repealing Obamacare to the president's desk in 2017 — when it will hopefully be signed into law.”

### **The Path(s) Forward**

**1. “One Sentence” Repeal:** The ideal and achievable first option should be for Congress to pass a one sentence bill that fully repeals the Affordable Care Act.

Paul Winfree of The Heritage Foundation laid out the “two budget” approach that Congress can use to set up a repeal of Obamacare through the reconciliation process in his recent Politico article [How to Repeal Obamacare: A road map for the GOP](#):

“Last year, Congress failed to pass a budget for fiscal year 2017, creating an opportunity for Congress to pass two budgets next year, rather than just one. This gives Republicans two shots at getting filibuster-proof reconciliation bills to Trump.

The first budget is simple. The spending and tax levels include one assumption: The ACA is repealed. That ACA repeal budget should also include instructions to the relevant committees in Congress. Congress should be able to easily pass a budget resolution with these criteria with simple majorities in each chamber and begin the process of work on the reconciliation bill before Inauguration Day. This will set up the ability for Congress to pass a reconciliation bill repealing all the budgetary components of the ACA immediately after Trump is sworn into office.

In summary, the three main steps in this preferred option of full repeal are: 1) The House and Senate pass a FY17 budget resolution that assumes the full repeal of Obamacare with reconciliation instructions (with the intention of doing a second budget later in the year for FY18); 2) The House then originates and passes a simple one-provision reconciliation bill that fully repeals Obamacare; and 3) The Senate takes up the House-passed reconciliation bill and passes it with a simple majority vote, sending it to President Trump’s desk by inauguration.

**2. 2015 Repeal Bill *Plus* the Insurance Mandates:** The second option (which also uses the two budget process, as does the third) is to take the language from last year’s effort, H.R. 3762, and then insert the repeal of the insurance mandates. Paul Winfree also explained in his [Politico](#) piece why and how this can be done:

“The main problem with last year’s reconciliation bill is that it maintained the ACA’s insurance [mandates]. These include the rules that all insurance meet or exceed Washington-dictated standards for what benefits they cover, as well as pricing rules that substantially raised the price of insurance for younger and healthier people....The repeal effort therefore must address these

insurance market regulations. One way would be to include the repeal of those regulations in the reconciliation bill.

...it is clear that those rules are inseparable from the rest of the ACA's structure. In fact, the Obama administration argued this before the Supreme Court in *King v. Burwell*, the case over whether enrollees who buy insurance through the federal exchange are eligible for subsidies. As a result, Congress may repeal those regulations via reconciliation."

It is critical to press for the inclusion of the insurance mandates with the Senate for two reasons. First, because the insurance mandates are some of the most problematic components of Obamacare and are crippling the health care market. Second, using reconciliation to repeal the insurance mandates was never adjudicated with the Senate parliamentarian, and many Senate budget experts argue that repealing the insurance mandates is definitely budgetary in nature. As [Heritage Action](#) argued during the 2015 reconciliation process:

"The Senate has not adjudicated full repeal or many of the questions involved in passing a robust repeal bill. Those suggesting that it has are misinformed.

Regardless, the Senate should not be used as a foil to convince House conservatives not to do all they can on reconciliation. The House should pass a strong repeal bill and allow the Senate to navigate the Byrd Rule if they must."

**3. 2015 Repeal Bill:** One last option is to simply re-pass the same bill as last year, which repeals the vast majority of Obamacare including the individual and employer mandates, the coverage subsidies, and the Medicaid expansion. However, as mentioned, the 2015 repeal bill did not repeal the costly insurance rules, regulations, and mandates on plan offerings that have contributed to premiums skyrocketing, healthcare costs rising, and insurance plans being canceled. Therefore it is important that this option is seen as a floor, not a ceiling, for what the Republican Congress and President Trump can accomplish.

### **Overcoming Obstacles**

There are two main, and interconnected obstacles, that may need to be overcome in the Senate: **the Byrd Rule and the Senate Parliamentarian.**

**The Byrd Rule:** The reconciliation process in the Senate can be convoluted and based on subjective criteria. The Byrd rule, established in 1985 and made permanent in 1990, sets up a six part test to ensure 'extraneous' provisions are not added to a [reconciliation measure](#). However, a House-passed one-provision reconciliation bill that fully repeals Obamacare could withstand scrutiny.

*Deficit Impact:* Some have pointed to a previous score from the Congressional Budget Office (CBO) to suggest full repeal of Obamacare would increase the deficit and thus would not be permissible in the Senate. The [Congressional Research Service](#) explains that "Determinations of budgetary levels for purposes of enforcing the Byrd rule are made by the Senate Budget Committee." In other words, for determining the budgetary impact of a reconciliation measure the CBO is not the official scorekeeper.

As the ultimate "scorekeeper" of the reconciliation bill, the Senate Budget Committee Chair should request an estimate from the CBO on the Medicare double count -- a budget gimmick that Republicans rightly condemned in 2009 and 2010. With that number in hand (at least \$550 billion over the ten-year budget window) the chairman could accurately assert that full repeal actually reduces the deficit absent

the double count gimmick. The [Congressional Research Service](#) notes that there is precedent for not using the official CBO score:

*“Although the Budget Committee and each instructed committee receives cost estimates from CBO and the JCT, it is the Budget Committee’s responsibility and prerogative to assess committee compliance on the basis of spending or revenue levels. In measuring compliance, the Budget Committee sometimes will make adjustments to the estimates provided by CBO or the JCT. One such adjustment, which occurred in 1995, involved a change in the enactment date assumed by CBO, which shortened the time available in FY1996 for the sale of the Naval Petroleum Reserves.”*

Based on the text of the Byrd rule itself and previous precedent, a one-provision reconciliation bill that fully repeals Obamacare would not include any extraneous provisions. There would be one “provision,” and it would clearly be budgetary in nature. Some have suggested that the parliamentarian would “look behind” the single provision in the reconciliation measure, but doing so would break with precedent.

*Scope:* Many forget that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (i.e. welfare reform) was passed using reconciliation. That bill converted low-income assistance programs, including the Aid to Families with Dependent Children (AFDC), into a single block grant under the new Temporary Assistance for Needy Families (TANF) program.

AFDC, which contained provisions that had both budgetary and non-budgetary effects, was authorized under Title IV-A of the Social Security Act. The welfare reform bill repealed the entire program with one provision:

**SEC. 103. BLOCK GRANTS TO STATES.**

(a) IN GENERAL.—Part A of title IV (42 U.S.C. 601 et seq.) is amended—

(1) by striking all that precedes section 418 (as added by section 603(b)(2) of this Act) and inserting the following:

“PART A—BLOCK GRANTS TO STATES FOR  
TEMPORARY ASSISTANCE FOR NEEDY FAMILIES”

When Senator James Exon (D-NE) *did submit* a list of extraneous provisions under the Byrd Rule on July 22, 1996, he *did not include* the section referenced above even though the section was extremely controversial at the time. There was clearly a budgetary consequence to the repeal of AFDC and therefore it did not violate the Byrd rule prohibiting reconciliation measures that do not change outlays or revenues even though repeal of individual elements under AFDC would have.

Based on past precedent, a simple, one-provision repeal of Obamacare should withstand any Byrd rule challenge, whether on the question of deficit reduction or related to extraneous provisions.

**The Senate Parliamentarian:** The Senate Parliamentarian traditionally plays a large role in interpreting the parameters the reconciliation rules and procedures. She may require persuasion that repealing the insurance mandates do, in fact, serve a budgetary purpose and are therefore eligible for reconciliation.

However, the parliamentarian is an employee of the Senate with the job of providing advice to the presiding officer on historical precedents as applied to the matter at hand. Ultimately, the decision of whether or not a point of order that is raised against a provision repealing the insurance regulations lies with the presiding officer, and ultimately, the Senate as a whole.

If a senator raises a Byrd Rule point of order, a ruling of the presiding officer that runs counter to the precedents of the Senate, as noted above, can be appealed and overruled with a simple majority vote. Therefore, a majority of senators supporting repeal are needed for this strategy.

### **Obamacare's Replacement**

Some will argue that we must have a replacement plan at the same time as repeal, but they make this argument hoping to kill the momentum for repeal under the guise of repeal and replace. However, until we fully repeal Obamacare, Republicans will have a difficult time agreeing on a combination of replacement packages. Meanwhile Democrats would refuse to negotiate and instead do everything in their power to sink the replacement plan and therefore Obamacare repeal. Members who truly want to repeal Obamacare must insist on repeal immediately. The above preferred process gives Republicans the best chance to repeal Obamacare and honor their commitment to the people who put them in power - while providing plenty of time to enact a replacement plan. Then there will be a time of transition for Congress to pass a replacement bill.

For example, as Nina Owcharenko and Ed Haislmaier of The Heritage Foundation, explain in their recent paper, [Preparing a Smooth Transition for the Repeal of Obamacare](#), Congress can:

1. Maximize the reconciliation process for repeal
2. Execute an aggressive regulatory rollback
3. Accelerate state-level action to restore authority over health insurance markets.
4. Begin the process for replacement

Specifically, the timeline suggested would be to “have the legislation completed by the end of 2017 so that the Administration can begin the regulation and implementation phase in 2018 for the 2019 plan year.” This would ensure that individuals who have purchased plans through the Obamacare exchanges have ample time to transition into private sector or employer provided coverage, which will ultimately be more affordable and provide better health insurance.

### **Conclusion**

Congress can secure a historic conservative policy victory by using the reconciliation process to send repeal to President Trump in January. There are no procedural excuses for not moving forward. The only reason for delay and inaction would be an unwillingness to deliver on a six-year old promise to fully repeal Obamacare. Now that the American people voted to keep Republican majorities in both chambers of Congress and give Republicans the White House, Congress must act immediately to repeal Obamacare once and for all. There are no more excuses.

### **Related:**

[How to Repeal Obamacare: A road map for the GOP \(November 2016\)](#)

[The Hill: A promise made to repeal Obamacare with reconciliation \(May 2015\)](#)

[Heritage Action: How to Repeal All of Obamacare with Reconciliation \(July 2015\)](#)

[Heritage: Why Reconciliations Can't Be Used to Defund Planned Parenthood \(September 2015\)](#)

[IJ Review: GOP Has No Intention Of Ever Defunding Planned Parenthood \(September 2015\)](#)

[The Hill: King v. Burwell helps repeal Obamacare \(October 2015\)](#)

[Heritage Action: FAQ on Reconciliation Bill \(H.R. 3762\) \(October 2015\)](#)

[Lee-Cruz-Rubio: We Cannot Support this Bill \(October 2015\)](#)