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THE DELAY OF THE EMPLOYER MANDATE

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH

OF THE

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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THE DELAY OF THE EMPLOYER MANDATE

WEDNESDAY, JULY 10, 2013

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON HEALTH,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:04 a.m., in Room 1100, Longworth House Office Building, Hon. Kevin Brady [Chairman of the Subcommittee] presiding.

[The advisory announcing the hearing follows:]

ADVISORY

FROM THE COMMITTEE ON WAYS AND MEANS

SUBCOMMITTEE ON HEALTH

FOR IMMEDIATE RELEASE
Wednesday, July 3, 2013
No. HL–06

CONTACT: (202) 225–3625

Chairman Brady Announces Hearing on the Delay of the Employer Mandate

House Ways and Means Health Subcommittee Chairman Kevin Brady (R–TX) today announced that the Subcommittee on Health will hold a hearing on the Obama Administration's recent decision to delay the information reporting requirements and penalties associated with the employer mandate in the Affordable Care Act until 2015. This hearing will allow the Subcommittee to focus specifically on the Administration's ability to make regulatory enforcement decisions on statutory provisions in law. **The hearing will take place on Wednesday, July 10, 2013, in 1100 Longworth House Office Building, beginning at 10:00 a.m.**

In view of the limited time available to hear from witnesses, oral testimony at this hearing will be from invited witnesses only. However, any individual or organization not scheduled for an appearance may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing.

BACKGROUND:

On Tuesday July 2, 2013, a posting on the U.S. Department of the Treasury's (Treasury) tax blog announced that the employer reporting requirements and the employer mandate tax penalties "will not apply until 2015." The announcement came as a surprise to opponents and proponents of the law, and it raises new questions about how the shift will affect other aspects of the Affordable Care Act. The Ways and Means Committee has raised significant concerns about implementation status of all aspects of the Affordable Care Act, with a particular emphasis on the impact of the employer mandate on jobs and the economy. The Obama Administration repeatedly testified to the Committee that implementation of the law is on track, and Administration officials emphasized that no delays were expected. The hearing will examine what led to the decision to delay the employer mandate, what authority Treasury is relying on to delay statutory provisions with clear implementation dates and Treasury's analysis of how the delay will impact other aspects of the healthcare law.

In announcing the hearing, Chairman Brady stated, **"The employer mandate is a flawed provision that has resulted in lost jobs, fewer hours and a loss of wages, while doing nothing at all to make health insurance more affordable—which is what individuals, employers and workers want and need. A 1-year delay will not undo this damage. I want to know why, after repeated assurances that everything was on track and that no more deadlines would be missed, that the Administration has taken this action. It is time for the Administration to explain to the American people why it's acceptable to grant this delay, while at the same time taking no action whatsoever to provide any relief from the individual mandate."**

FOCUS OF THE HEARING:

The hearing will focus on the Obama Administration's decision to delay the employer mandate and the employer information reporting requirements under the Affordable Care Act.

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Please Note: Any person(s) and/or organization(s) wishing to submit for the hearing record must follow the appropriate link on the hearing page of the Committee website and complete the informational forms. From the Committee homepage, *http://waysandmeans.house.gov*, select "Hearings." Select the hearing for which you would like to submit, and click on the link entitled, "Click here to provide a submission for the record." Once you have followed the online instructions, submit all requested information. ATTACH your submission as a Word document, in compliance with the formatting requirements listed below, **by the close of business on Wednesday, July 24, 2013**. Finally, please note that due to the change in House mail policy, the U.S. Capitol Police will refuse sealed-package deliveries to all House Office Buildings. For questions, or if you encounter technical problems, please call (202) 225–1721 or (202) 225–3625.

FORMATTING REQUIREMENTS:

The Committee relies on electronic submissions for printing the official hearing record. As always, submissions will be included in the record according to the discretion of the Committee. The Committee will not alter the content of your submission, but we reserve the right to format it according to our guidelines. Any submission provided to the Committee by a witness, any supplementary materials submitted for the printed record, and any written comments in response to a request for written comments must conform to the guidelines listed below. Any submission or supplementary item not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All submissions and supplementary materials must be provided in Word format and MUST NOT exceed a total of 10 pages, including attachments. Witnesses and submitters are advised that the Committee relies on electronic submissions for printing the official hearing record.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. All submissions must include a list of all clients, persons and/or organizations on whose behalf the witness appears. A supplemental sheet must accompany each submission listing the name, company, address, telephone, and fax numbers of each witness.

The Committee seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202–225–1721 or 202–226–3411 TDD/TTY in advance of the event (four business days notice is requested). Questions with regard to special accommodation needs in general (including availability of Committee materials in alternative formats) may be directed to the Committee as noted above.

Note: All Committee advisories and news releases are available on the World Wide Web at *http://www.waysandmeans.house.gov/*.

Chairman BRADY. The Subcommittee will come to order. We are examining the Treasury Department's strangely timed announcement that it is delaying the enforcement of ObamaCare's employer mandate for 1 year.

For the last several months, we have heard the White House repeatedly pledge to Congress and the American people that the President's Affordable Care Act will be ready on schedule; absolutely taken to the bank.

In fact, Secretary Sebelius recently insisted before this very Committee that the White House would not miss another ObamaCare deadline, not one, not again.

Shortly thereafter, the Nation learned in a blog post of the embarrassing failure by the White House to have this major pillar of the new law in place on schedule.

The Treasury Department's announcement confirms our concerns. ObamaCare is simply not ready. This Committee has serious questions about how and why this alarming decision was made and the effect that delaying this key provision will have on other provisions of the law, specifically the directive that individuals purchase either Government-approved health care or pay a tax.

There are also questions about the unprecedented manner in which it was announced on an obscure Treasury blog site just 2 days before the 4th of July holiday.

We invited Treasury officials to testify today to explain to the American people the rationale for the delay and how they announced this major setback. However, they declined to appear.

Let me be clear. This Committee intends to get an explanation and will plan on Treasury officials appearing at a date in the near future.

Let's also be clear about what this decision means. This 1-year reprieve does not solve the problems of local businesses struggling to comply with ObamaCare. The consequences of the mandate still remain.

Employers are still required to provide Government-mandated coverage or pay a substantial tax. Many local businesses continue to cut workers' hours and workers' paychecks as they grapple to meet the Affordable Care Act's definition of a "full-time employee."

Many businesses are laboring to find more money for rising healthcare costs for themselves and their workers as costs increase, and jobs are still at risk, up to 3.2 million in the franchise industry alone, as local companies struggle with the onerous ObamaCare requirements.

For patients, families and their children, you have to wonder. If ObamaCare is not ready for business, is it ready for my family? A lot of lives are at stake. Quality health care is critical.

Everyone is aware the White House has missed almost every key deadline in preparing this healthcare law for individuals and families as well.

The White House says it is listening to the concerns of our Nation's businesses, but are they ignoring the voices of American families and taxpayers.

Unlike businesses and labor unions, which have been granted a reprieve, there have been no delay of the individual mandate, forcing average Americans to buy Government-approved health insurance or pay a tax.

These families and individuals are also facing higher costs and sky rocketing premiums. They have no relief from the new taxes in ObamaCare.

Today, 3 years after the passage of the President's signature healthcare law, the majority of Americans disapprove of this law. Who is listening to them?

If the Government mandate to buy insurance has been postponed for businesses and labor unions, out of fairness, should it not be postponed for families and individuals as well?

While the White House continues to suggest ObamaCare will be ready on October 1, the stunning delay of the employer mandate calls that into question.

Look at the pattern of delays and failures that have occurred since implementation began. The Class Act proved unworkable and was abandoned. The onerous 1099 reporting mandate was overwhelmingly repealed. The exchanges promised for small businesses failed to be ready on time and were delayed. Significant parts of the law were found unconstitutional, 34 States have chosen not to build State exchanges.

The technology intensive data hub that is key to ObamaCare is not ready. The navigator grants have not gone out to local communities. On and on, the list is growing, not shrinking, as we get closer to October 1.

Clearly, the roll out of ObamaCare is in disarray and experts question whether the White House is competent enough to administer its own massive healthcare law.

The employer mandate delay also can have profound impact on the Federal budget and raises numerous questions. How much less will the Government collect because of the delay?

How many more people will end up being forced into the exchanges? Without employer reporting requirements, how can we ensure subsidies are only going to those without offers of affordable insurance?

Again, it is unfortunate that no Treasury officials are here to answer these important questions. The American people, Congress and this Committee deserve these answers and we will get them.

What we do know is ObamaCare is making health care more expensive, costing Americans their jobs, shrinking their paychecks, and preventing families from keeping the health care they have and they like.

Instead of simply delaying enforcement of certain provisions of ObamaCare, it is clear this law must be repealed.

Before I recognize the Ranking Member, Dr. McDermott, for the purposes of an opening statement, I ask unanimous consent that all Members' written statements be included in the record. Without objection, so ordered.

I now recognize Dr. McDermott, Ranking Member, for his opening statement.

Mr. MCDERMOTT. Thank you, Mr. Chairman. I suppose we could spend the morning talking about how and why the policy was changed and how it was announced. I might have preferred a different approach, but it is not my job to speculate on best practices for the White House.

It is my job, it is our job actually, to continue to shape and guide reform so that it best serves the American people, to focus on policy, not on politics.

There has been a lot of noise on both sides of the aisle over what this shift means but nobody really knows. I did not spend my 4th of July combing over the implications of the change and I doubt there is anybody on the dias that did.

I am trying to adjust and dissect this plan on the back of a galloping horse before we have a chance to properly consider it, which is completely unwise. We are back in session 2 days and here we are having a hearing on something that was announced before the 4th.

I am sure it is tempting for those who stood against reform and progress from the beginning to see this as a chance to rip ObamaCare apart again yet another time. The irony of objecting to the delay of a program you have been trying to stop is no doubt lost on this room.

We are even going to get a 38th vote shortly to repeal it, so you know where one half of this room is coming from. The fact is ObamaCare is largely unaffected by the delay. It was always designed to be built on current coverage and fill in the gaps. The employer responsibility requirements are just a piece of that puzzle that make up universal coverage.

The marketplace exchanges are on track to open on March 1 (sic). My State is well out there. I have been talking to people over the 4th of July and they are raring to go. There are many places in this country that have geared up for this. Places like Texas have not, and that is another issue.

Premium filings are coming in lower than expected in Washington, California, and other States. Oregon's 2014 filings show premiums slashed by as much as 35 percent.

Reality dramatically contradicts the rhetoric that you hear in here.

We do not know exactly what the landscape will look like in January, but it is entirely possible this decision will actually help the consumers. They will have a chance to have access to the exchanges. Employees who remain uncovered will be able to find assistance through tax credits and other subsidies in the Federal marketplace or the State exchange.

The delay will also give businesses time to adjust and for the community to work with Treasury to work out the most efficient and effective way to comply for the law. For 95 percent of the employers who already offer coverage to their employees, we have every reason to believe they will continue to do so.

Microsoft, Amazon, Boeing, they are not going to stop offering to their people.

Massachusetts saw no drop in employer coverage under Romneycare. In fact, in the 7 years since its implementation of universal health insurance, employer coverage has actually increased slightly, but more importantly, it is better for us to delay this and get it right than to rush and get it wrong.

I would like to put it in a little historical context here. In 1966, when I was beginning my medical practice, medical workers were traveling door to door—Medicare workers were traveling door to door trying to enroll seniors with 100 million leaflets that were printed before the bill was signed into law or passed out of the Congress.

They were already up and running. They got a jump start. They printed it without appropriated funds, and usually those doors were slammed in their face.

The American Medical Association denounced the program as the first step towards socialism, and agency administrators wondered if hospitals would be overrun with the sick and the elderly patients stretching out for blocks.

You can read this in the history. I am not making this up. This is what was going on in 1966.

The Bureau of Health Insurance began operating without oversight and often without regard to formal requirements of rulemaking simply hoping things would fall into place. Forty-seven years later, Medicare is the bedrock of our social safety net. It is the standard bearer of a Government that works, and a big part of what saved us then was everyone was working together to get it off the ground.

Congress intentionally wrote flexible conditions and the Administration was allowed to make changes as they saw fit. They were willing to take chances to ensure success.

Let's consider the path before us. Before we burn the bridge behind us, the President is not going to reverse this decision so nothing that happens today is going to make any difference, so let's see where it goes.

More importantly, let's remember to whom we are accountable. It is not pollsters or cable news anchors or the President's campaign team.

Our only job in this Committee is to fulfill the promise to American citizens of affordable health care. We are having this hearing to hear from you why this is not going to work. That is what it is all about. The supposition of this hearing is that it is all over, it is dead.

Let's see if that is true. I yield back the balance of my time.

Chairman BRADY. Today we will hear from five witnesses. Avik Roy, Senior Fellow from the Manhattan Institute. James Capretta, Senior Fellow with Ethics and Public Policy Center. William Dennis, Jr., Senior Research Fellow at the National Federation of Independent Business. Sean Falk, President and Owner of WolFTeaM LLC, and Nachogang LLC, and Timothy Jost, the Robert L. Willett Family Professor of Law, Washington and Lee University School of Law, who is accompanied by his wife, Ruth, today.

Mr. Roy, you are recognized for 5 minutes.

STATEMENT OF AVIK ROY, SENIOR FELLOW, MANHATTAN INSTITUTE FOR POLICY RESEARCH

Mr. ROY. Chairman Brady, Ranking Member McDermott, and Members of the Health Subcommittee, thanks for inviting me to speak with you today with the Affordable Care Act employer mandate.

My name is Avik Roy. I am a Senior Fellow at the Manhattan Institute for Policy Research in which capacity I conduct research on health care and entitlement reform.

In my remarks today, I will focus on three questions. First, does the employer mandate the Affordable Care Act achieve its goals?

Second, what are the ramifications of the White House's decision to delay the mandate by 1 year?

Third, what would be the policy impact of H.R. 903, the American Job Protection Act, which would repeal the employer mandate in its entirety?

While the Affordable Care Act strives to achieve many things, the law's primary goal is to move the United States as close as possible to universal health insurance coverage. Does the employer mandate help to achieve this goal? My view and the view of many others across a spectrum is it does not.

According to the Medical Expenditure Panel Survey, 97 percent of firms with 50 or more workers already offer health benefits. Now, 97 percent is not 100 percent, of course, and not all firms that offer coverage offer it to every employee.

The ACA's employer mandate perversely incentivizes employers to avoid hiring low-income workers, precisely the type of workers who tend to be uninsured. As the Center on Budget and Policy Priorities put it in 2009, in essence, affected firms would pay a tax for hiring people from low or moderate-income families.

The penalties associated with the employer mandate are only triggered if a worker is not offered what the ACA deems "affordable coverage," and if the worker then gains subsidized coverage on an ACA-sponsored insurance exchange.

As a result, employers have three incentives. First, to hire fewer full-time workers. Second, offer so-called "unaffordable coverage" for which the penalties are lower. Third, hire illegal immigrants or workers from high-income families who are not eligible for exchange subsidies.

For the Affordable Care Act, low-income individuals would still be able to gain subsidized health insurance but they will be tagged with a Scarlet "S" for gaining those subsidies, because to employers, hiring subsidized individuals will be far more costly than hiring unsubsidized ones.

A 1-year delay of the employer mandate does give the Administration more time to implement the law, but a delay does not fundamentally alter the perverse incentives I have just described. It simply gives employers an additional year to restructure their workforces accordingly.

A 1-year delay does, however, impact other important provisions of the ACA. In order to gain eligibility for exchange subsidies, an individual must prove he has not been offered "affordable coverage" from his employer.

Now that the reporting requirements of the employer mandate have been delayed, it may be difficult for him to establish that. Hence, it appears that CMS will rely on applicants' attestations, the so-called "honor system," to dispense subsidies in some cases.

Similarly, the ACA's individual mandate only works if the Government can verify whether or not a worker is full-time or part-time, whether he has been offered affordable or "unaffordable coverage," or none at all.

H.R. 903, the American Job Protection Act, is a bipartisan bill that was introduced last February by Dr. Boustany and others and referred to this Committee. It would repeal the employer mandate by striking the relevant sections of the Internal Revenue Code and the Affordable Care Act.

Repealing the employer mandate would eliminate the perverse incentives I described earlier. Most importantly, it would encourage the transition away from costly, inefficient employer-sponsored coverage, and towards portable, individually owned insurance policies.

As you all know, economists have long advocated for this transition and repealing the employer mandate would go a long way toward achieving it. In this way, H.R. 903 could emerge as a major policy advance.

Some analysts have raised concerns that such a transition would be costly due to the increased spending on exchange subsidies that would result. However, in March 2012, the CBO estimated that if an additional 14 million workers moved from employer based to exchange based coverage, the deficit would actually decrease by $13 billion over 10 years. This is because the increase in exchange subsidies is offset by a reduction in lost revenue from the tax exclusion for employer-sponsored insurance.

It will be important for H.R. 903 to be adjusted in order to take into account its impact on the disbursement of subsidies in the individual mandate.

The individual mandate, for example, could be replaced with a more limited open enrollment period for participating in ACA certified insurance plans. This would achieve the individual mandate's goal of curbing adverse selection without the mandate's intrusiveness or constitutional injury.

I will conclude by recalling that Scarlet S. We all want an economy in which those at the bottom of the ladder have the opportunity to find gainful employment and good health. The employer mandate harms those it is intended to help. Instead of delaying it, we should repeal it.

Thanks again for having me. As an addendum to my written testimony, I have included three articles from Forbes in which I further expand on these issues. I look forward to your questions and to being of further assistance to this Committee.

[The prepared statement of Mr. Roy follows:]

Testimony before the Health Subcommittee of the House Ways & Means Committee

July 10, 2013

Delaying the ACA Employer Mandate

Avik Roy
Senior Fellow, Manhattan Institute for Policy Research

Summary

The employer mandate does not further the Affordable Care Act's goal of expanding access to health insurance coverage. Indeed, the mandate effectively penalizes employers for hiring low-income Americans. Delaying the employer mandate by one year does not alter these long-term incentives, but it does complicate the implementation of ACA exchange subsidies and enforcement of the individual mandate.

H.R. 903, the American Job Protection Act, is a bipartisan bill that would repeal the employer mandate. That bill, if enacted into law, would eliminate these perverse incentives. It would also encourage a transition away from employer-sponsored health coverage into individually-purchased coverage, a transition that health care economists have long advocated. The Congressional Budget Office believes that such a transition would not meaningfully affect the net fiscal cost of the Affordable Care Act, because increased exchange subsidies would be offset by a reduction in lost revenue from the tax exclusion for employer-sponsored insurance.

H.R. 903 could be improved by taking into accounts its impact on exchange subsidies and the individual mandate. For example, the individual mandate could be replaced with a more limited open-enrollment period for participating in ACA-certified insurance plans.

We all want an economy in which those at the bottom of the ladder have the opportunity to find gainful employment and good health care. The employer mandate harms those it is intended to help. Instead of delaying it, we should repeal it.

Written Statement

Chairman Brady, Ranking Member McDermott, and members of the Health Subcommittee: thanks for inviting me to speak with you today about the Affordable Care Act's employer mandate.

My name is Avik Roy, and a Senior Fellow at the Manhattan Institute for Policy Research, in which capacity I conduct research on health care and entitlement reform.

In my remarks today, I'll focus on three questions. First, does the employer mandate help the Affordable Care Act achieve its goals? Does it work? Second, what are the ramifications of the White House's decision to delay the employer mandate by one year? Third, what would be the policy impact of H.R. 903, the American Job Protection Act, which would repeal the employer mandate in its entirety?

Does the employer mandate work?

While the Affordable Care Act strives to achieve many things, the law's primary goal is to move the United States as close as possible to universal health insurance coverage. Does the employer mandate help to achieve this goal? My view, and the view of many others across the spectrum, is that it does not.

According to the Medical Expenditure Panel Survey, 97 percent of firms with 50 or more workers already offer health benefits. 97 percent is not 100 percent, of course, and not all firms offer coverage to every employee. But the ACA's employer mandate, perversely, incentivizes employers to avoid hiring low-income workers, precisely the type of workers who tend to be uninsured. As the Center on Budget and Policy Priorities put it in 2009, "In essence, affected firms would pay a tax for hiring people from low- or moderate-income families."

The penalties associated with the employer mandate are only triggered if a worker is not offered what the ACA deems "affordable" coverage, and if the worker then gains subsidized coverage on

an ACA-sponsored insurance exchange. As a result, employers have four incentives: (1) to hire fewer full-time workers; (2) to offer so-called "unaffordable coverage," for which the penalties are lower; (3) to hire workers from high-income families, who are not eligible for exchange subsidies; and (4) to hire illegal immigrants, who are also ineligible for subsidies.

In sum, the employer mandate penalizes firms for hiring low-income Americans. Through the Affordable Care Act, these individuals would still be able to gain subsidized health insurance. But they will be tagged with a scarlet "S"—for gaining those subsidies—because, to employers, hiring subsidized individuals will be far more costly than hiring unsubsidized ones.

What is the impact of the one-year delay?

A one-year delay of the employer mandate does give the Treasury Department more time to implement the law. But a delay does not fundamentally alter the perverse incentives I have just described. It simply gives employers an additional year to restructure their workforces accordingly.

A one-year delay does, however, impact other important provisions of the Affordable Care Act. In order to gain eligibility for subsidized coverage on the exchanges, an individual must prove that he has not been offered "affordable" coverage from his employer. But now that the reporting requirements of the employer mandate have been delayed, it may be difficult for him to prove or disprove that.

Hence, it appears that CMS will rely on applicants' attestations—the "honor system"—to dispense subsidies in some cases. Similarly, the ACA's individual mandate only works if the government can verify whether or not a worker is full-time or part-time, whether he has been offered "affordable" or "unaffordable" coverage, or none at all.

Delaying the employer mandate's reporting requirements, therefore, affects the implementation of the subsidized exchanges and the individual mandate.

Is it desirable to repeal the employer mandate?

H.R. 903, the American Job Protection Act, is a bipartisan bill that was introduced last February by Representatives Boustany, Tiberi, Barrow, and Black, and referred to this Committee. It would repeal the employer mandate by striking Sections 4980H and 6056 of the Internal Revenue Code, and subsection (c) of Section 1513 of the Affordable Care Act.

Repealing the employer mandate would eliminate the perverse incentives I described earlier. Most importantly, it would encourage a transition away from costly, inefficient employer-sponsored coverage, and towards portable, individually-owned insurance policies. As you all know, economists have long advocated for this transition, and repealing the employer mandate would go a long way toward achieving it. In this way, the passage of H.R. 903 could emerge as a major policy advance.

Some analysts have raised concerns that such a transition would increase the fiscal cost of the Affordable Care Act, due to increased spending on exchange subsidies. However, in March 2012, the Congressional Budget Office estimated that if an additional 14 million workers moved from employer-based to exchange-based coverage, the deficit would actually decrease by $13 billion over ten years. This is because the increase in exchange subsidies is offset by a reduction in lost revenue from the tax exclusion for employer-sponsored insurance.

It will be important for H.R. 903 to be adjusted in order to take into account its impact on the disbursement of subsidies and the individual mandate. The individual mandate, for example, could be replaced with a more limited open-enrollment period for participating in ACA-certified insurance plans. This would achieve the individual mandate's goal of curbing adverse selection, without the mandate's intrusiveness.

The employer mandate harms those it is intended to help

I will conclude by recalling that scarlet "S." We all want an economy in which those at the bottom of the ladder have the opportunity to find gainful employment and good health care. The employer mandate harms those it is intended to help. Instead of delaying it, we should repeal it.

Thanks again for having me. As an addendum to my written testimony, I've included three articles from *Forbes*, in which I further expand on these issues.

I look forward to your questions, and to being of further assistance to this committee.

Addendum: Excerpts from Avik Roy Articles at Forbes.com

May 21, 2013: Employers Can Minimize Their Exposure To Obamacare's Penalties By Offering Low-Cost 'Skinny' Coverage

http://www.forbes.com/sites/theapothecary/2013/05/21/employers-can-minimize-their-exposure-to-obamacares-health-insurance-mandate-by-offering-low-cost-skinny-coverage/

The employer mandate gives employers "an incentive to offer coverage that is either 'unaffordable' according to Obamacare or that fails to meet the law's 'minimum essential requirements.'" Let's delve into that further, as this aspect of Obamacare is likely to have far-reaching consequences for the way that employers offer health coverage in the future.

Poll after poll shows that Americans who have health insurance—most through their employers—are happy with the health coverage they have. According to Gallup, around 70 percent consider their coverage to be "excellent" or "good." Democrats' push to nationalize health care in the early 1990s, led by Hillary Clinton, failed largely because the vast majority of voters who have health insurance feared that it would be too disruptive to their existing arrangements.

That's why President Obama, in his Obamacare pitch, repeatedly promised that "if you like your health care plan, you can keep your health care plan." And it's why the Affordable Care Act includes an employer mandate. Because Obamacare subsidizes private coverage for the uninsured, Democrats wanted to make sure that employers didn't have an incentive to drop coverage for workers and send them onto the new subsidized exchanges.

So they put in an employer mandate to force employers to continue covering their workers; if workers ended up accepting exchange subsidies, employers would face significant fines.

However, due to some technicalities in the way that the employer mandate works, the actual consequence of the law will be to incentivize employers to offer de minimis coverage for their

workers, coverage that some workers will then reject by seeking more favorable terms on the Obamacare exchanges.

The strong penalty vs. the weak penalty

The employer mandate actually consists of two different penalties, based on two different categories of employer behavior. These originate from Section 4980H of the Affordable Care Act. Subsection (a) requires steep penalties for employers who offer no coverage at all. Subection (b) requires modest penalties for employers who offer "minimum essential coverage under an eligible employer-sponsored plan." This difference—between the strong penalty in 4980H(a) and the weak penalty in 4980H(b)—is crucial to understanding how things will play out in the future.

Under the strong penalty, in which an employer "fails to offer to its full-time employees…the opportunity to enroll in minimum essential coverage," and "at least one full-time employee" enrolls in an exchange, the employer has to pay a fine of $2,000 times the total number of full-time-equivalent employees at the firm, minus 30. (The employer mandate only applies to firms with 50 or more full-time-equivalent workers.) So if you employ 50 workers, that's a fine of 20 * $2,000 = $40,000. And the fine isn't tax-deductible, adding to the pain.

Under the weak penalty, in which an employer does offer "the opportunity to enroll in minimum essential coverage," but that coverage doesn't meet Obamacare's requirements for affordability or actuarial value, and at least one worker enrolls on an exchange instead, the fine is $3,000 times the number of workers who enroll on the exchanges. So, if you employ 50 workers, and three of them get coverage on the exchange instead, the fine is a much lower 3 * $3,000, or $9,000. (Technically, in subsection (b), employers pay the lesser of the weak penalty or the strong penalty, but this in most cases should be the weak penalty.)

So: Employers avoid the strong penalty and gain eligibility for the weak penalty by offering "minimum essential coverage." So what is "minimum essential coverage?"

'Minimum essential coverage' is very broadly defined

The legal term "minimum essential coverage" is defined by Section 5000(A)(f) of the Internal Revenue Code. The IRC states that minimum essential coverage can consist of either (a) government-sponsored coverage, such as Medicare or Medicaid; (b) an "eligible employer-sponsored plan"; (c) a plan "offered in the individual market within a State"; (d) a "grandfathered health plan"; or (e) anything else that the Secretary of Health and Human Services deems appropriate.

So what is an "eligible employer-sponsored plan?" Paragraph 2 of Section 5000(A)(f) defines one as "a group health plan or group health insurance coverage offered by an employer to the employee which is [either a government-sponsored plan] or "any other plan or coverage offered in the small or large group market within a State."

In other words, any health insurance plan that is legally sold within a state's boundaries counts as an "eligible employer-sponsored plan." In many states, insurers market inexpensive plans that cover a limited range of services. According to Obamacare, employers can offer these inexpensive plans to their workers and thereby avoid the employer mandate's strong penalty.

This has significant ramifications for sectors of the economy that employ hourly-wage workers, such as restaurant chains McDonalds (NYSE:MCD); Burger King (NYSE:BKW); Dunkin Brands Group (NASDAQ:DNKN); Yum! Brands (NYSE:YUM), owners of Taco Bell, Pizza Hut, and KFC; and Darden Restaurants (NYSE:DRI), owners of Red Lobster, Olive Garden, and Capital Grille, among others.

Employers can minimize fines by offering 'skinny' coverage

All of this is the context for an article that appeared yesterday in the *Wall Street Journal*, highlighting the emerging recognition of this method for avoiding the employer mandate's strong penalty. Reporters Christopher Weaver and Anna Wilde Mathews confirmed with federal officials that this strategy is a viable one.

Nonetheless, Obamacare's designers expressed surprise that employers would do such a thing. "Our expectation was that employers would offer high quality insurance," said Robert Kocher, a former Obama health care adviser.

Weaver and Mathews of the *Journal* report that Bill Miller Bar-B-Q, an excellent fast-food chain in San Antonio, will offer just such a skinny plan to avoid the strong penalty. The plan will cover preventive services, doctors' visits and generic drugs, but not surgeries nor hospital stays, and cost less than $600 a year:

> San Antonio-based Bill Miller Bar-B-Q, a 4,200-worker chain, will replace its own mini-med with a new, skinny plan in July and will aim to price the plan at less than $50 a month, about the same as the current policy, said Barbara Newman, the chain's controller. The new plan will have no dollar limits on benefits, but will cover only preventive services, six annual doctors' visits and generic drugs. X-rays and tests at a local urgent care chain will also be covered. It wouldn't cover surgeries or hospital stays.

Because the coverage is limited, workers who need richer benefits can still go to the exchanges, where plans would likely be cheaper than a more robust plan Bill Miller has historically offered to management and that costs more than $200 per month. The chain plans to pay the $3,000 penalty for each worker who gets an exchange-plan subsidy.

Pan-American Life Insurance Group, the *WSJ* reporters write, is developing these bare-bones plans for the California market, along with other states. It's almost certain that nearly all large employers of hourly-wage workers will go this route, given the clear economic incentives to do so.

Skinny coverage is a welcome development

The Oregon Medicaid experiment showed us Medicaid didn't make people healthier, but it did provide financial protection to the uninsured. The lesson to draw from this is that the Singapore

model of catastrophic insurance and health savings accounts is the most cost-effective way to provide Americans with health security.

Obamacare incentivizes firms to dump their workers onto the exchanges, and to reduce the scale and scope of employer-sponsored coverage. Obamacare is, in fact, the most dramatic disruption to employer-sponsored health coverage in seventy years.

But if you step outside of the politics for a moment, and think about the policy, this disruption is actually a welcome development. Though Obamacare's exchanges are poorly designed, they at least offer Americans the opportunity to shop for insurance for themselves. A widespread shift to 'skinny' plans will do the same thing, by reducing the problem of over-insurance, and giving workers the opportunity to purchase supplemental catastrophic coverage for hospital care.

The next step in this transformation is for small businesses to press state legislatures to legalize a broader range of "skinny" health plans, so that insurers can offer the most cost-effective coverage possible.

Ultimately, Congress should repeal the employer mandate, because it makes it much costlier for employers to hire entry-level workers. And it's entry-level workers who are already suffering the most in the Obama economy. Until then, businesses will do what they have to do to compete in the real world.

March 15, 2012: Could Employer Dumping of Health Coverage Reduce the Deficit?

http://www.forbes.com/sites/theapothecary/2012/03/15/if-employers-stop-paying-for-health-care-who-wins-maybe-everyone/

One of the biggest concerns with the Affordable Care Act has been that the law will drive employers to stop sponsoring health insurance for their workers, instead dumping those workers on to the new law's subsidized insurance exchanges. The Congressional Budget Office, in a

provocative new report, believes that such behavior could, in some circumstances, actually reduce the deficit.

The ACA's exchange subsidies will lead to employer dumping

A number of credentialed budget wonks, most notably Gene Steuerle (a former Treasury Department official), Jim Capretta (a former health-care specialist at the White House Office of Management and Budget), and Doug Holtz-Eakin (a former director of the CBO), have pointed out that the ACA strongly incentivizes employers to drop coverage for their lower-to-middle-income employees, because those employees get a better deal by seeking out coverage on the law's new exchanges. "Droves of employees—potentially tens of millions—are likely to shift out of employer-provided insurance in the next decade or two," wrote Steuerle in a widely-cited report.

Indeed, the new CBO report agrees that the exchanges offer a better deal for the vast majority of people who qualify for the exchange subsidies. According to CBO's estimates, someone making $50,000 a year (200 percent of the federal poverty level) would benefit $11,300 a year by going onto the exchanges; someone making $74,000 (300%) a year would benefit by $3,000; and someone making the maximum $99,000 a year (399%) would only lose $700: a rounding error.

It's these numbers that drove the findings in the now-famous McKinsey survey that found that 50 percent of employers with a "high awareness of reform" would "definitely or probably" stop offering employer-sponsored insurance in the years after 2014. The McKinsey report detailed a number of creative strategies that companies could use to take advantage of the subsidies, such as increasing the use of part-time employees, and splitting a company into two parts: one that provided coverage for higher-income employees, and one that dumped lower-income workers onto the exchanges.

The fiscal risk of employer dumping

The big worry is that employer dumping could explode the deficit. "The CBO projects that the premium-assistance program will cost about $450 billion from 2014 to 2019," Capretta and Holtz-Eakin wrote in 2010. "But that cost would rise to $1.4 trillion if workers and their family members between 133 percent and 250 percent of the poverty line were to migrate out of their current plans and into the exchanges on Day One."

This is where the new CBO report gets interesting. Last year, on the heels of the McKinsey survey, a number of senators and congressmen, led by Orrin Hatch (R., Utah) and Paul Ryan (R., Wisc.) asked the CBO to evaluate a number of different scenarios in which employer dumping was more widespread than the CBO projects. In the new report, CBO argues that dramatic increases in employer dumping would reduce, not expand, the deficit.

The CBO modeled out four different scenarios, on top of their baseline projections for the Affordable Care Act. In Scenario 1, employers dump 7 million more people onto the exchanges and other public programs (Medicaid and the Children's Health Insurance Program). In Scenario 2, employers actually increase coverage by 8 million people, due to the law's employer mandate: effectively the inverse of Scenario 1. In Scenario 3, employers dump 14 million more people onto the exchanges; and in Scenario 4, companies use the McKinsey restructuring strategies to dump their lower-paid employees onto the exchanges, while continuing to pay for insurance for their higher-income workers.

CBO: employer dumping could reduce the deficit

According to the CBO, the scenario with the most widespread dumping, Scenario 3, actually reduced the deficit by $13 billion from 2012 to 2022. The two other scenarios with dumping, Scenarios 1 and 4, increased the deficit by a relatively small amount: $45 and $36 billion, respectively. Scenario 2, in which employers covered more people, reduced the deficit by $82 billion.

How could dumping more people onto the subsidized exchanges, in the case of Scenario 3, actually reduce the deficit? Because people who get insurance through the exchanges, rather than

their employers, would no longer be able to take advantage of the tax deduction for employer-sponsored health insurance.

So, for example, in Scenario 3, the CBO assumes that the government will spend $310 billion more on the exchanges, and $65 billion more on Medicaid and CHIP. On the other hand, the government will gain $351 billion in tax revenue because of a reduction in the size of the employer tax exclusion, and $45 billion in penalties from the employer mandate. Similar math, on a smaller scale, applies to the other scenarios.

If the CBO's analysis is correct, it would be encouraging news for the fiscal soundness of our new health law. But is it correct?

The CBO's critical assumptions: wage substitution and low premium growth

It appears that the CBO has made a critical assumption in its calculations: that employers who dump health coverage will replace that coverage, on a dollar-for-dollar basis, with increased cash wages. So, for example, if your boss is paying you $50,000 a year, and spending $20,000 a year on your health insurance, under the ACA, he'll drop your health coverage and give you $70,000 in wages. Since you'd be paying income taxes on that extra $20,000 of wages, whereas you weren't paying taxes on your employer-sponsored health insurance, the CBO estimates that the subsidies you'd get from the exchange are offset by new income taxes on your extra wages.

If the CBO is right, and we have little to worry about with regards to the fiscal risks of employer dumping under the ACA, this would be a very good thing. Indeed, if we could do so in a fiscally neutral way, moving people out of the employer-sponsored system into one in which individuals bought their own insurance would do a lot to bring choice and competition to our health-care system.

March 31, 2012: What's Democrats' Plan B If the Individual Mandate Goes Down?

http://www.forbes.com/sites/theapothecary/2012/03/31/whats-democrats-plan-b-if-the-individual-mandate-goes-down/

As I have noted in my several write-ups of this past week's oral argument at the Supreme Court, there is a reasonable chance that the Court will vote to strike down Obamacare in its entirety. But what happens if it doesn't? What happens if, instead, the Court strikes down only the mandate, leaving the rest of the law intact, or doing what the Administration suggests, and striking down the mandate and two limited provisions? And, in each of those cases, what could the law's supporters offer as a backup plan?

Strike One: The Supremes strike down the individual mandate only

Howard Dean and Paul Starr have been lonely voices on the Left in calling attention to the constitutional vulnerability of the individual mandate. "The American people aren't going to put up with a mandate," said Dean in 2010. "I've made this prediction before, and I'm going to make it again: by the time this thing goes into effect in 2014, I think the mandate will be gone. Either through the courts, or because it's unpopular."

In December, in a piece entitled "The Mandate Miscalculation," Starr noted that "the Court's general movement in restricting use of the commerce clause should have made Democrats wary of resting the mandate's constitutionality primarily on that basis, when they could have almost certainly have made the law bulletproof by [imposing] a tax to pay for health care, while providing an offsetting credit to those with insurance.

As Starr points out, this taxation-and-deduction method would have been equivalent to the mandate in policy terms, but would have been far sounder from a constitutional standpoint. I know that to many on the Left, this difference seems pedantic or trivial, but it most certainly is not: granting Congress the power to directly force Americans to enter into private contracts would be a dangerous, and unprecedented, act.

It's ironic that, given the fact that the mandate may end up bringing down the whole law, it's a weak mandate that might not have even successfully addressed the problem of adverse selection: people gaming the system in order to only buy insurance when they're sick.

In 2009, Starr proposed an alternative solution that would have easily passed constitutional muster: instead of a mandate, Obamacare could have adapted a German provision that requires those who opt out of insurance to wait five years before being able to gain guaranteed-issue insurance that doesn't exclude pre-existing conditions:

> But Congress could address this problem more directly. The law could give people a right to opt out of the mandate if they signed a form agreeing that they could not opt in for the following five years. In other words, instead of paying a fine, they would forgo a potential benefit. For five years they would become ineligible for federal subsidies for health insurance and, if they did buy coverage, no insurer would have to cover a pre-existing condition of theirs.
>
> The idea for this opt-out comes from an analogous provision in Germany, which has a small sector of private insurance in addition to a much larger state insurance system. Only some Germans are eligible to opt for private insurance, but if they make that choice, the law prevents them from getting back at will into the public system. That deters opportunistic switches in and out of the public funds, and it helps to prevent the private insurers from cherry-picking healthy people and driving up insurance costs in the public sector.

Chairman BRADY. Thank you.
Mr. Capretta.

STATEMENT OF JAMES C. CAPRETTA, SENIOR FELLOW, ETHICS AND PUBLIC POLICY CENTER, AND VISITING FELLOW, AMERICAN ENTERPRISE INSTITUTE

Mr. CAPRETTA. Mr. Chairman, Ranking Member McDermott, and Members of the Subcommittee, thanks for the opportunity to be here today.

The decision by the Administration to abandon the employer mandate for 2014 and to allow applicant income attestations in some instances were only announced last week. It will take some additional time before the full implications are known.

Nonetheless, in my testimony, I will try to provide some initial observations about what they might mean. Technically, the Administration did not announce a delay in the employer mandate. What was announced was an 1-year delay in the reporting requirements necessary to enforce the mandate.

The Administration simply noted in its announcement that the delay in collecting the relevant data would necessarily mean a simultaneous delay in determining which employers owed shared responsibility payments. Thus, the entire employer mandate structure was put off for a year through the back door of an administrative decision to not collect information.

Some have questioned the Administration's legal authority to take this action. It is certainly clear that what the Administration is doing is not consistent with the intent of the statute Congress put in place to mandate and a reporting system to enforce it to begin in 2014, not 2015.

I am not a lawyer. I will leave it to others to debate whether the Administration can stretch the meaning of the words in the statute to justify what they are doing.

I would only note that no one has yet disputed that it is clearly inconsistent with what Congress intended.

The employer debate is terribly flawed policy. It is harmful to lower-income workers, to job growth, and to the strength of the broader economy. The structure of the mandate's effects on employment and job growth are well known. They were obvious even before enactment.

For starters, the law exempts any employer with under 50 workers from the mandate's requirements. Not surprisingly, firms are adjusting to stay beneath this 50-worker threshold. Exactly what we do not need in the current economy.

The structure of the mandate's penalties, as already mentioned, provides powerful incentives for employers to avoid hiring lower income workers.

For instance, if you are a restaurant and you have the option of hiring a worker who you were going to pay low wages to from a middle-class neighborhood or a lower-income neighborhood, you might pick the middle-class neighborhood because the probability is they would be less likely to draw subsidies under the exchange and therefore induce a penalty on the employer. It creates a terrible bias in the law.

The law also exempts part-time workers from the penalty structure and establishes 30 hours per week as the upper limit for determining which workers are considered part-time.

We have seen story after story around the country now about firms adjusting and even local governments adjusting to push their workers below this 30-hour per week threshold.

In addition, it was known in advance of enactment that the employer mandate as designed in the healthcare law would be terribly burdensome to enforce.

Former Congressional Budget Office Director Robert Reischauer made this point publicly to a meeting of journalists in 2009, stating it would be an immense hassle on the administrative front as he urged a different approach. Last week's announcement made it clear that he was absolutely right.

The Administration's decision not to enforce the mandate does not alter these problematic effects. Employers that are today hesitant to hire workers to go above the 50-worker threshold or to move their part-time workers above 30 hours a week are not going to turn their plans upside down based on an 1-year delay.

The recent unilateral decisions by the Administration will have significant budgetary consequences. CBO estimated that the employer penalties were supposed to generate $10 billion in 2015 based on reporting in 2014. It is hard to imagine they are going to collect that $10 billion now. In fact, I assume it is gone.

Moreover, it is quite clear that the whole structure for enforcing the employer requirements has now been put into question. If you listen to the employer community, they say it is basically unworkable and will never generate the income it was supposed to generate.

In CBO's original estimate, they assumed $140 billion from these employer payments. Does anyone believe we are going to collect that much money from something that is so controversial?

Finally, the reliance on income attestation, in some instances in the exchanges, is very likely to result in more erroneous payments.

In 2012, according to the Treasury Inspector General for Tax Administration, the Federal Government paid out up to $13.6 billion in erroneous EITC payments, a system that has many more data checks, also has been in place for more than two decades, and has lots of enforcement tried to be built into it, and probably less complicated than the premium credits in the healthcare law.

Relying on the "honor system" is very likely to result in numerous and large scale erroneous payments.

The Administration's recent decision to delay significant parts of the healthcare law is an invitation to Congress to revisit the law, too.

I would urge this Committee and this Congress to consider statutory delay of the employer mandate, a simultaneous statutory delay in the individual mandate, and a strong look at delaying the entire exchange process until it is clear that the data systems protect taxpayers.

Thank you.

[The prepared statement of Mr. Capretta follows:]

Testimony Presented to the House Ways and Means Committee:

"The Obama Administration's Delay of the Employer Mandate"

James C. Capretta
Senior Fellow, Ethics and Public Policy Center
and Visiting Fellow, American Enterprise Institute

July 10, 2013

Mr. Chairman, Ranking Member McDermott, and members of the subcommittee, thank you for the opportunity to participate in this very important hearing on the Obama administration's decision to delay enforcement of the employer mandate enacted in the Patient Protection and Affordable Care Act (PPACA).

This unilateral decision raises many more questions than it answers. It also needs to be assessed in tandem with the decision, announced last Friday, to essentially abandon independent income verification of some applicants in the exchanges until 2015. These decisions will exacerbate the problems that are already undermining effective implementation of the law for 2014.

The decisions to abandon the employer mandate for 2014 and to allow applicant attestations in some instances were announced only last week; it will take some additional time before the full implications are known and understood. Nonetheless, in my testimony, I will provide some initial observations about what they mean for employers and the federal budget, and for broader implementation of the 2010 health care law. I also offer my recommendations to the committee and to Congress regarding what I

believe would be an appropriate legislative response to the administration's recent announcements.

What the Administration Announced

Technically, the administration did not announce a delay in the employer mandate, which was enacted by Congress with a clear start date of January 1, 2014.[1] What was announced -- in the form of a blog post from the Assistant Secretary for Tax Policy in the Treasury Department -- was a one-year delay in the reporting requirements necessary to enforce the employer mandate.[2] The administration simply noted in its announcement that the delay in collecting the relevant data from employers would necessarily mean a simultaneous delay in determining which employers owe "shared responsibility" payments. Thus, the entire "employer mandate" structure was put off for a year through the back door of an administrative decision to not collect information.

Some have questioned the administration's legal authority to take this unilateral action regarding these reporting requirements. It is certainly clear that what the administration's current plan is not consistent with the intent of the statute. Congress put in place this mandate, and a reporting system to enforce it, to begin in 2014, not 2015. When the law says that the Secretary has discretion over the timing and manner of employer reporting, it's obvious that this was not intended to mean the Secretary could

[1] The employer mandate, or "Shared Responsibility for Employers," can be found in section 1513 of the Patient Protection and Affordable Care Act (P.L. 111-148), as amended by the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152).
[2] The Treasury blog post can be found here: http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx.

decide to start employer reporting for activity occurring in 2015. That makes no sense in the context of what is required of employers under the law.

I am not a lawyer. I will leave it to others to debate whether the administration can stretch the meaning of the words in the statute to justify what they are doing. I would only note that no one has yet disputed that it is clearly inconsistent with what Congress intended.

Moreover, even if the reporting requirements are delayed and the administration looks the other way on employer penalties, the law's requirements are not wiped away by an administrative act. Employers are still -- by law -- subject to the employer mandate and associated penalties in 2014, whether or not the administration collects them. A blog post, or a regulation for that matter, cannot undo the mandate in 2014. That step can only be achieved by another act of Congress.

The Harmful Economic Consequences of the Mandate Will Not Go Away

The employer mandate is terribly flawed policy. It is harmful to lower income workers, to job growth, and to the strength of the broader economy. With the administration's delay of the mandate, there would appear to be a growing bipartisan consensus on these points.

The mandate's negative effects on employment and job growth are well known and obvious. For starters, the law exempts any employer with under 50 workers from the mandate's requirements. Not surprisingly, firms are adjusting to stay beneath this 50-worker threshold. This is exactly what the American economy does not need at this moment in our history, with the unemployment rate holding at 7.6%. Large firms, with many workers, usually start as small firms with big potential, but the health care law is discouraging today's small business entrepreneurs from become tomorrow's big employers.

The structure of the mandate's penalties provides powerful incentives for firms to avoid hiring lower income workers because the size of the penalties firms must pay are tied directly to the number of lower-wage workers getting subsidized insurance in the law's health exchanges. If a firm with at least 50 employees does not offer "affordable insurance" to its workers, and those workers get federally-subsidized insurance in the exchanges instead, the firm must pay a penalty of $3,000 per worker. As the Center for Budget and Policy Priorities warned in 2009, this kind of penalty provides a strong disincentive for firms to hire workers from lower income households because they might become eligible for subsidies in the exchanges, and therefore also trigger penalties on their employers.[3] This is not true if a firm hires low-wage workers from households with higher overall incomes. For instance, a small restaurant chain might find it more attractive to hire a low wage service worker who happens to live in a middle class

[3] "Finance Committee Makes Flawed Employer Requirement in Health Reform Bill Still More Problematic," Robert Greenstein and Judy Solomon, Center for Budget and Policy Priorities, October 21, 2009 (http://www.cbpp.org/files/9-16-09health3.pdf).

neighborhood than to hire someone from a lower income area who might be eligible for the health law's premium subsidies.

The law also exempts part-time workers from the penalty structure and establishes 30 hours per week as the upper limit for determining which workers are considered "part-time." Firms at risk of paying fines under the mandate have a strong incentive to keep as many workers as possible in part-time status. Thus, we have been reading scores of news stories about companies and even local governments racing to move as many workers as possible from above 30 hours per week to just below that threshold. This is of course very troubling to the workers who are seeing their hours, and incomes, cut.

In addition, it was known in advance of enactment that the employer mandate, as designed in the PPACA, would be particularly burdensome to enforce. Former Congressional Budget Office (CBO) Director Robert Reischauer made this point to a meeting of journalists in 2009, stating that it would be an "immense hassle on the administrative front" as he urged a different approach.[4] Last week's announcement by the administration made it clear that he was right.

The administration's decision not to enforce the employer mandate for one year does not alter these problematic effects of the law's requirements. At best, the decision delays the problems for a matter of months. This is very unlikely to effect how employers are reacting to the law's incentives. Employers that are today hesitant to hire new workers, or allow their part-time employees to work more than 30 hours per week,

[4] Greenstein and Solomon, October 21, 2009, p. 5.

are not going to change their plans based on a one-year reprieve. Moreover, firms that have already downsized or made other adjustments to get around the law's requirements are unlikely to undo what they have already implemented. After all, the administration is insisting that the mandate will go into effect in 2015.

The only way to really free up employers from the burdens of the law's employer mandate, and thus to improve job growth and the economy, is to permanently repeal it.

Budgetary Implications

The recent unilateral decisions by the administration will have significant budgetary consequences. In May of this year, CBO updated its estimates of the PPACA insurance coverage provisions and projected that the employer mandate would generate $10 billion in employer payments in fiscal year 2014 and $140 billion over the coming decade.[5] At a minimum, the administration's decision has jeopardized the $10 billion assumed to be collected in 2014. It is also not unreasonable to doubt whether any of the planned $140 billion in ten-year collections will ever be received by the federal government given the loud and apparently accurate complaints by the employer community that the mandate, as currently written, is hopelessly and irreparably flawed and cannot easily be enforced.

[5] "CBO's May 2013 Estimate of the Effects of the Affordable Care Act on Health Insurance Coverage," Congressional Budget Office, May 2013 (http://www.cbo.gov/sites/default/files/cbofiles/attachments/44190_EffectsAffordableCareActHealthInsuranceCoverage_2.pdf).

Moreover, the administration's decision to forgo income verification for some applicants for subsidies in the exchanges, as well as to forgo independent verification of employer-provided insurance status in some cases and rely instead on applicant attestations, raises many additional budgetary questions. Without a system in place as a check against erroneous payments, the costs of providing subsidies in the exchanges will almost certainly rise above what otherwise would have been spent. According to the Treasury Inspector General for Tax Administration, the federal government paid out up to $13.6 billion in erroneous Earned Income Tax Credit (EITC) payments in 2012, and that's with extensive electronic data systems in place aimed at reducing waste in the program.[6] The recent announcement from the Obama administration that only the "honor system" will be in place in some cases opens up the federal treasury to potentially very substantial erroneous payments in a program that is arguably even more complex and harder to administer than the EITC.

It is true that any excessive payments can, in theory, be collected back later. But much of that collection system is based on income tax filing, and many of these applicants do not file income tax forms each year. Moreover, previous experience indicates that it is very difficult, if not impossible, for the federal government to recoup overpayments made to low and moderate-income households once the subsidy payment has already been made.

[6] "IRS Made Up to $13.6 Billion in Improper EITC Payments in Fiscal 2012, TIGTA Says," Tax Notes Today, February 25, 2013 (http://www.taxanalysts.com/www/features.nsf/Articles/CEA84B262A7B890985257B5800465097?OpenDocument).

Conclusion

The administration's recent decisions to delay significant parts of the PPACA are an invitation to the Congress to revisit the law too.

At this point, it would seem that there is bipartisan agreement that the employer mandate should not go into effect -- at least not before 2015. This committee and Congress should consider enacting into law the one-year delay that the administration already says it supports. This would allow Congress to write the delay in a manner that clearly relieves employers of their obligations. It would allow Congress to revisit the question again next year. The same reasons that compelled the administration to delay its enforcement this year will be there next year, with possibly the same result.

And if the employer mandate is going to be delayed, it would seem only fair that the individual mandate be delayed as well. Why should large companies be relieved of responsibilities but not workers? The administration's delay of the employer mandate may mean that some workers will not get an offer of insurance at their place of employment, even as the exchanges in some states will be barely operational and offer very few insurance options (and in at least one case, only one option). Is it fair to threaten tax penalties on the uninsured under these circumstances? Moreover, if employers and insurers are not required to submit 2014 insurance enrollment information to the federal government, how can the individual mandate be enforced fairly anyway? It

only makes sense for Congress to couple the employer mandate delay with a delay in the individual mandate too.

It also becoming increasingly clear that the exchanges being planned for October carry with them the risk of significant waste in taxpayer funds. A process that relies in some cases on self-reporting will predictably result in billions of dollars in erroneous payments. Therefore, this committee should seriously consider legislation that couples delays in the employer and individual mandates with a simultaneous delay in the entire exchange roll-out. This would give the administration more time to prove that the data systems it has been promising and working on for three years are actually in place, tested, and ready to work without risks to taxpayers.

Chairman BRADY. Thank you.

Mr. Dennis, you are recognized.

STATEMENT OF WILLIAM J. DENNIS, JR., SENIOR RESEARCH FELLOW, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. DENNIS. Thank you, Mr. Chairman. My name is William Dennis. I am a Senior Research Fellow at the NFIB Research Foundation.

When you are ill prepared, as a general rule, it is advisable to delay, postpone or even cancel. In this case, small business people, small business owners certainly are receptive to the delay.

There has certainly been no information or certainly inadequate information for them to make the decisions, which are necessary to operate under this program.

The delay, however, changes nothing, just kind of delays it, moves it back a year, including small business reticence to hire and to invest.

The exception, of course, is the diminished confidence in the ability of this Administration and perhaps any administration to get something of this size done correctly or even to do it at all.

Let's assume for a moment that everything gets straightened out next week. There is guidance, rules, and all that sort of thing, and obviously that is not going to happen, but let's make that assumption.

Small business still has a major information problem. Small business owners get their information generally through secondary channels. Secondary channels are accountants, lawyers, and Websites of trade associations, so on and so forth.

That means that in order to inform the small business population generally, it is a two-step process. You have to educate the educators. The educators then in turn will educate the population.

Quite frankly, if we are looking at 2015, January 1, 2015, they are still going to have to hustle to get information out to small businesses that will help them with compliance issues. That says nothing for any recordkeeping that they are going to have to start with on January 1, 2014, depending on how the rules are subsequently interpreted.

As I mentioned, the substantive issues really have not changed. They are the same, they are just moved back a year. I have identified five that I would just like to mention, although there are some others I am sure others would highlight.

The first obviously is the full-time/part-time issue, the 35 hours/30 hours. I am not sure I know of anyone who disagrees this has become a real problem and a real disincentive to hiring.

Parenthetically, some would argue that only 3 percent of small businesses are affected by this employer mandate. This provision alone shows that number is silly because this provision will affect literally hundreds of thousands if not millions because those with and those without are going to have to consider this when they make their decisions on health insurance.

The second is the so-called "look back rules." This effectively is going to require enormous amounts of paperwork because they are going to have to start keeping hourly records on salaried employees.

Fifty-five percent of small businesses have at least some salaried employees. They are not keeping hours now. They do not have systems in place. They would not normally have systems in place to do this.

Clearly, if we were going to look at these people on an hourly basis to qualify as full-time employees, they are going to have to have hourly records, which is a massive new recordkeeping problem.

The determination of affordability is number three. I am not really sure what to say because we never had any rules, proposals, and it looks like it may be difficult but who knows. That is really up in the air.

Number four are the business aggregation rules, and this is the sleeper. This is the one that I think has huge potential significance and for two reasons. Many owners have more than one business, many businesses have more than one owner. What combination or combinations constitute a single entity?

Now we get to the second problem. This has been answered by putting these combinations under the ERISA rules. The ERISA rules are some of the most complicated rules known to mankind. In fact, there is only a very small segment of the legal population, employee benefit group that can even interpret this thing.

Here you may have as many as 100,000 businesses needing some type or should have some type of interpretation, understanding or whatever, and only a very, very small community is going to be there to satisfy that.

Last, five, the mandate per se, it is a relic in a sense. It is tied to health insurance. It ties health insurance to employment. We should be going exactly in the opposite direction. Effectively, we are freezing the past when we should be looking to the future.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Dennis follows:]

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
The Voice of Small Business®

Testimony of

Mr. William J. Dennis, Jr.

before the

Health Subcommittee

on the subject of

the Delay of the Employer Mandate

on the date of

July 10, 2013

When you are ill-prepared, the wise thing to do typically is to delay, postpone, or even cancel. The Administration's one-year delay in the employer mandate somewhat improves a bad situation, despite raising such questions as –

How will delay affect small business confidence that the mandate will be implemented rationally and with maximum efficiency?
Will the Administration be ready in another year?
Why was the Administration so ill-prepared in the first place? and
Is it legal to delay implementation of the employer mandate when the law specifically states that it will "shall apply to the months after December 31, 2013?[1]

I cannot answer the last of these three questions, though they are highly relevant to the topic at hand. But I can address the first with some confidence – small-business owners are likely to be relieved that they will not have to immediately comply with legal obligations about which they have few, if any, details, holding out hope, though not necessarily confidence, that the second time around there will be adequate information on which to make sound judgments.

The information NFIB has on member opinion to date is largely anecdotal. It comes from NFIB staff speaking with members in groups and individually, from Administration call-ins which typically yield many questions and few concrete answers, and NFIB staff's own inability to obtain useable responses despite plowing through pages of advisory notices, proposed regulations, and similar material. For example, considerable confusion lies in the business aggregation provisions of the law. The concept is simple: if a small-business owner has multiple firms, regardless of industry, whose total employment adds to 50 or more, the business must offer full-time employees health insurance. The issue is relevant because 39 percent of small-business owners currently holding one small business employing 20 or more people also own at least 10 percent of at least one or more other businesses.[2] Not long ago, a member called asking for information about his multiple business situation. After listening to his story, we could only advise him to talk to his lawyer or accountant. He already had, and they were absolutely clueless. And, as our member got off the phone, he was left to the vagaries of a ERISA definition whose interpretation was now transferred to a condition for which it was clearly not developed.

This member is far from an isolated example. But to ascertain the current condition on a nationally representative basis, the NFIB Research Foundation this spring organized a three year longitudinal study to track the implementation of the Affordable Care Act on small businesses. One section of the first survey is devoted to awareness and knowledge of the Act (ACA). That instrument is currently in the field. Within a month or two, we will be able to provide you empirical data on ACA awareness by small employers. Moreover, since about 30 percent of responses were obtained prior to the July 2 employer mandate-delay announcement, we will be able to offer a before and after examination of the announcement's impact on small-employer thinking and reaction to various aspects of the ACA.

Learning and the Educational Process

The Administration indicated that it would provide further guidance in the next few weeks.[3] One can only hope that that the guidance will be clear, specific, and soon. Small employers are normally most likely to discover what government requires of them through secondary channels.[4] Those channels include accountants and lawyers, other affected business owners, and trade Web sites. A necessary

[1] Affordable Care Act, Section 1513(d).

[2] Businesses Within Families, *National Small Business Poll*, (ed.) William J. Dennis, Jr., NFIB Research Foundation, Vol. 12, Iss. 4, 2012.

[3] See, Mark J. Mazur, "Continuing to Implement the ACA in a Careful, Thoughtful Manner," blog post, July 2, 2013. www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner Accessed 7/5/2013.

[4] Regulation, *National Small Business Poll*, (ed.) William J. Dennis, Jr., NFIB Research Foundation, Vol. 12, Iss. 6, 2012.

process is therefore "teaching the teachers" before understanding and compliance can be expected from the population. These key points of contacts must first understand what the ACA requires, not in generalities, but in specifics. And, they are not yet aware. If clear and specific guidance does come in the next few weeks, and the delay just experienced offers no confidence to that effect, it will still be difficult to fully inform the affected population before the next deadline, now presumably January 1, 2015.

Some might suggest that the IRS or some other agency of government simply send a notice to all affected taxpayers containing compliance instructions (once they have been developed) and all would be satisfied. Indeed, wide dissemination of that nature would be helpful. But don't expect immediate awareness and knowledge as a result. Despite broad outreach by the IRS,[5] including mailing over four million notices post cards about the Small Business Health Insurance Credit in 2011,[6] only about half of eligible small businesses were even aware of the credit shortly thereafter,[7] let alone familiar enough to know if they were eligible.

Inherent Mandate Problems

Delay of the employer mandate for one-year, possibly more, does not erase the inherent problems with the employer mandate. It only postpones addressing them. A few examples should suffice:

*Full-time employees – Full-time employees must be offered coverage by the mandate; the same does not apply to part-time employees. A full-time employee according to the ACA works more than 30 hours a week. The Bureau of Labor Statistics (BLS) classifies full-time employees as working 35 hours a week or more and part-time employees as 1 – 34 hours per week.[8] That is also common usage of the terms in the private sector. Further, it has been policy to provide additional compensation after extended hours, such as time and one-half (overtime pay) after 40 hours.

The ACA's differential classification has already caused employers to start juggling hiring practices and forcing employee hours to fall under 30 hours.[9] Already we have seen employers reduce or announce reduction in hours to escape the mandate, and not just small employers as illustrated by the actions of the Commonwealth of Virginia[10] and some colleges.[11] This is not to be confused with the hiring caution currently exhibited by small employers due to mandate uncertainty.[12]

Further, proposed regulations complicate matters unnecessarily by designating monthly totals for full-time employees as 130 hours/month and for full-time equivalent employees as 120 hours/month. So, do we have a weekly standard or a monthly standard, and does the latter differ between February (28 days) and March (31 days)? And, why is it essential to differentiate hours between full-time employees and full-time equivalent employees?

*Look-Back Rules – Given that employee hours can fluctuate from month to month, a proposed regulation would allow employers to utilize a 3 - 12 month look-back period to determine whether

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[5] Small Employer Health Tax Credit: Factors Contributing to Low Use and Complexity, Government Accountability Office (GAO-12-549), May 2012, p. 16.

[6] http://www.irs.gov/pub/irs-news/health_care_postcard_notice.pdf accessed 7/8/2013

[7] Small Employer Health Tax Credit: Factors Contributing to Low Use and Complexity, op. cit.

[8] http://www.bls.gov/cps/lfcharacteristics.htm#fullpart accessed 7/8/2013

[9] Obamacare Putting Millions of Part-time Workers at Risk of Seeing Cut Hours: Study, Huffington Post, July 9, 2013. http://www.huffingtonpost.com/2013/05/07/part-time-workers-obamacare_n_3210321.html accessed 7/9/2013

[10] Bill Sizemore, "Va. workers' part-time hours capped due to health law," PilotOnline.com, Feb. 8, 2013. http://hamptonroads.com/2013/02/state-workers-parttime-hours-capped-due-health-law accessed 7/8/2013.

[11] Colleen Flaherty, "So Close Yes So Far," Inside Higher Ed., Nov. 20, 2012, www.insidehighered.com/news/2012/11/20/college-cuts-adjuncts-hours-avoid-affordable-care-act-costs accessed 7/8/2013.

[12] See, "Small Business Economic Trends," NFIB Research Foundation, Washington, DC, series.

employees work full-time (130 hours/month, not 120 hours/month). Though reporting may add paperwork depending on the requirements method of implementation, counting and recording hours for hourly employees is not an issue. Employers already do it. Salaried employers are a different matter, and small businesses have a considerable number of salaried employees. Fifty-five (55) percent of small businesses employing 20 or more people pay at least some employees' salaries.[13] Salaries mean that an entirely new administrative structure and record-keeping procedure must be established by these firms. The new paperwork represents a business cost and the type of hassle that small business owners constantly complain about. My guess is that salaried employees are not going to be thrilled about it, either.

Presumably, the Administration will provide new rules on the way that the data should be collected, maintained, and reported.

*Affordability Determination -- Businesses of all sizes that offer health insurance to their employees must satisfy an affordability test in order to keep employees in their employer-sponsored insurance plans.[14] Employees with an offer of unaffordable coverage could leave employer-sponsored coverage in favor of individual exchange coverage. The law defines affordable coverage as less than 9.5 percent of *household* income. But no employer wants to ask employees about household income, that is, income not only of the employee but other members of the household, for legal, ethical, and human relations reasons. So, the household affordability test has conveniently been transformed into a self-only test (still 9.5 percent of income), thereby also skipping the possibility of additional income among approximately seven million multiple job holders.[15] (What's changing the law by fiat among friends?)

Once the employer has established that his insurance plan is not affordable for a particularly employee, what then? What are the reporting requirements? Is the employer liable for an error, by excluding an employee when the employee should not have been, or vice-versa? The affordability determination has nothing inherently to do with offering health insurance. Rather, the employer is now being required to become part of the country's social welfare structure, somewhat akin to the new navigator's role.

Employers NEVER had the rules or regulations on how to report the offer of affordable and adequate coverage.[16] That makes compliance difficult.

*Aggregation – An aggregation rule's presumed purpose is to prohibit small employers from sub-dividing their firms into multiple parts in order to avoid the mandate. An aggregation rule might work if the world consisted of individual small employer owning individual small firms. But the world consists of single firms with multiple owners and owners with multiple firms. For example, just 35 percent of small businesses employing 20 or more people have a single owner (counting a husband/wife

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[13] Compensating Employees, *National Small Business Poll*, (ed.) William J. Dennis, Jr., NFIB Research Foundation, Vol. 3, Iss. 2, 2003.

[14] Considerable concern has been expressed that employers will purposefully design their health insurance packages to push lower income employees into the individual exchange, thereby reducing business costs and making insurance cheaper (less out-of-pocket) for affected employees. See, for example, Amy B. Monahan and Daniel Schwarcz, Saving Small Employer Health Insurance, University of Minnesota Law School, Legal Studies Research Paper No. 12-36, 2012.

[15] http://www.bls.gov/cps/cpsaat36.htm accessed 7/8/2013.

[16] The following is typical: "The ACA includes information reporting (under section 6055) by insurers, self-insuring employers, and other parties that provide health coverage. It also requires information reporting (under section 6056) by certain employers with respect to the health coverage offered to their full-time employees. We expect to publish proposed rules implementing these provisions this summer, after a dialogue with stakeholders - including those responsible employers that already provide their full-time work force with coverage far exceeding the minimum employer shared responsibility requirements - in an effort to minimize the reporting, consistent with effective implementation of the law." Mazur, op. cit.

combination as a single person).[17] Earlier we noted that 39 percent of people owning a small business with 20 or more employees also held a 10 percent or more share in at least one other venture separate and distinct from the enterprise about which they were initially interviewed. Adding to the complication is the degree of control owners have over each business. For example, 70 percent who have family member owners indicate that these family member/owners actively participate in the firm's critical decisions.[18] At the same time, owners are likely to participate in the critical decisions of a second firm they own and somewhat less likely to participate in the critical decision of a third firm that they own.[19]

The rules proposed to handle these complexities are ERISA rules. The problem is that ERISA rules are intricate, meant for interpretation by legal specialists in benefits law, not for the general public or even attorneys generally. That means that perhaps as many as 100,000 small businesses will need an interpretation from a specialist in benefits law to be confident about his or her status.

*Tying Health Insurance to Employers – The employer mandate makes little sense per se. It is a relic of the past and limits future options. Health insurance became tied to employment through an historical quirk. Many now think that health insurance should move away from the current employer based system, to an individually based system offering people more options that better fit their unique situations. The employer mandate moves in exactly the wrong direction.

Thank you.

[17] Business Structure, *National Small Business Poll*, (ed.) William J. Dennis, Jr., NFIB Research Foundation, Vol. 4, Iss. 7, 2004.
[18] Businesses Within Families, *National Small Business Poll*, (ed.) William J. Dennis, Jr., NFIB Research Foundation, Vol. 12, Iss. 4, 2012.
[19] Ibid.

Chairman BRADY. Thank you, Mr. Dennis.

Mr. Falk, you are recognized.

STATEMENT OF SEAN FALK, PRESIDENT AND OWNER, WOLFTEAM LLC, AND NACHOGANG LLC, ON BEHALF OF THE INTERNATIONAL FRANCHISE ASSOCIATION

Mr. FALK. Chairman Brady, Ranking Member McDermott, and Members of the Subcommittee, thank you for your invitation to testify at today's hearing.

I am honored to speak with you regarding the Affordable Care Act. I believe my role as a franchise/small business owner gives me an unique perspective that is not heard often enough in Washington.

Franchise/small businesses have been particularly affected by the Affordable Care Act, and I hope to express the concerns of myself and that of our industry as a whole.

My name is Sean Falk and I own and operate 12 franchise business units. As a former United States Marine, I understand the demand for hard work. As a business owner, I had the luxury of working any 80 hours of the week that I choose. With 43 full-time-equivalent employees, I am a proud participant in a diverse franchise community, which supports nearly 18 million jobs.

You may recognize some of the businesses I operate, Salsarita's Fresh Cantina, Great American Cookies, Mrs. Field's Cookies, and Pretzelmaker.

I bought my first franchise in 1998, and through 2008, I was opening on average more than one location per year. I am also a member of the International Franchise Association, and I am here today to represent the Association and the entire franchise community.

Government actions play an important role in my business decisions. As a business owner, I cannot make future business plans when Congress plans and extends regulations for only 1 year at a time or changes them with only 6 months before implementation.

While my fellow small business owners and I applaud the Administration for delaying the implementation of the employer mandate due to the continued ambiguity of the law and its compliance requirements, it does not solve the fundamental problems associated with the ACA and its impact on business operations and future job growth.

We have to plan well in advance for significant changes in the law. Receiving key regulations less than 3 months before a new requirement goes into effect does not provide ample time for employers and small business owners to successfully adapt their businesses to remain economically stable.

Implementation of the Affordable Care Act has presented an enormous challenge to me as a small business owner. Navigating the constant changes, waivers, extensions, regulations and clarifications of an already cumbersome law has diverted my focus from developing my business and creating new jobs. I am facing the legalities of healthcare exchanges, the employer mandate, and full-time equivalents, whether it is in 2014 or 2015, all of these tasks take me away from my core mission of growing my business.

There are very few Government resources to guide small business owners through this process.

The franchise industry has two specific changes that could be made to the ACA to help small business owners like myself comply with the law without hurting our businesses.

Number one, increase the 30-hour threshold that qualifies an employee as full-time to 40 hours a week. Second, increase the 50 full-time-equivalent employee threshold that requires employers to provide coverage to full-time employees.

Currently, I employ 43 full-time-equivalent employees. If my business grows and I create jobs, I will also drastically increase my costs due to the employer mandate. This has an undeniable impact on my bottom line, which is my livelihood as a business owner, and it is making me reconsider opening new locations.

Also, I may be forced to reduce my employees' hours to less than 30 hours per week so that they do not require full-time status when I do expand.

With these challenges and changes, I fear it may be a struggle just to keep the doors open on my 12 existing businesses.

I would relish the opportunity to grow my business, but the recent Government regulatory burdens placed on my small businesses and the uncertain economic climate have given me reason for pause.

I have to weigh the pro's and con's of the ACA before deciding on future growth. I hope policymakers will consider focusing their energies on addressing the burdens small business owners face within the employer mandate, whenever it is implemented.

It is time to address these fundamental challenges facing our industry that are keeping small business owners and entrepreneurs on the side lines and from creating new jobs.

Thank you for the opportunity and I look forward to answering any questions you may have.

[The prepared statement of Mr. Falk follows:]

TESTIMONY OF SEAN FALK
PRESIDENT AND OWNER OF

WOLFTEAM, LLC AND NACHOGANG, LLC

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON WAYS & MEANS

SUBCOMMITTEE ON HEALTH

JULY 10, 2013

Chairman Brady, Ranking Member McDermott, and members of the Subcommittee, thank you for your invitation to testify at today's hearing. I am honored to speak with you regarding the Affordable Care Act. I believe my role as a franchise small business owner gives me a unique perspective that is not heard often enough in Washington. Franchise small businesses have been particularly affected by the Affordable Care Act and I hope to express the concerns of myself and that of our industry as a whole.

My name is Sean Falk and I own and operate 12 franchised business units. With 43 full-time employees, I am a proud participant in a diverse franchise community which supports nearly 18 million jobs. You may recognize some of the businesses I operate: *Salsarita's Fresh Cantina, Great American Cookies, Mrs. Field's Famous Brands, and Pretzelmaker.* I bought my first franchise in 1998 and through 2008 I was opening, on average, one store per year. I am also a member of the International Franchise Association and am here today to represent the association and the entire franchise community.

Government plays an important role in my business decisions. As a business owner, I can't make future business plans when Congress passes and extends regulations for only one year at a time. **While my fellow small business owners and I applaud the Administration for delaying the implementation of the employer mandate due to the continued ambiguity of the law and its compliance requirements, it does not solve the fundamental problems associated with the ACA and its impact on business operations and future job growth. We have to plan well in advance for significant changes in the law; receiving key regulations less than three months before a new requirement goes into effect does not provide ample time for employers and small business owners to successfully adapt their businesses to remain economically stable.**

Affordable Care Act Implementation

Implementation of the Affordable Care Act has presented an enormous challenge for me as a small business owner. Navigating the constant changes, waivers, extensions, regulations and clarifications of an already cumbersome law has diverted my focus from developing my business and creating new jobs. I am facing the legalities of health care exchanges, the employer mandate, and full-time equivalents whether it is in 2014 or 2015. All of these tasks take me away from my core mission of growing my business, and there are very few government resources to guide small business owners through this process.

The Franchise industry has two specific changes that could be made to the ACA to help small business owners like myself comply with the law without hurting our businesses:

1. Increasing the 30-hour threshold that qualifies an employee as full-time to 40 hours a week;
2. Increasing the 50 full-time equivalent employee threshold that requires employers to provide coverage to full-time employees.

Currently, I employ 43 full-time equivalent employees. If my business grows and I create more jobs, I will also drastically increase my costs due to the employer mandate. This has an undeniable impact on my bottom line and is making me reconsider opening new locations. Also, I may be forced to reduce my employees' hours to less than 30 hours per week so that they do not acquire full-time status when I do expand. With these challenges and changes, I fear that it may be a struggle just to keep the doors open on my 12 existing businesses.

Summary

I would relish the opportunity to grow my business, but the recent burdens placed on small businesses and the uncertain economic climate have given me reason for pause. I have to weigh the pros and cons of the ACA before deciding on future growth. I hope policymakers will consider focusing their energies on addressing the burdens small business owners face within the employer mandate, whenever it is implemented. It's time to address these fundamental challenges facing our industry that are keeping small business owners and entrepreneurs on the sidelines from creating new jobs.

Thank you for this opportunity and I look forward to answering any questions from the Subcommittee.

Chairman BRADY. Thank you.

Mr. Jost, you are recognized.

STATEMENT OF TIMOTHY STOLTZFUS JOST, ROBERT L. WILLETT FAMILY PROFESSOR OF LAW, WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW

Mr. JOST. Thank you for this opportunity to address you today. You have now heard 20 minutes of criticism of the Affordable Care Act and I have 5 minutes to respond. I wish I had 20 minutes to respond because a lot of what has been said is inaccurate and a lot of questions that have been raised have answers. I will try to confine my remarks.

On January 1, 2014, millions of uninsured and uninsurable Americans will become eligible for coverage under the Affordable Care Act. The ACA expands coverage through five major mechanisms.

These are the premium tax credits, which will make care affordable to millions of lower- and middle-income Americans, expand Medicaid for lower-income Americans, which in spite of the Supreme Court's decision will still extend Medicaid coverage to millions next year.

Provisions that protect Americans from preexisting conditions from being denied insurance or charged higher premiums, the individual responsibility provision that asks Americans who cannot afford health insurance to purchase it or pay a tax, and finally the employer mandate, which requires large employers to offer affordable and adequate coverage to their full-time employees or risk facing a tax penalty to offset the cost the public will incur of covering their employees.

Ninety-five percent of employers with 50 or more employees already offer health coverage in the absence of a mandate, but this mandate is there to encourage employers to maintain or expand coverage and discourage them from dropping it.

On January 2, 2013, the Treasury Department announced it was delaying for 1 year the ACA employer and insurer reporting requirements. Treasury had heard from businesses, and I think we have heard this morning, that they needed more time to comply.

Because it is impractical to implement the mandate without the reporting, enforcement was delayed until 2015. This decision raises four issues. First, was it legal.

ACA's employer responsibility provisions do have an effective date of January 1, 2014. The reporting requirements, however, apply "At such time as the Secretary may prescribe."

Also, the ACA requires the IRS to assess and collect penalties in the same manner as penalties under Chapter 68 of the Internal Revenue Code, and the IRS frequently abates Chapter 68 penalties.

The IRS claims authority under Section 7805 and points to a long history of both Republican and Democratic Administrations delaying implementation of tax provisions when time and resource constraints have made immediate implementation impractical.

A second question is whether delay jeopardizes the implementation of other ACA requirements, particularly provisions dealing with eligibility for premium tax credits.

The law was never intended—exchanges were never intended to rely on insurer and employer reports, which are supplied long after tax credits are granted, to determine an applicant's employer coverage.

In a final rule released last Friday, the Administration set out a system for gathering and verifying information needed to determine individual eligibility. It is described in my written testimony. I would be happy to explain it in as great length as you would please.

It is not an honor system. Much of our tax reporting system is a honor system. This is not an honor system. Furthermore, false reporting carries a $250,000 fine and is a felony.

The third question is whether the delay is justifiable from a policy perspective. The announcement was greeted favorably by a wide range of business and insurance interests who were concerned about the complications of reporting. The moratorium should allow employers and insurers to adjust their IT systems to make reporting possible beginning in 2015.

In the meantime, employers will know how many of their employees if any are getting premium tax credits and will have time to adjust their coverage offering's to make sure they are in compliance by 2015.

There is little evidence that employers will rush to exit employee coverage in the meantime. All the many reasons employers have for offering coverage today will continue to exist and the lack of one more incentive is not going to drive them to drop coverage.

Finally, will the delay otherwise impede the implementation of the ACA. Congress in 2010 gave the Administration an enormous task, preserving our current employment and private-insurance-based system while modifying it to serve all Americans.

This Congress has made that task immensely more difficult by starving the Administration of the resources they need to do this task. The Administration continues to reiterate that the most important reforms, the premium tax credits and the exchanges, will be fully functional by January 1, 2014, and I know of no evidence to the contrary.

Delaying the less essential employer mandate will make the Administration's job easier, not harder, and is likely to minimize potential confusion for employers and employees alike.

If you actually care whether ACA implementation will help your constituents, take action immediately to appropriate the money needed to get the job done. If you are not willing to help with the job of ACA implementation, you have no standing to complain of delays.

Thank you.

[The prepared statement of Mr. Jost follows:]

Committee on Ways and Means:
Subcommittee on Health
Hearing on the Delay of the Employer Mandate
July 10, 2013

Testimony of Timothy Stoltzfus Jost, Professor,
Washington and Lee University School of Law

Mr. Chairman Brady, Ranking Member McDermott, members of the Subcommittee. Thank you for the opportunity to address you today.

On January 1, 2014, millions of otherwise uninsured or uninsurable Americans will become eligible for coverage under the Affordable Care Act. Among them will be my 23 year-old son, who has a chronic disease that would make him uninsurable in the individual market, but who is already covered today because of the ACA and who can be assured that he will remain covered for the rest of his life once it is fully in place. Among them also is a good friend from my church, also uninsured, who recently discovered a large growth on her shoulder and was told by a doctor that it may be cancer but that he would not operate unless she paid one quarter of his fee up front. She will also be able, on January 1, to obtain affordable health insurance—and more importantly, health care—despite her low income.

The ACA expands health coverage through five major mechanisms. First, and most important, are the premium tax credits, which will help make coverage more affordable for millions of uninsured Americans with incomes between 100 and 400 percent of poverty. This extends a benefit that virtually everyone in this room, including my fellow panelists, already enjoys—tax-subsidized health insurance.[1] Low-income individuals and families will also qualify for cost-sharing assistance to ensure that health care, as well as health insurance, is affordable.

Second, the ACA would have extended Medicaid to every American under age 65 with income below 138 percent of the federal poverty level.[2] However, as we all know, the Supreme Court in 2012, in a decision that was literally unprecedented, decided that Congress could not require states to expand Medicaid, even though the expansion is fully federally funded for the first three years. This decision—coupled with state inaction—is leaving millions of the poorest uninsured Americans without a right to health coverage. As of today, almost half the states have decided to move forward on January 1, 2014.[3] I believe more are likely to follow.

Third, the ACA protects people with pre-existing conditions by prohibiting insurers from refusing to cover them or charging higher premiums as a result of their health needs.[4] Thus my son, who will have a pre-existing condition for the rest of his life, can rest assured that he—and everyone else with pre-existing conditions—will never be turned down for insurance and that it will remain affordable to him.

Fourth, the ACA's individual responsibility provision requires all Americans who can afford health insurance to purchase it or pay a tax.[5] This provision, which has been bitterly contested but upheld by the Supreme Court, is necessary to ensure affordable coverage for all. Pooling risk—where both healthy and sick people are buying policies – is a basic requirement for providing insurance to all. Of course, few of us know when illness or accident will leave us in need of health care, and the individual responsibility provision ensures that we will not become a burden to others when we need expensive health care. After all, states generally require car insurance before you get on the road, even though it is safe to say most of us hope we will not need it. Likewise, banks and other mortgage issuers require homeowners' insurance, irrespective of anticipated losses. Why should health insurance be any different in this respect?

Finally, the ACA requires large employers to offer affordable and adequate coverage to their full-time employees or face a tax penalty to help offset inevitable costs of their employees who do not receive health benefits.[6] Since the 1940s, our health care system has been largely dependent on employer-sponsored coverage, which currently covers 55 percent of our population.[7] Currently, 98 percent of employers with 200 or more employees and 94 percent of employers with 50 to 199 employees offer health insurance to their employees.[8]

Under the ACA, an employer with at least 50 full-time employees who fails to offer any health insurance will face a penalty of $2000 for every full-time employee if any employee gets premium tax credits through the exchange.[9] While this penalty applies if even one uncovered employee obtains tax credits, the penalty only applies to the number of employees in excess of 30. This "discount" was created to mitigate against potential disincentives to grow a business above 50 workers. Alternatively, an employer that offers its full-time employees health insurance that is either "unaffordable" coverage (the employee share of premiums for self-only coverage is more than 9.5 percent of household income) or "inadequate" (its actuarial value is less than 60 percent) will instead face a penalty of $3000 for every employee who ends up getting premium tax credits through an exchange or marketplace.[10]

The employer responsibility provision was intended to build on the current employer-based system, minimize disruption, and help ensure a level playing field among businesses. No employer, of course, is likely to offer health insurance simply to avoid a $2000 or $3000 penalty—health insurance costs far more than that. But nearly all mid-size and large employers already offer health insurance without a penalty, and all of the reasons that they do so now—the ability to increase compensation through tax subsidies, recruitment and retention of employees, increased productivity and reduced absenteeism—will continue to exist in 2014 and beyond. The penalties are merely a marginal incentive, which might induce a few more employers to offer insurance and, more importantly, will keep a few others from dropping it.

On July 2, 2013, the Treasury Department and White House announced that they were delaying for one year the reporting requirements that the ACA had included to help the IRS enforce the law's employer responsibility provisions.[11] According to Administration

officials, they had heard from businesses that the reporting requirements were too complicated, and that businesses needed more time to comply. Because Treasury concluded that it would be impractical to enforce the employer responsibility provision without the reporting requirement in place, it was also delayed until 2015.

The Administration did not ask for my opinion on this issue. They never do. I did not find out about it until a reporter called me during dinner for my reaction. My initial response was shock and disappointment, which is reflected in statements I made to the press and on my Health Affairs blog post immediately following the announcement. But as I have had time to reflect on it further, I am not sure that it was such a bad decision. It seems to me that the decision raises four issues, which I would like to discuss today.

The first is whether it is legal. The employer responsibility provisions of the ACA, like many of its other provisions, have an effective date of January 1, 2014.[12] Arguably this is not true of the reporting requirements under sections 6055 and 6056, which apply "at such time as the Secretary may prescribe," although the ACA seems to say that the reporting also must begin for 2014.[13] I am informed that Treasury believes that it has authority to offer transition relief under its general rulemaking power under IRC § 7805(a). Also, the ACA requires the IRS to assess and collect in the same manner as penalties under subchapter B or chapter 68 of the Internal Revenue Code, and the IRS frequently abates penalties assessed under chapter 68.[14] Under this analysis, Treasury has the authority to delay the reporting requirement and thus their enforcement of the employer responsibility provision.

However, even if one disagrees with that analysis, there is in fact a long history, going back at least to Marbury v. Madison,[15] of both Republican and Democratic administrations failing to comply promptly, or even refusing to comply at all, with laws passed by Congress. Sometimes this failure has been due to disagreements about policy. The George W. Bush administration, for example, refused to enforce certain requirements of the Clean Air Act.[16] Sometimes, it has been due to simple inability to comply in a timely manner with all of the demands made by Congress and in the context of given resource constraints.[17] This is presumably the case with this situation.

Between competing obligations and scarce resources, it appears that the Administration has concluded that employers cannot practically implement these requirements of the law at this point and instead opted to delay enforcement for one year. The Supreme Court in Heckler v. Chaney held that "an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion."[18] Arguably the Administration's decision to delay enforcement of the employer responsibility provision is within its discretion. But if it is not, a delay in enforcement is certainly not without precedent, and arguably delayed enforcement is better than non-enforcement, a policy that has been pursued by other administrations in other contexts.

A second question is whether delay jeopardizes the implementation of other ACA requirements, particularly provisions dealing with eligibility for premium tax credits and the individual responsibility provisions. The Administration's statements say that

implementation of the rest of the ACA, including the launch of marketplaces or exchanges and the availability of premium tax credits, is going forward on schedule. From all appearances this is true.

Advance premium tax credits, however, are only available to employed individuals who are either not offered health coverage by their employers or are only offered employer coverage for which "self-only" coverage costs more than 9.5 percent of household income or that fails to offer "minimum value" —covering 60 percent of health care costs. Also, taxpayers are subject to the individual mandate penalty if they fail to accept coverage from their employer that meets the minimum value requirement and costs 8 percent or less of household income.

It had never been intended that the exchanges would rely on employer and insurer reporting to determine the existence and scope of an applicant's employer coverage. Employer and insurer reports are not filed until the next reporting year. Indeed, the premium tax credit eligibility provisions of the ACA itself require that applicants, not employers, provide information on employer coverage.[19] Under the final rule on premium tax credit eligibility verification, released on Friday, July 5, an applicant for premium tax credits will be required to attest as to whether or not he or she has employer coverage, its cost, and extent.[20] The application form includes an appendix for this information.[21] The applicant can, but is not required to, ask the employer to provide information to fill out this form. The employer is not required to help, but it is hoped that employers will help their employees fill out these forms and make pre-populated forms available to employees.

Once the exchange receives this information, it will check available databases to verify the information, including Office of Personnel Management data for federal employees and the state's SHOP exchange data.[22] If the exchange finds information incompatible with the applicant's attestation, it will ask the applicant to provide evidence to resolve the inconsistency. In most instances, however, there will be no electronic data available to confirm the attestation. In these cases, the exchange will select a statistically significant random sample of cases in which it only has the attestation and, after notice to the applicant, contact the employer to verify the information. If the employer provides information incompatible with the applicant's claims, the exchange will ask for further proof. In cases where the employer does not respond, however, or cases that are not a part of the random sample, the exchange will rely on the applicant's attestation. HHS will offer to perform this verification procedure for the states when requested, but will not be able technically to take this task on until 2015. Because some states were relying on HHS being able to do this for them, the states are excused from conducting the sampling procedure until 2015 as well although the federally facilitated exchanges will do it for their own enrollees. The exchanges will rely on the same procedures for verifying lack of employer coverage for exemption from the individual responsibility provision.

Some commentators have claimed disparagingly that this approach effectively creates an honor system for applicants. In many respects, however, our income tax system relies on

the honor system. Like others on this podium today, I receive from time to time payment for speaking engagements or articles I publish. Unlike the other speakers, the amounts are often small enough that I do not receive a 1099. I am on my honor to report this income to the IRS when I file my taxes, and I do. While some of the income reported to the IRS each year is backed up by reporting from third parties, much is not.

For example, another provision of the ACA that would have required businesses to file 1099s reporting purchases of goods in excess of $600, was repealed in 2011.[23] It was expected by the CBO to produce $22 billion in revenue over 10 years because otherwise unreported income would be uncovered. Apparently, however, Congress believed businesses could be trusted to self-report their income. Does anyone here believe that low-income Americans are categorically less trustworthy than businesses? If so, where is your evidence?

There are, moreover, serious consequences for applicants who misrepresent their employer-sponsored coverage. The exchange must still notify employers every time one of their employees receives premium tax credits.[24] Applicants who receive tax credits for which they are ineligible will have to pay them back when they file their taxes, and the exchange will inform applicants of this fact if it provides the applicant with tax credits pending verification of information provided by the applicant. Negligent misrepresentation of eligibility information can result in a $25,000 fine, while knowing and willful violations are punishable by a $250,000 penalty.[25]

A third question is whether the delay is justifiable from a policy perspective. It is ironic that many of those most critical of the delay are also those who have been complaining most loudly about the employer responsibility provision, or about the ACA in general. The reason that the Administration gave for the delay makes some sense. The approach that Treasury had contemplated for implementing the employer reporting requirements was quite complex and if taking a little more time could result in simplification, that should relieve a burden on American businesses. The announcement was greeted favorably by a wide range of business and insurance interests, including the National Association of Health Underwriters, America's Health Insurance Plans, the American Benefit Counsel, the National Business Group on Health, and the ERISA Industry Council.[26]

The moratorium should allow employers and insurers to adjust their IT systems to make reporting possible for 2015. In the meantime, employers will know how many of their employees, if any, are getting premium tax credits and will have time to adjust their coverage offerings to make sure they are in compliance by 2015.

As I said earlier, there is little evidence that employers will rush to exit employee coverage in the meantime. Employers have, of course, been dropping employee health coverage for some time, and this is likely to continue. But a recent survey by the International Foundation of Employee Benefit Plans found that the vast majority of employers intended to continue to offer health insurance once the ACA was implemented.[27] Less than 1 percent of large employers stated that they were very likely

to or would definitely drop coverage in the next year. Most importantly, 70 percent of employers said they offered health insurance to retain current employees and 65 percent to attract future talent. This will not change, regardless of when enforcement of the mandate begins. Further, if the mandate influences employer choice at all, an employer would be silly to drop coverage for 2014 realizing that enforcement will begin a year later.

Finally, there is the question of what the delay says about timely implementation of the rest of the ACA. Critics of the ACA have been proclaiming for some time that implementation is shaping up to be a disaster. A GAO report last month raised reason for concern that some regulatory deadlines that the administration had set earlier had been missed, although it concluded that timely implementation was still feasible.[28]

It was never going to be easy to restructure our private health care financing system in less than four years to make it work for all Americans. But the premise of the Act was to build on current coverage, rather than starting from scratch.

In addition, Congress, which in this case is to say the Senate, made the task infinitely harder by asking the states to take on much of the responsibility for implementation. This body had the good sense to leave more of the task to the federal government. Asking the states to help was done in good faith—it was an effort to maintain state sovereignty over insurance markets and ensure flexibility for the states. But even before the ACA was adopted, the law had become intensely political, and with a dramatic shift in control over state governments in 2010, most states opted out of taking responsibility for implementation.

That left the Administration with a massive task—setting up exchanges for two-thirds of the states and enforcing all of the insurance market reforms in over one-fifth of them. The federal government must run the reinsurance and risk adjustment premium stabilization programs in virtually all of the states. It will also have to enforce the individual responsibility requirement and issue premium tax credits and cost-sharing assistance to millions of Americans.

The Administration continues to assert that the central ACA reforms will be implemented on time. It will have the Federally-facilitate exchange up and running by October 1, 2013 and start issuing premium tax credits by January 1, 2014. I expect that there will be disruptions and glitches, like there were in implementing the Part D prescription drug program in 2006, the CHIP program before that, and countless other policy changes.[29] But I continue to expect that my friend from church will be able to get covered on January 1, 2014, and hope that coverage will come in time for her.

If further delays become necessary, however, the blame lies entirely with those in Congress who refuse to accept the law of the land and provide adequate resources for its implementation. It is simply not possible for a program of this magnitude to be implemented without substantial resources. The ACA appropriated $1 billion for initial implementation efforts, but I do not believe that it was the expectation of Congress that

this would be enough to get us to 2014. The amount is certainly inadequate to implement the law given the unexpected increase in federal responsibilities, especially in light of the Supreme Court's decision and the political intransigence of a number of states. Of course, sequestration has only made a bad situation worse.

If you actually care about implementation of the ACA—if you actually care about my son and my friend from church—take action immediately to appropriate the money needed to get the job done. If you are not willing to help with ACA implementation, you have no standing to complain about any delay on the Administration's part.

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Chairman BRADY. Thank you. I have questions for Mr. Capretta, Mr. Roy and Mr. Falk. Mr. Capretta, you talked about fairness in your testimony that you submitted to us, that if the employer mandate is going to be delayed, it will only seem fair if the individual mandate is as well. Why should large companies be relieved of the responsibilities but not workers.

You talk about is it fair to threaten tax penalties on the uninsured under these delays.

Can you explain why you feel that way?

Mr. CAPRETTA. Yes. Certainly the law requires that individuals beginning in 2014 sign up with the Government approved insurance, either through their employer or through the exchanges, or they pay a penalty of the greater of $95 or 1 percent of their household income. That will be enforced in the tax system through what they are filing in taxes probably early in 2015.

Look at the situation we have now, where you have many employees potentially not getting an offer of coverage from their employers because the employer requirements have now been suspended for a year. Moreover, we do not know if they were offered coverage through their employer.

Moreover, in many of the exchanges around the country, in at least one State, only one plan is being offered, and in many States, maybe two plans being offered, so the choices are going to be quite limited.

Is that the circumstances upon which you want to start imposing on many lower income families a tax for not signing up for coverage? They made the judgment that the employer system was not ready to be enforced in 2014. It is quite obvious to me that the individual mandate is also not ready to be enforced in 2014.

I would absolutely urge this Committee and the Congress that if you are going to delay one, you should delay both.

Chairman BRADY. Thank you. Mr. Roy, if ObamaCare is not ready for businesses, is it ready for our families? You are a healthcare expert. Let's assume it is your family, your child is ill, your spouse needs treatment, is ObamaCare ready for your family in your opinion?

Mr. ROY. No, I would not only echo Mr. Capretta's points but I would point out that the cost of coverage on the ACA exchanges is going to be much higher than what currently exists in the individual market for health insurance. Not only are we requiring through the individual mandate that individuals and families purchase insurance coverage, we are requiring them to buy coverage that in many cases is two to three times the cost of coverages available today.

Chairman BRADY. For some, their healthcare costs will go up dramatically?

Mr. ROY. That is correct.

Chairman BRADY. Mr. Falk, you were not here a few years ago, but you are hearing history rewritten today. A few years ago, the employer mandate was taunted as one of the twin pillars of ObamaCare upon which this massive new law depended upon, and every effort by Republicans on this dias to eliminate the employer mandate was greeted with outrage, and claimed we were trying to gut ObamaCare.

Today, you hear a different story, that the employer mandate, no big deal, really just an after thought that has no impact on businesses like yours. In fact, what we hear today is this 1 year reprieve is the greatest thing since sliced bread.

Is the employer mandate impacting your business and your ability to hire, and is this reprieve what you seek, this 1 year temporary reprieve, is that what you think is the solution?

Mr. FALK. I think the 1 year reprieve really does not do anything to address the problems of the mandate itself. The mandate does affect me, although I am not under it right now, it does prevent me from growing my business to become even larger. As I told you, for 10 years, I opened up about 1.5 locations per year on average, and I want it to grow forever. Since 2008, I have really slowed that down.

Chairman BRADY. For every one of those, how many people are you hiring when you have a new franchise?

Mr. FALK. Each location is anywhere between 10 and 25 people, probably about three of those people on average are full-time, the rest are part-time. I am in a business where I have a lot of first-time employees, high school or college people or people who are just trying to make ends meet by getting a part-time job. The full-timers are not as numerous as the part-timers.

Chairman BRADY. For you, the employer mandate is not a small thing?

Mr. FALK. It is not a small thing at all. I have been nominated and selected as Franchisee of the Year many times, and I am very engaged with my franchise system. I am very engaged with the IFA. I am very engaged in business in general.

I am embarrassed to say that I really have no idea about the employer mandate and where to find information. I do not know how to report, where to report, what the requirements are. It is coming up, I know that. I still do not have any information on it. I am upset to know that I have to worry about all these things rather than just grow my business and provide jobs. This takes up all my time now.

I do not want to call out Mr. McDermott but he said on the 4th of July, he did not spend his 4th of July worrying about the announcement and the changes, well, I did, as a business owner, I worked on the 4th of July. I worried about it. I fielded calls from other franchisees asking what this meant on the 4th of July.

Chairman BRADY. Thank you. I would just point out, I appreciate Mr. Jost being here, but the IRS, the tax system, is not an honor system. At least the IRS uses $10 billion a year to enforce that honor system.

The claim that the Administration has been starved just has no basis in fact. In fact, HHS used $8 billion to create out of thin air a bonus program for Medicare Advantage, to postpone the cuts before the election. I just wonder if they would like to have that $8 billion that they squandered back, now that they are claiming they do not have the ability to implement.

Mr. JOST. Can I respond to that?

Chairman BRADY. Sure.

Mr. JOST. With respect to the first question about the tax system being an honor system, certainly some parts of our tax system are covered by reporting, but many parts are not.

I would remind you that this Congress repealed the 1099 requirement, which was supposed to take small businesses, or businesses off the honor system with respect to reporting purchases of goods of more than $600, and the CBO projected that lost $22 billion in revenue by putting businesses on the honor system.

The tax gap in the United States in 2006 was estimated to be $385 billion of uncollected taxes. Those taxes were uncollected because we do essentially have an honor system for many parts of our——

Chairman BRADY. What we are learning from the IRS investigations is our agents apparently are spending all their time pursuing political agendas rather than enforcement of our current law.

Again, ObamaCare and HHS squandered $8 billion on a program they made out of thin air and got hammered on because they squandered that.

Again, back to the issue here, is it fair to demand that businesses—that workers and their families have a Government mandate when we have given a reprieve for businesses.

Dr. McDermott.

Mr. MCDERMOTT. Thank you, Mr. Chairman. It strikes me that the issue here is basically not about the delay because the businesses asked for the delay and the Government gave it to them. That is off the table.

The real issue here is whether you want ObamaCare or not and are you going to do it, and are you going to have any kind of mandates in it.

From the very start, everybody has understood that for a system to work, you have to have everybody in. Justice Scalia in his oral questioning on this case in the Supreme Court when talking about the mandatory coverage provisions said, "My approach would be say if you take the heart out of the statute, the statute is gone. There is going to be a deficit that is to be made up by the mandatory coverage provisions."

All that money has to come from somewhere, so you just are put to a choice, I guess, bankrupting the insurance companies and the whole system comes tumbling down, or else enacting a Federal subsidy program which is what the insurance companies would like.

It is clear there is a difference between the employer mandate and the individual mandate. The individual mandate is the core of the issue. If we do not require Americans, we are going to continue to have people who are free riders, who walk into the emergency room, get taken care of, and you and I who have insurance pay for it, $1,000 a year. What this system is doing is saying let's everybody pay what we can.

I listened to Mr. Falk and I am really sorry that you had such a bad weekend. Healthcare.gov is on the computer. You can look in there. There is a section for small business. I am sure you have looked at it already and you can read, obviously, so you know what is there.

Mr. Jost, explain what is really going to happen to individuals when this law is implemented or in January, as people enroll from September or October 1 to January, what is going to happen to them?

Mr. JOST. Thank you. One thing I would like to point out to begin with is the individual mandate is already being phased in, so if we are trying to level the playing field that is what HHS is doing.

The first year of the sanction for not complying with the individual mandate is $95, and again, that is only if you do not fit into one of the many exemptions to the rule or you can afford health insurance otherwise.

It then phases up over 3 years. Well, we are essentially doing the same thing now for businesses. We are saying you do not have to comply the first year, but you do have to get serious about compliance after that.

As far as leveling the playing field, that is in a sense what the Administration is doing, although I am not sure I appreciate the way they did it.

In terms of what happens now, on October 1, the exchanges are going to open their doors. People who cannot afford health insurance, people who find insurance unaffordable, people who are ineligible for Medicaid, can show up at the exchanges and sign up. There are going to be many insurers, insurance agents and brokers and navigators and community assistors, enrollment counselors and others trying to get them in that door.

I have a good friend at church who a week ago discovered that she had a big lump on her back. She went to see a doctor in the emergency room. The doctor said it could be cancer, I can operate on it, but you will have to pay me a quarter of my fee up front. She is uninsured. As of January 1, she is going to be able to get health insurance. She is going to be able to get health insurance she can afford. She will be able to get medical care. That is what is going to happen.

On the individual mandate——

Mr. MCDERMOTT. How will they go about verifying whether she is eligible for a subsidy or not?

Mr. JOST. She will go to the exchange, and this is what came out in the rules, and I frankly spent 18 hours on Saturday reading the 600-page rule.

Mr. MCDERMOTT. Thank you.

Mr. JOST. If anybody wants to know what it says, you can go to my blog at HealthAffairs.org, and it is there.

The way the verification system works for income is the first thing, the exchange will log into the data hub, which will have information from the IRS, from Social Security, from Homeland Security. It will verify that the person is a citizen or legal resident, and the amount of income they reported the prior year.

If the income is essentially the same, there is not a problem. If they are reporting now my income has significantly decreased, the Federal exchanges, which will operate in two-thirds of the States, will ask for verification of that.

The State exchanges for the first year have the flexibility of instead doing a statistical sampling, so they will for a sample of the

people in the exchange, they will ask for verification of income, but the rest, they will not for the first year, to relieve the burden from the State exchanges.

Chairman BRADY. Thank you. Mr. Jost, perhaps we can return to you in another line of questioning. Time has expired. Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. I hate to see a dictatorship come into this country, but it sure looks like that is what is happening with health care.

Mr. Capretta, many have raised a concern of the impact of ObamaCare on the Federal Government and our budget and the criticism was there was over $1.8 trillion in spending, and many of the pay-fors were in fact budget gimmicks. They claimed the Class Act would raise $80 billion. The Administration shut it down because they admitted it was fiscally unsustainable. Congress repealed it.

The 1099 reporting requirement, an outrageous reporting requirement on business, raised $22 billion. Congress repealed that.

Both the House and Senate have voted to repeal the medical device tax because it is costing jobs and hurting medical innovation. That tax raised over $30 billion.

Now the employer mandate is delayed, lost at least $10 billion in 2014 alone in penalties. As you point out, if this never goes into effect, that is another $140 billion.

With the lack of employer reporting, there will be more errors and more subsidies so the cost of ObamaCare is just going up and up and up.

Mr. Capretta, is ObamaCare now officially a fiscal time bomb and can it be considered a drain on our economy and the American family?

Mr. CAPRETTA. Yes, the short answer is yes. It was always a fiscal time bomb. It has been made more so by the fact that the Administration is implementing something that was not passed. As you indicated, you enumerated many of the instances. There are a few more.

There is a health insurance tax that was enacted as part of this law that applies only to fully insured products but not self insured plans. It is a huge distortion in the insurance marketplace, pushing a lot of people that probably should not self insure towards self insurance to avoid the tax. Another bad idea, it probably will not survive the long term.

You mentioned the employer mandate. Obviously, at $140 billion, it looks to be in question. The individual mandate is tied to it in a lot of ways. They are thinking they are going to collect about $45 billion over the next decade from the individual mandate payments. At least in the first year, I very much question whether they can collect $2 billion.

You now have a system that it is hard to figure out whether people have an affordable offer of coverage from their employer. There is going to be a lot more people presumably in the exchanges getting subsidies that actually got an affordable offer of coverage.

Finally, you know they cut about $700 billion out of the Medicare program as part of this. They essentially double counted the

money. They spent the money in this new entitlement program and they are counting on those reserves to pay future Medicare claims.

The whole thing was built on a house of cards. It is not fiscally sustainable. This is one more element, I think, the announcement last week that shows it was built on financing that we cannot count on.

Mr. JOHNSON. Docs like to get paid, you know. I am not sure they are going to under this system. I remember when I was stationed in England in the Air Force, as you know, they have that system over there. I walked into the doc's office with my son and they said are you paying. I said yes. Come right in, ahead of about 100 people that were waiting out there. That is the way you make health care work.

Mr. Capretta, I think it is officially a fiscal time bomb. You said that. Can it be considered a drain on our economy and the American family?

Mr. CAPRETTA. I think last week's announcement by the Administration was a concession that it was. One thing that strikes me, it is quite clear that employers are going to the Administration and saying hey, this is costing jobs, if you look at the recent data, there is lots of evidence that small businesses are not growing as fast, they are moving people into part-time work.

The Administration, I am sure, is hearing this from lots of people around the country, their allies that are trying to promote the law.

If it was a bad idea to enforce this in 2014, I cannot imagine it is going to be a good idea in 2015. They are going to have a real problem, I think, justifying making this a permanent part of the law going forward.

Yes, it is a burden on the economy and frankly I think the Administration conceded as much.

Mr. JOHNSON. Thank you, sir. Thank you, Mr. Chairman. I yield back.

Chairman BRADY. Thank you. Mr. Thompson is recognized.

Mr. THOMPSON. Thank you, Mr. Chairman. Thank you for having today's hearing and thanks to all the witnesses for being here.

I do not think you can claim that anybody is excited about this delay. I do not like the delay any more than anybody else. I would suggest it is better to do the delay and to get this right than not do the delay and get it wrong.

This is important stuff. I think it is important to point out that we did not do healthcare reform because we did not have anything else to do one day. We did not wake up and say nothing is going on, let's do healthcare reform.

Healthcare reform was in response to a national crisis. I do not think we can downplay that. We had folks who were not insured. We all know that. We had people that were a layoff away from having no insurance at all or a sickness away from having no coverage at all. That is devastating to everybody, including the business community.

We had a system where we had uncompensated care costs in every hospital and every district across this country. Every one of us had millions of dollars of annual uncompensated healthcare costs to our medical providers and to our hospitals. The system was broken, and that is what we tried to fix.

It is important that we get it right. It is important that we insure folks. I believe that we are going to hit other snags along the way. I do not think there is any program of any importance where this is not going to be the case.

I know that people across this country, people in my State, in particular in California, are working very hard to make sure that affordable health care and healthcare insurance are available to people who need it.

Mr. Dennis, you talked about some business issues. What is your business? What business do you own?

Chairman BRADY. Could you hit that microphone?

Mr. THOMPSON. What business do you own?

Mr. DENNIS. Excuse me. I'm a Senior Fellow with the NFIB Research Foundation. So I——

Mr. THOMPSON. But you had mentioned some of the challenges that businesses were facing. I can tell you without question the businesses in my district want this to work.

And, Mr. Falk, you talked about the lack of information. Does your association not provide its members with help in regard to many different programs, including healthcare reform?

Mr. FALK. Absolutely. I have been to 15 to 20 different conferences that we have had.

Mr. THOMPSON. I know that local Chambers of Commerce do it. I know that other business associations do it.

Mr. FALK. Yes, yes.

Mr. THOMPSON. I have had a number of town hall meetings in my district for business folks.

Mr. FALK. Yes.

Mr. THOMPSON. For small owners to come in and get answers to these questions.

Mr. FALK. But the problem, Mr. Thompson—excuse me—is that it——

Mr. THOMPSON. Excuse me. Let me. I have got a limited amount of time.

It is important that you do have these answers, and it is important for all of us to make sure that we work to provide those.

Mr. Jost, do you see this delay in the employer responsibility provision impacting access to healthcare insurance in States like California who have been working diligently to set up their exchanges?

Mr. JOST. I do not think this will have a significant impact. I think the delay of the individual mandate would have a significant impact.

I am a consumer representative to the National Association of Insurance Commissioners and talk to a lot of regulators and insurers, and they would be very, very worried if the individual mandate would be delayed because as weak as it is, it is what is going to keep insurance markets from collapsing once we open the door to people with preexisting conditions and offer Federal tax credits to help people get insured.

Mr. THOMPSON. Mr. McDermott had mentioned that one of the reasons this was postponed was in response to business requests. I know you are not privy to discussions at Treasury, but do you believe it is fair to say that one of the reasons is that they have been hearing from businesses that they need it?

Mr. JOST. Absolutely, and I included in my testimony statement by, I think, six major associations, like AHIP, like the Employee Benefits Council, that came out strongly affirming this when it was announced.

Mr. THOMPSON. And is this unprecedented? Have Administrations delayed implementation?

Mr. JOST. Not at all. The Administration, in fact, has released a list of times when other Administrations, including the previous Administration, have delayed effective dates for——

Chairman BRADY. Thank you. Your time has expired.

Mr. Ryan.

Mr. RYAN. Thank you.

If this is not a case for the need to simplify government, I do not know what is. This law is literally just unraveling before our eyes. I do not know how you can conclude that this is not a total fiasco.

Mr. Falk, I want to give you a chance to respond in a second, but, Mr. Capretta, you are a well-known budget and policy fiscal expert, healthcare expert. Give me a sense of what the Administration was looking at as they saw this employer mandate unfolding from a perspective of what it was going to do to the economy and what it was going to do to health insurance markets.

What were the actuarial estimates, the various ranges? I know Deloitte put out a big study as to what would have happened to people with employer-sponsored health insurance once this mandate came about. If you recall, the law was sold on the premise that if you like what you have got, you can keep it.

And so, you know, for those of us who were here when this law was written, this is a law that was written which was never intended to go into law. I mean, the law as written was a Senate bill written basically on Christmas Eve with the intent to get into conference, then rewrite the law, fix it with the House, and then pass a final version.

But because they lost a Senate race in Massachusetts, because they did not have the ability to go back to the Senate again and pass an improved version, they took the bill that they wrote in duress on Christmas Eve and shoehorned that into law, which is what we have today.

And so we see all of these shoes dropping, all of this happening. What do you think the Administration was looking at? Because we will have Treasury here. We want to dig into their actuarial models and the rest. What were they looking at happening in the employer-sponsored health insurance market from your judgment because you look at the same numbers?

Mr. CAPRETTA. I think they were looking at two things. If you go back and look in 2009 and read what Dr. Reischauer said about the design of this particular employer mandate, I think the Treasury Department working with the employer community figured out it is essentially unenforceable because of the massive data requirements they are imposing on employers all across the country.

So they figured out, number one, this thing was way, way too much of a burden just to comply with it, with employers having to file these forms, filling out details about the insurance they were offering. It is a massive new burden, and employers are going to them saying, "You have got to be kidding me. We have to change

every IT system in the country to comply with this thing. It ain't going to work."

I think the Treasury Department kind of figured that out, and they said, "Look, we cannot do this. It is going to be devastating. It will be a total mess."

The second thing I think they figured out is what you are alluding to, which is that, you know, they are kind of stuck at this point though because they have this massive subsidy system going in through the exchanges, and the reason the employer mandate was there in part was because they wanted to make sure there was not a huge exodus out of the employer system. Okay?

So they put this massive system in place to say, hey, if you are of a certain size, you have go to report. You have got to provide the coverage.

Now that that is gone at least for 1 year, they may be stuck with actually it is easier for employers just to dump their people into the exchanges. Now, you know, I am not sure that that is what they are—you know, there is a lot of cynicism going around about what they are up to here, but I really do not know if that is their game plan, but certainly the employer mandate was put in there in part to create a firewall, as they called it, around the employer system and not allow leakage into the exchanges, which would drive up the budgetary cost.

Treasury has probably figured out that, look, the burden we are going to impose for 1 year on the employer system was so much it was going to cost jobs. It was going to be very disruptive. It was going to probably explode and actually not work. Therefore, you know, they were stuck between a rock and a hard place, and they picked the easy way out.

Mr. RYAN. Yes, and so we see estimates where anywhere from 20 to 60 million people could have lost their employer-sponsored health insurance over a long period of time and gotten dumped into the exchanges, and so we have the exchanges where we are, as Mr. Roy pointed out, in some cases doubling and tripling the cost of health insurance. So through the regulations we are imposing much, much higher health insurance costs on people, but we will subsidize them with taxpayer dollars. So make health insurance more expensive, and then subsidize it so the consumer does not feel the price as much. The taxpayer bears the burden. The employer has a mandate. The employer has a greater incentive to just stop offering health insurance to their employees.

Most employers are sitting around the table thinking, "Well, if my competitor is going to drop health insurance and put their employees in the exchange, all I have got to do is pay a $2,000 per person, you know, tax indexed at inflation versus, you know, $10 to $20,000 a family plan."

Once the employer makes that decision, it is not long after that their competitors will have to make the same decision and dump their employees into the exchange, and the costs are going to explode.

Mr. Johnson walked you through the charade of the Pay-Fors. I cannot see that this ruling right here will do nothing more than further explode the cost of this thing.

There is so much more I could get into, but in the interest of time, I will not.

Thank you.

Chairman BRADY. Thank you. Your time has expired.

Mr. Kind is recognized.

Mr. KIND. Thank you, Mr. Chairman.

I want to thank the panelists for your testimony here today. I think it is always helpful for us to have these discussions.

And, Mr. Falk, I especially appreciated your testimony today, you know, the challenges that you are facing as a small business owner, but to my good friend from Wisconsin, I mean, the same point could be made on the opposite side.

I was back home last week, as we all were, for the 4th of July, and I met with a small business owner with 55 employees. He says, "Ron, I am glad there is an employer mandate as part of it because as a small business owner, when I first created this business I bent over backwards to make sure that my employees had affordable healthcare coverage, and yet right now I look down the street, and I have got competitors who are not doing it."

And he is providing affordable coverage with 55 employees because he thinks it is the right thing to do. It helps with recruitment. It helps with retention, and he feels it is the right thing to do for his employees.

And, in fact, over 95 percent of businesses over 50 are already providing coverage even though there is no requirement for them to do so because they have made a business calculation that it is in their best interest for recruitment and for retention and because it is the right thing to do to try to provide healthcare coverage.

So I think the same argument can be made on the other side. Mr. Falk, you said you have 43 employees. Are you right now providing healthcare coverage for them?

Mr. FALK. Actually I have over 100 employees. It is 43 full-time equivalents, and, yes, I do provide for my full-time employees. I do not think the argument is there, the argument that you made. I think the argument is more the Band-Aid and the reporting requirements.

Mr. KIND. But you are currently providing coverage for yours?

Mr. FALK. For the full-timers, yes.

Mr. KIND. Let me just ask the panel right down the line a simple question. Mr. Roy, what is your recommendation for this Congress, to fully repeal the Affordable Care Act or to fix certain features of it to make it work better?

Mr. ROY. I think that repealing and replacing the Affordable Care Act would be an optimal policy outcome.

Mr. KIND. Mr. Capretta, what is your recommendation, to fully repeal or to fix?

Mr. CAPRETTA. I am for repealing and replacing it.

Mr. KIND. Mr. Dennis, what is your recommendation to the Congress?

Mr. DENNIS. Repeal and replace.

Mr. KIND. Mr. Falk.

Mr. FALK. If it does not get replaced enough, repeal it.

Mr. KIND. Mr. Jost.

Mr. JOST. I think that there are some things that need to be fixed, and I think they can be fixed if this Congress would set its mind to that task.

Mr. KIND. My dad probably gave me the best political advice as a young kid growing up. He said, "Son, you are going to face two critics in life, people who criticize you because they want to see you do better and those who criticize you because they want to see you fail."

I think that is the major obstacle that the Affordable Care Act faces today, is there is so much opposition for political reasons alone to see that this thing fails and not whether it is going to help small business or help Americans throughout the country, and that is the real tragedy with these type of hearings and the discussion that we are having under the Affordable Care Act today.

Mr. Dennis, you are a representative of the NFIB. Every year I introduce the SHOP Act, which became the basis of the health insurance exchanges. The NFIB was fully supportive of it. We did not have an employer mandate as part of the legislation, but when I introduced the bill there were an equal number of Republicans and Democrats that supported it.

And now, Mr. Jost, we have had seven States now report back on what the rates would be for small businesses entering the SHOP exchanges, and they are coming in below what current rates are, and it is because what the exchange does is it sets up competition and transparency, finally empowering small businesses to have the same type of leverage that large businesses have today.

Mr. Dennis, do you know what percentage of your membership at NFIB have 50 or fewer employees?

Mr. DENNIS. Fifty or fewer?

Mr. KIND. Yes.

Mr. DENNIS. Probably dealing with about 85 percent, something like that.

Mr. KIND. I have got a chart. I guess we ran it off, your membership list in that, but it showed those with 40 or more employees is roughly a little bit less than 7 percent of your members.

Mr. DENNIS. Yes.

Mr. KIND. So around 93 percent of them are below 50 employees.

Mr. DENNIS. That is correct.

Mr. KIND. So they are not even going to be impacted right now on the employer mandate; is that right?

Mr. DENNIS. No, that is not correct.

Mr. KIND. And what type of information are you sending out to those members in regards to the Affordable Care Act today?

Mr. DENNIS. Well, we have basically a whole series of programs where we try and disseminate information to the members, printed as well as calling and conference type things. We send staff out.

Mr. KIND. Good. I am glad you are doing that because there is a whole lot of misinformation being sent out misinforming people, I think, deliberately again to scare them and to make sure that this legislation fails.

Mr. Falk, are you also a member of NFIB?

Mr. FALK. No, I am not.

Mr. KIND. Okay.

Mr. FALK. Sorry.

Mr. DENNIS. That is all right.

[Laughter.]

Mr. KIND. I did not want to put you on the spot next to Mr. Dennis at all now, but Mr. McDermott did point out we have got healthcare.gov. We have got SBA.gov. There are a lot of sites that small businesses can go to get just the facts, and that is what I am hearing from folks back home more than ever. We just want the facts of what is happening and what we need to do to prepare for what is coming up.

And so if we can just focus on that and have honest conversations like we are trying to have today, I think all of us would be much better off.

Thank you, Mr. Chairman.

Chairman BRADY. Your time has expired.

Mr. Nunes.

Mr. NUNES. Thank you, Mr. Chairman.

I will just say that Republicans want health care to be successful. They want the American people to have good quality health care, and what we see this as is not about some political issue about having the bill fail. We see this as definitely something that leans toward socialism, and socialism has been known around the globe to fail time and time again.

So I remind my friends on the other side of the aisle, as you may remember from the 2010 debate, these were the claims that we were making, was this was trying to centralize the healthcare system in Washington which has failed around the globe.

We want to improve health care. Now, I have a question that I am going to give to Mr. Capretta and to Mr. Jost. I do not know what part of the law the Administration is using to allow to just say that this mandate on the employer side can just be ignored, and I do not know why my friends on the other side of the aisle are not insisting that the letter of the law is followed.

So Mr. Capretta, do you know what waiver that they used, what part of the Affordable Care Act or ObamaCare was used? What are they citing to essentially waive this requirement?

Mr. CAPRETTA. In the blog post that has been referenced, they cite the reporting requirements is where they are going for a delay. So they are not actually going into the structure of the mandate itself to say it can be delayed. They are going to the section that requires employers to report on what they are doing regarding health insurance.

But there has been an inquiry sent by your leadership in the House to the President and his team asking that very question. I think they have been asked by the press, and they have not responded yet. So I do not know. There has been no official response from the Administration about their legal reasoning about how they could do this.

Mr. NUNES. What is your personal opinion, Mr. Capretta?

Mr. CAPRETTA. My personal opinion is that—well, I am not a lawyer. Let me stipulate that. Mr. Jost is a lawyer. So he can answer some of the questions about the legal part of it, but I think it is quite obvious on its face this is not what Congress intended. Whatever the legal, you know, however they might stretch some of

the statute to say, "Well, you know, we can interpret this," this is not what was intended.

I mean, obviously the employer mandate was supposed to go into effect in 2014. They established a reporting system that was supposed to go into effect in 2014. If you read the statute, it is pretty obvious that is what was intended, but you know, I do not know whether they can stretch the language to do something different.

Mr. NUNES. Thank you, Mr. Capretta.

Mr. Jost.

Mr. JOST. There was a CRS report on this yesterday, and it referenced an earlier CRS report that referenced the Trap case, which is the leading case in this area.

The IRS is relying on its general rulemaking authority, and what the Trap case said, which is a D.C. Circuit case which is the leading case in this area, is that when a question rises as to whether an Administration can delay enforcement of a law, it is subject to a rule of reason. Where Congress had provided a timetable or other indication that may supply content, although in the D.C. Circuit and several other circuits the courts have held that that does not make an absolute requirement.

But other things that can be considered are whether it would damage human health and welfare, whether the court should consider the expediting delayed action or other agency activities of the higher and competing priority, in other words, resource constrained; what are the interests that would be prejudiced by the delay.

So I think looking at the judicial legal authority here, I think that they do have some room.

Mr. NUNES. Okay. So unions have been granted waivers. Other special interests have been granted waivers. Now you have done an employer waiver. Why can you not do an individual mandate waiver?

Mr. JOST. Well, in fact, in the first place, I am not sure what you are referring to with respect to unions. There was a waiver that was included in the statute for a delay of the annual limits requirement, and some unions received a delay under that, although a lot of businesses did as well.

Mr. NUNES. So let me——

Mr. JOST. Can I just finish?

Mr. NUNES. Can the White House grant an individual waiver? That is my question.

Mr. JOST. The statute——

Mr. NUNES. For an individual mandate.

Mr. JOST. The statute permits a hardship waiver and in regulations that were published about a week or two ago, the Administration interpreted that very broadly. There will be many, many people who will qualify for a hardship waiver, but of course, there are already, I think, seven or eight other exemptions, including an exemption for everybody who cannot afford coverage.

So the individual mandate has been very widely misunderstood. It is not a requirement that applies to everyone.

Mr. NUNES. So why not just do an individual mandate waiver also at the same time?

Mr. JOST. Because people who can afford health insurance ought to buy health insurance. They ought not to wait until they get sick and then assume that their neighbors will take care of them. It is an individual responsibility requirement, is what it is called.

Mr. NUNES. Mandated by the government. That is not individual——

Mr. JOST. Yes, just like—just like——

Mr. NUNES [continuing]. Responsibility or individual liberty. That is socialism.

Mr. JOST. Just like government requires that you get car insurance.

Mr. NUNES. Yield back.

Chairman BRADY. All time has expired.

Mr. Pascrell.

Mr. PASCRELL. Yes, Mr. Chairman.

When all else fails, then you have got to send up the red flags: socialism, apocalypse now. And we heard it again just recently.

Well, I resent the fact that, first of all, you accused those folks who sat hour after hour in putting the legislation together of doing a Christmas Eve swing. Months after months, listened to many people on this issue.

Is this perfect? There is not a piece of legislation that ever came through this body that was perfect. So we need change. You cannot deny that ObamaCare—we will use your term—is helping millions of Americans. Do you want chapter and verse? I will give it to you.

You cannot deny that most employers offer health insurance even without a mandate, and small businesses will be exempt.

You have no ideas on health reform yourself. In fact, those you put before the Congress your own party rejected. So you cannot have it both ways.

More important, more important, it is better to be right than fast. And, Sam, you know that better than anybody on this panel.

Things change. Things need to be corrected. So, Mr. Falk, when you say that the information is not existing, I will give you the information. We have got it in print now.

Mr. FALK. I did not say it did not exist, sir.

Mr. PASCRELL. Well, it is here.

Mr. FALK. I agree.

Mr. PASCRELL. It is interesting. In fact, on the first page of the regulations that you referred to, you have not looked at anyway. It is a very interesting part of this legislation, the medical loss ratio. Do you know what that is, sir?

Mr. FALK. No, I do not, sir.

Mr. PASCRELL. Let me tell you what the medical loss ratio is, and that is insurance companies now must provide and spend a specified percentage of premium dollars on medical care, which they never had to do before. This is very critical to everybody.

There are a lot of good things in this legislation. I am glad you are the only panelist on the left of Mr. Jost. That said, well, if it cannot be fixed enough, then maybe I would repeal it.

This is all about repeal. They do not want to change it. They want to do away with it. The election is over. The Supreme Court decision has been rendered. But we are going to continue to try to

do away with this entire piece of legislation, which is reforming health care.

Now, Mr. Roy, the more than 95 percent of businesses are small businesses. They have got fewer than 50 employees that would not be subject to this mandate. Do you agree with me so far?

Mr. ROY. Not subject to this mandate is not a static term because businesses grow and——

Mr. PASCRELL. Do you agree with me or disagree with me.

Mr. ROY. I disagree with you.

Mr. PASCRELL. Good. An approximately 200,000 large businesses with more than 50 employee are subject to the employer responsibility requirement. Of these 200,000 large employers, at least 95 percent already offer health insurance to their employees.

Do you agree with that statement, Mr. Jost?

Mr. JOST. Yes.

Mr. PASCRELL. You agree.

Do you agree with Mr. Jost?

Mr. ROY. I do agree, but as I mentioned that does not mean that all of those employees are covered.

Mr. PASCRELL. And what do you mean by that?

Mr. ROY. Ninety-five percent or 97 percent, as I mentioned in my remarks, 97 percent of businesses with greater than 50 or more employee do offer health benefits, but not necessarily to all employees. A significant number of the uninsured are actually people who are employed by those firms.

Mr. PASCRELL. Mr. Jost, do you think that it seems likely that employers who currently offer coverage right now would start dropping their health insurance all of a sudden?

Mr. JOST. No.

Mr. PASCRELL. Why not?

Mr. JOST. Particularly if they know that it is going to come back in 2015.

Mr. PASCRELL. This is all I have been hearing over here, but why do you not think so?

Mr. JOST. Well, number one, the main reason employers offer health insurance to their employees is for recruitment and retention. Employees expect health insurance.

Another reason is that there are huge tax subsidies that are already there, which was mentioned by Mr. Capretta and Mr. Roy.

Mr. PASCRELL. Yes.

Mr. JOST. If we wanted to have the largest tax increase in American history by abolishing the employer tax deductions and exclusions, we could talk about that. I am not sure that many Members on this Committee want to do that.

Mr. PASCRELL. I would.

Mr. Roy, do you agree with Mr. Jost?

Mr. ROY. I do agree that it would be desirable to move away from an employer-sponsored system to an individually-sponsored system.

Mr. PASCRELL. Thank you very much, Mr. Chairman.

Chairman BRADY. Thank you.

Mr. Roskam.

Mr. ROSKAM. Thank you, Mr. Chairman.

So are we looking for perfect in response to my friend from New Jersey? We are not looking for perfect. We offered 30 amendments when we were in the minority that were swatted away by the majority late into the night, not considered, not adopted. Many of them were thoughtful attempts to improve the bill. So we are not looking for perfect.

What we are looking for is even a reasonable characterization of what was promised. What was promised to the American public by the President of the United States was you get to keep your physician. If you like him, you get to keep him. Do you remember that? That is not true.

Average healthcare costs per family are going to go down $2,500 a year. Do you remember that? That is not true.

So we are looking for a reasonable assimilation of the representation to the public by the President of the United States and his Administration during the course of the debate. That is long gone. That is far in the distance. That is never going to happen.

And so now here we are, and we are debating and we are considering what is clearly an embarrassment. And it is an embarrassment that we could see a foreshadowing of it when then Speaker of the House Nancy Pelosi said this out loud. She said, "We have to pass this bill so that you can see what is in it." Wow, she just does not disappoint.

And here we are. So now we have got a situation where essentially the Administration for years has been pumping sunshine. For years the Administration when asked, "How are you doing this exactly? How is this great feat coming to fruition?" and this Committee and in all sorts of public representations has been told, "It is fine. It is great. We have got it under control. In fact, we have got a wonderful plan for your life, and it is going to be absolutely terrific."

And now what happens? Later before a holiday weekend the Administration on a blog post essentially whispers, "It is not working. Oops. This is a mess."

Yeah, but you know what? You may not be able to hear me, but the whole country heard that whisper, and it was a blog post. We were admonished a couple of minutes ago to go check Websites. Go check Websites? It is ridiculous.

So now here we are, and I have a prediction to make. My prediction is this, that the ObamaCare statute, the Affordable Care Act as it has been enacted is unsustainable. It is unsustainable because of a whole host of reasons. The architecture is fundamentally flawed, and it is an edifice that is now wavering.

And one of two things is going to happen. Many of the proponents, not all, but many of the proponents of ObamaCare, actually their heart's desire is the single-payer system, and they will tell you that. They admitted that during the course. They could not get single-payer. Their fallback position was the public option. Could not get the public option. Fallback position was ObamaCare. That is their heart's desire, a single-payer system.

That is one way that this could go. The other way it could go, and it is my hope that it goes in a very different direction, and that is toward a consumer-oriented healthcare system. So do we want

to repeal this? You bet your life. Caught red-handed, we absolutely want to repeal this. We want to replace it.

The red herring argument that we heard a couple of minutes ago from my friend from Wisconsin, Mr. Kind, was that somehow a desire to see something fail is somehow unjust. No, what we want, as Mr. Nunes said, is we want to see health care improved, but we have got a far different vision, a vision that was blocked out during the debate in this Committee in this room late at night during the debate on ObamaCare, but now it is coming to fruition, and we have got an opportunity to remedy this.

And my sense is that the public is waking up. The public has an awareness there was a false claim, and they want to redeem now that false claim and revisit the false representation that was made to them, and it is their hope that this Congress is part of that solution, and I have every confidence that we can do this, that we can have patient-oriented, consumer health care that empowers patients and physicians to meet one another and have an absolutely terrific system without big government telling us what is right and what is wrong.

I yield back.

Chairman BRADY. Thank you.

Mr. Rangel.

Mr. RANGEL. Thank you, Mr. Chairman, for the courtesy that you have extended in allowing me to participate in these very, very important hearings.

And to my friend and colleague, Mr. Roskam, I join with the sunshine pumpers, and I think that is what all of us are. We really try hard to improve the quality of life for Americans, and we have these hearings to see whether or not there are storms or impediments, to see whether or not we are doing the right thing.

And so I want to welcome all of you to come to help us to make certain that if we are on the wrong track, you can help us by improving the work that we are doing as a Congress.

Now, it is my basic understanding that with the exception of Mr. Jost, the other four witnesses support repeal. So there are no sunshine pushers there. You believe that we ought to get rid of this, and I assume out of the four, with the exception of Mr. Falk, right now none of you have a small business. You do not make payrolls and you do not have responsibilities for healthcare and pension benefits for anybody; is that correct?

And I would assume further that you are not just volunteering your thoughts. The three of you are experts in what you do unlike Mr. Falk, and you get paid for what you do the same way doctors and lawyers get paid. Calling you lobbyists would not be a stigma. It would be just a label as to what your business is. Am I correct in that assumption, Dr. Roy?

Mr. ROY. No. I am not a lobbyist. I am a Senior Fellow with the Manhattan Institute, which is a nonpartisan policy research institute, where I have actually articulated alternatives to the Affordable Care Act that would provide universal coverage.

Mr. RANGEL. So you do not get any compensation—no, no. You are extremely qualified in research. I read that, but you do not get paid to take a position? In other words, you would not be here, your firm, the research outfit, if you were supporting or trying to

improve the health care. You are here basically, your income is based on the fact that that is your professional position. I mean, you are not a doctor. You are not——

Mr. ROY. I would strongly, strongly disagree with you. I have articulated——

Mr. RANGEL. Do not disagree. Just say what it is.

Mr. ROY. Yes, I am sorry. My position——

Mr. RANGEL. I am asking.

Mr. ROY. My positions are on the record. I write them every day on the Internet. I have not only advocated——

Mr. RANGEL. I am asking you whether you get paid for advocating your position. That is all. I do not doubt that you are professional with it.

Mr. ROY. I do not get paid to advocate any particular position. I——

Mr. RANGEL. Well, when you were working for the person that was running for President, did you get paid for advocating a health position with him?

Mr. ROY. No, I did not.

Mr. RANGEL. You are a volunteer professional.

Mr. ROY. I volunteered for the Romney campaign, yes.

Mr. RANGEL. But I mean in the positions that you take on health care, you do not get compensated for it.

Mr. ROY. I do not get compensated for taking any particular position on any particular piece of legislation.

Mr. RANGEL. So what you are doing is volunteer contribution you are making to help us on the Committee and others to understand your position. You are not a doctor, but you do have a professional position, right?

Mr. ROY. I have articulated my view about the Affordable Care Act. I have done so here today

Mr. RANGEL. And you have done it eloquently, but the only person I am concerned with is Mr. Falk because it appears to me that it is his opinion that would help us understand better what we have done and how we can do it better.

And incidentally, I am an infantryman and my son is a Marine, and so I cannot say anything unkind except Semper Fi because you guys in the Marines, I want to thank you for your service, but whatever they put in your water, I can understand that you are just as excited about your business as you have been for serving our great country. I want to thank you for your service.

Now, with all of the people that you hire, approximately part-time and full-time, what is the breakout of that? I know you have more part-time than full-time.

Mr. FALK. Absolutely. Probably about 15 percent of my employees are full-timers, but that is by choice. Most of the people that I employ are first time employees. They are high schoolers, college kids.

Mr. RANGEL. No, I know, but if you needed full-time, you would hire full-time.

Mr. FALK. Absolutely, and I offer most of my employees——

Mr. RANGEL. Supply and demand.

Mr. FALK [continuing]. As many hours as they want.

Mr. RANGEL. Okay. But you said that those who work full-time, the 15 percent, they get health care.

Mr. FALK. I offer health care to them.

Mr. RANGEL. They accept it.

Mr. FALK. Not all the time.

Mr. RANGEL. But you offer health care not because you are a nice guy. It is a part of good business, is it not, to make certain that the workers have access to health care?

Mr. FALK. It is because I am a nice guy, and it is good for business. It is about providing an opportunity for my employees. I want to take care of them because they are very valuable to me.

Mr. RANGEL. So if we——

Chairman BRADY. Thank you. All time has expired, Mr. Rangel.

Mr. RANGEL. Could I just ask one concluding question, Mr. Chairman?

Chairman BRADY. Perhaps we can follow up or we can submit in writing.

Mr. RANGEL. That means that I cannot ask the question.

Chairman BRADY. That would be the correct assumption.

Mr. RANGEL. All right. Thank you, Mr. Chair.

Chairman BRADY. I would also like to point out for the record, your qualifications, none of yours are in question today. You may have different views and different beliefs, but you are here because you care about the issue. You are expert in the issue. You are impacted by the issue, and on behalf of the Committee we are pleased that you are here with us today.

Mr. RANGEL. And I want to join with the Chairman in his observation.

Chairman BRADY. Thank you.

Mr. Gerlach.

Mr. GERLACH. Thank you, Mr. Chairman.

First, Mr. Roy and Mr. Capretta, a macro questions if we can. We have not talked too much about this during this hearing, but since the enactment of ObamaCare to this point when this employer mandate has been temporarily suspended for a year, what do you think the overall impact of the enactment has had on GDP growth relative—and also add in Mr. Dennis as well for NFIB—what is your thought on the impact of the slow growth we have had in the GDP over the past few years relative to the implementation or the proposed implementation of this enactment?

What impact has it had on the decisions of our business, our job creators relative to their decisions to hire and expand?

Mr. CAPRETTA. Well, I do not think I have seen an academic estimate of that. So, you know, it is necessarily a subjective kind of responsive I am going to have to give.

There has been a lot of information coming through the system even at the Federal Reserve level where they have noted that employers are responding to the incentives of the healthcare law by limiting the hiring they are doing. So if the direction is clear, it is negative, but the size and quantity of it, you know, that is a little bit harder for me to put a number on that.

I would say that there have been many reasons why the economy has performed poorly in a certain sense in this post-recession period, but this is certainly one of the reasons.

Mr. ROY. I would add that what we have seen is a substantial shift from full-time employment to part-time employment. So we have record high numbers of people who are part-time workers and lower and lower numbers of full-time workers, and that is a transition I would expect to continue as small- and medium-sized employers wrestle with the employer mandate, another reason why it would be a great policy to repeal the employer mandate.

Mr. GERLACH. Mr. Dennis.

Mr. DENNIS. Now, we keep data and produce it monthly on the status of the small business economy, and it has been quite clear that over the last few years things have not gone well. The difficulty is—and that is all since 2010—the difficulty is trying to pull out what is actually the macro economic issues from the problems put forward by ObamaCare. We simply just cannot tear them apart as to which is which.

Clearly, it has had some impact on their general view of the requirements that are before them and the costs that are before them. We do have some data suggesting recently that they are becoming increasingly concerned about political issues rather than economic issues as an impediment to their growth.

Political is a very wide term and it could be a whole series of things.

Mr. GERLACH. Mr. Falk, you indicated that you think it is important to provide health insurance to your full-time employees, and you also indicated that your part-time employees are offered the opportunity to work more hours if they want to.

Does that working more hours at some point lend to the prospect that you might get to a point where you would hit the 50 full-time employee threshold, and if so, what that then means in terms of your ability to conduct your businesses, your 12 units?

Mr. FALK. Well, it definitely is something I take into consideration. At my current size, I do not think that I will go over that threshold immediately.

Mr. GERLACH. And what has been happening with your current insurance premiums over the past few years for the health insurance you are providing your full-time employees? Has that been steady?

Mr. FALK. No.

Mr. GERLACH. Have they been going down?

Mr. FALK. Every year it has gone up. I mean, it is true. I mean, it is not a myth out there that my insurance premiums for my employees that we share the premium, where I still pay the majority, it costs me more and it costs them more every year.

Mr. GERLACH. And can that be tied to the continuing pressures of the ObamaCare requirements that the health insurance industry continue to pay a billion dollars' worth of assessment to the Federal Government each year, which in turn gets passed on to the employers that pay those premiums to the insurance company, the lifting of the policy cap part of the enactment, the extension of coverage to those 26 years of age; do you think all of those factors as they continue under ObamaCare lend themselves to increasing premiums for the job creator on the street?

Mr. FALK. No, Mr. Gerlach, I do not know. Mr. Rangel is very good in pointing out that all of these other panel members are ex-

perts in what they do in health care. If I were to tell them that they have, you know, until July to get 12 businesses up and running and there was a Website out there that they could go to figure it out, I am sure they would be overwhelmed as well.

So this takes up all of my time right now.

Mr. GERLACH. Very good. Thank you. I appreciate it.

Chairman BRADY. Thank you.

Dr. Price.

Mr. PRICE. Thank you, Mr. Chairman, and I want to commend you for holding this hearing.

This is a remarkably important topic as we move forward with the calamity that is confronting the country right now.

Just to set the record straight, Republicans are for health reform. We are for positive health reform. We are for reform that recognizes that patients and families and doctors ought to be making medical decisions and not Washington, D.C. So there are wonderful, positive solutions. I am sorry my friend from New Jersey has left, but I will remind him once again, as I did in our last hearing, that H.R. 2300 is there for his perusal, and I would encourage him to take a peek at it. It embraces those positive solutions.

Mr. Kind talked about this being all about politics. Well, now, you talk about politics. Here is an announcement from the Administration coming out on a blog post from the IRS, a blog post. So now we have governance by blog post, I guess, that delays the reporting requirements. It does not delay the law. It delays the reporting requirements for employers for a year that just so happens to fall after the 2014 election. Talk about politics.

I would encourage my friends to open their eyes to the political activity of the Administration.

Mr. Jost, you said, "If you actually care" you would throw more money at this program. Well, with all due respect, if the individuals who wrote this law actually cared about the health care of this country, they might have investigated the consequences for physicians taking care of those patients, as I did for over 20 years. They might actually have talked to folks like Mr. Falk, who are out there trying to run a business and create jobs instead of doing what we have clearly identified and has been actually admitted to by folks on the other side of the aisle when they are honest behind closed doors that this was not to be the final product, as Mr. Ryan talked about again.

This is a delay in the reporting requirement. This does not change the law one iota, not one iota, and so, Mr. Falk, I want to commend you for what you are trying to do out there, to navigate the remarkable waters of this destructive law.

You mentioned in response to Mr. Thompson, and I had a question. You said there was some concern about getting information and you were having difficulty doing that, and he did not allow you to respond. I would like to give you an opportunity to present the challenges that you have got in getting information.

Mr. FALK. Right. One of the things I wanted to respond to him about was I have been to 15 to 20 different conventions, and we have had a briefing about health care every time, but every time it is a different briefing. That target continues to move, and with

every new policy or extension or waiver or consideration that they are giving to somebody else, I still do not know what to do.

And he is right. Yes, there is a Website out there, healthcare.gov. It just got announced publicly a couple of weeks ago. I understand that, and I will go there, and I will look up all of the information I can.

But, see, I am engaged. I am here. I do all of these events. I do all of these conferences on business. There is probably 75 percent of small business owners who have no idea what is going on. They do not know about healthcare.gov.

Mr. PRICE. I can say I have been to healthcare.gov. It is wonderful, beautiful site, but it does not do a thing to assist you in trying to figure out how you are supposed to comply with the reporting requirements that have now been delayed.

When you spend all of this time trying to comply with government regulations like this and rules that are incomprehensible, what is the consequence to your employees and to your business and to job creation?

Mr. FALK. Well, again, all of these guys are experts, but they really are not creating any jobs. I am trying to create jobs and grow my business, but right now I am fortunate enough to be a large enough small business owner that I have an operations manager and I have an administrative assistant, but I do not have a government relations person on my staff, like maybe Microsoft or Boeing has as Mr. McDermott talked about earlier. So I have to shoulder all of these burdens to find out what is going on with health care and how it is going to affect me, my employees and my business.

My business is what provides me an income for my family, the profit that I make. So if these costs continue to take out the profit, I am going to decide either to not grow or to close some of my lower-performing units because they are just not going to make enough money, and therefore, it is going to take jobs away.

Mr. PRICE. Take jobs away, exactly.

Mr. FALK. Yes.

Mr. PRICE. Mr. Roy, I want to touch on the point that you were making about part-time workers. I have had employers in my community tell me they are decreasing the number of full-time workers to part-time workers because of this law. In fact, 322,000 increase in part-time workers, involuntary part-time workers to 8.2 million in June.

Can you describe the consequences that are happening in the real world, bringing about increasing part-time workers and how destructive that is to jobs?

Mr. ROY. You know, we have heard a lot of talk today about what the right thing to do is or what employers would do if they care. We have not heard a lot about what the incentives are, and the incentives are very clear with the employer mandate. It is to restructure to part-time workers because then you do not have to offer coverage to those part-time workers. That is just the plain as day economic incentive in this law and that is what will drive activity.

Chairman BRADY. The time has expired.

Mr. PRICE. Thank you, Mr. Roy.

Thank you.

Chairman BRADY. Thank you.

Mr. Buchanan.

Mr. BUCHANAN. Yes, thank you, Mr. Chairman.

I wanted to mention as someone who has been in business 30 years before I got here that we have two chambers in our area, about 2,000 each in Sarasota and Manatee Counties. Ninety-three percent, 90 percent are 50 employees or less. The Florida chamber, I was very active with them, 137,000 businesses in that chamber, 93 percent or less 50 employees or less.

The number one issue, not in the last 3 years; I would say in the last 13 to 15 years, and I would be interested in your comment on this, Mr. Dennis; the number one issue is the rising cost of health care. In our area, we had one employer that has been somewhat successful. His costs last year, a larger employer, went up $1.5 million.

But the other end of that spectrum that I deal with mainly when we do town halls, and we all do town hall meetings, one woman stood up and she said, "I have six employees. My healthcare cost has gone from $1,000 to $2,000 for a family of four."

That is the thing that is crazy. It is unbelievable. They said they were going to cut the cost 25 percent. I am just looking at reality with a lot of businesses. They get their bill every year. I had a pharmacist that I walked in the other day. His bill came in, 27 percent increase. He negotiated out 12 percent. The employees are kicking in more. The coverage is not quite as good. So they get it down to about 12 percent, but that is the reality.

This is doing nothing to bend the cost on health care in the last 3 years even though it was supposed to come down 25 percent.

Mr. Roy, I want to go to your point, one point that you made, because that is what I see in our area, and that is the uncertainty that people are feeling about not expanding, not growing, and not creating jobs.

But you said that healthcare cost already has or is going to double or triple. Is that what you said or how did you say how healthcare costs are going up substantially? And then give me a little more background on where you are getting your information from.

Mr. ROY. Well, healthcare costs, the cost of health insurance is increasing for everyone, but it is going to particularly increase for people who shop for coverage themselves, the so-called individual or non-group market. That is where the Affordable Care Act's heavy regulation of the individual insurance market will drive up the cost of insurance plans in that market by two to three times for some workers, and on an average it seems like it is——

Mr. BUCHANAN. So you are saying a worker might pay what now, based on your numbers, and what are they going to pay in somewhat the future?

Mr. ROY. So, for example, in the State of California where I have done extensive research, the average increase for unsubsidized individuals shopping for insurance in the non-group market will increase by about 70 percent.

Mr. BUCHANAN. That is what I am hearing.

Mr. Falk, I want to just first applaud you because we need in this country to be competitive with China and India more start-ups, more entrepreneurs, more people willing to take risk, more

people who are willing to sign a note at the bank and put everything at risk. So I applaud you and what you are doing.

But you said something about planning, and everybody that is in business or I have always done some kind of planning, but one of the factors is the uncertainty factor. One of the factors is cost going forward for employees.

It used to be someone said the other day in his business 22 percent. Now when you hire someone for 50,000, you have got to figure almost on 40 percent in terms of his experience, but in terms of your business, how many jobs do you think maybe you have not created or businesses you might not open as a result of dealing with the uncertainty?

Mr. FALK. Well, as I said, from 1998 to 2008, about one and a half locations per year on average; from 2008 until today, 5 years, I have only opened up two locations, and that was just last year.

So I would say that, you know, I probably could have opened up another six to eight locations. As I get bigger I can probably move a little bit more aggressively because I have more assets, but I have chosen not to do that because of the uncertain economy and all of the regulation changes that happened, not just with the ACA, but with taxation and everything else, but the ACA is the most important regulation right now that is on my mind.

Mr. BUCHANAN. Thank you.

Mr. Dennis, I was going to mention you said multiple entities. How many? Is that a huge issue within the NFIB or is that in a list of five or six things more at the bottom of the list?

Because I have got a lot of people where their wife owns a business and they own a business and it is family related. Their son has a business, and they are very, very concerned, again, about the uncertainty.

Mr. DENNIS. Well, the truth is we do not know exactly how big it is. I think it is what I call a sleeper issue because we just do not know exactly how broad this extends. For example, of all small businesses that have 20 or more employees, there is only about 35 percent of those that have a single owner. Most of them have multiple owners.

And then you talk about business owners themselves, and 39 percent of them own multiple businesses, and they do this in combinations, and of course——

Chairman BRADY. Your time has expired. I am sorry, Mr. Dennis.

Mr. BUCHANAN. Thank you, Mr. Chairman.

Chairman BRADY. You are welcome.

Mr. Smith is recognized.

Mr. SMITH. Thank you, Mr. Chairman, and thank you to all of our witnesses today. I know that you have a great perspective and expertise on both sides of the issue, and these are discussions that I think are healthy and need to be had.

We know that the American people want our healthcare systems to work. There is growing skepticism that the more the government gets involved, the more expensive it becomes, and actually people can be harmed, and that is a growing concern and one that I think we all share.

Mr. Jost, you are an expert on the President's healthcare bill, and I appreciate that. I think you have probably studied that a great deal. This component that we have discussed here today we are told is not ready for enforcement, and do you think there are other components that might share the same view of yours or are there other parts that perhaps you think need to be delayed as well?

Mr. JOST. Well, I think that the Administration right now is in a triage mode. Seriously, they do not have the resources to implement all of the provisions on time.

Mr. SMITH. So it is a lack of resources?

Mr. JOST. Much of it is a lack of resources. Another part of it is the way this law was intended to be implemented, the States were going to take much of the responsibility. For political reasons, the States have declined to do that. So the Administration has ended up with a much bigger job than they otherwise would have had.

So I think they are under a lot of pressure. I think they are trying to decide what needs to be done right now, what can wait a little bit.

There have been a couple of other provisions. Another provision that relates to business is the nondiscrimination in favor of highly compensated employees provision, which says that for businesses who are insured, they cannot offer a better package to their highly compensated employees than they can to their lower compensated employees. That raises a lot of difficult issues which we could probably spend another hearing talking about, but they have said that provision fortunately says nothing happens until they put out regulations.

So they are trying to figure that out. That is going to interface with this one. So I think that they have decided—they do not talk to me any more than they talk to you—but I think they have decided just from my observation that they are going to focus on what is absolutely essential, which is the premium tax credits, the individual mandate to keep the insurance markets from collapsing, getting the exchanges up and running, and things like the employee——

Mr. SMITH. Now, when you say the premium tax credits, is that the small business tax credit that I constantly hear from folks back home that it is so complex?

Mr. JOST. No, this is the individual tax credit. The small business tax credit is already out there.

Mr. SMITH. Do you feel that a lot of small businesses are eager to take advantage of that and find it to be an efficient use of resources?

Mr. JOST. A nonprofit that my wife is on the board of has taken advantage of that and has found that it has allowed them to extend insurance to their employees. A lot of other small businesses have, but you are right. Many have found that it is really limited to small business, very small business with very low wage employees. So it does not apply to a lot of small businesses.

But I think the Administration is moving ahead with the resources they have and the time they have to do the essential,

which is to get health insurance to people who are uninsured and who need health care.

Mr. SMITH. Thank you.

Mr. Dennis, if you could reflect a bit perhaps on the small business perspective on this small business tax credit, the feedback I get from constituents is that it is much more hassle than it is worth, and it only adds to the complexity of our already very overly complex Tax Code.

Mr. DENNIS. Yes, the small business tax credit, I do not know whether I want to call it totally a fiasco, but it really has not done very much, and the good part of the reason was that it was not structured very well, I think, and it is very complex.

The second one is that it is a bit of a bait and switch in the sense that it brings you in and gives you credit for a while, and after a while it goes away. So it gives you this incentive to make an obligation, if you will, and then once you have made the obligation and gone on for a year or two, then it is gone.

So it has not been successful in the sense of very few people or very few businesses have taken advantage of it. There have been a few businesses that have taken advantage of it. In all likelihood they would have been offering health care anyway, but it was apparently enough of a stimulus to help out a little bit.

Mr. SMITH. Okay. Thank you. I yield back.

Chairman BRADY. Thank you.

Mr. Kelly is recognized.

Mr. KELLY. Thank you, Mr. Chairman, and I thank the panel for being here.

I especially want to talk to Mr. Falk, because I am also a small business person, but I think that when you look at this whole activity that is taking place right now, and I think the piece that is missing more than any other is the relationships that you build with the folks that work with you. Being an employer and having associates, we have about 110, 115 people at any one given time, but the relationship is a lot different. I am an automobile dealer. It is not a front end machine. It is not a piece of equipment. It is a person, and what we are talking about today is people.

We are talking about is it fair for everybody. Does it make sense for the American people? Is it really providing what it was supposed to provide? And because the infrastructure cannot be put in place, now it is being delayed, and being delayed. It is not being waylaid. It just being delayed.

Because people need to understand. You as an individual, and Mr. Rangel said something about you. You are a good guy, and I am sure the people that you paid—we pay every 2 weeks, on the 6th and 21st actually—they think I am a good guy, but only if I can pay them, and they do not work for me because they like me. They work for me because they like me, but they additionally can provide for their families.

This piece of legislation though has made it so difficult for people that get up every day and do not walk into Congress, but walk into their business, that have to worry about payday and have to worry that you have got to sign the front half of the check so that your employee can sign the back half of the check, and doggone it, that had better be able to work.

I think what is missing here, and I really find it unusual that an outfit that is running $17 trillion in the red is able to sit down and give anybody business advice. Give me a break.

Now, most of the things that we run, small businesses are not only family-owned. They are family-operated. Tell me about the people because I have got to tell you. I have been to baptisms. I have been to first communions. I have been to weddings. I have also been to funerals. So we follow each other the whole way through life. These are people. These are people that we get to know. They are part of who we are, and that is what makes us successful.

But this law separates you. You are no longer able to be a good guy. You are a guy now that is keeping them from attaining something because the government mandated that it be done. Now, you do not want the employee mandate? No, you do not have to worry about that. Why? It is not because small businesses asked for it. It is because there is no infrastructure in place to handle it. Come on. Be a little bit honest about this, right?

And I think the American people have witnessed this, and they now know that if it waddles like a duck and quacks like a duck, it is a duck. This is a bad piece of legislation that does not serve its purpose, and some of my colleagues said ahead of time if you like what you have, you can keep it. If you like your doc, you can keep it. I am 65 now, and if I want to sit down with my kids and decide what my medical future is, forget that deal. That is not going to happen.

But now the individual mandate is still in place. My question to you because you live with these folks; you work with them every day, and when you said you worked how many hours a week?

Mr. FALK. In the 80 hours.

Mr. KELLY. Eighty, and I know on 4th of July because we are open 4th of July, too.

Mr. FALK. Yes.

Mr. KELLY. But it is not just about that because we know when you run your own business you do work half days, and it does not matter whether it is the first 12 or the second 12.

Mr. FALK. Right.

Mr. KELLY. And some days you have to work a little overtime, but you live it. That is my point. You live it, and we have driven a wedge between you and the people who work with you, who work for you, who work towards your mutual success.

Tell me how hard it is, and, Mr. Roy, maybe you can chime in. There is so much uncertainty with this. This is what makes it difficult, and we do not know tomorrow. What is the next shoe to drop? What else are they going to hold back on?

Mr. ROY. Yes. So it is not just because there is regulatory uncertainty because the law makes so many dramatic changes to the way employers deliver health insurance. It is also that the regulations have been coming out piece by piece and contradicting each other.

So, for example, and this is not even about small business, but this is about States, the States that have been trying to roll out these exchanges, I mean, they are usually Democratic States, right? So these Democratic States, these exchanges directors are

saying, you know, "We designed the exchange. We built the exchange, and then HHS comes along and completely changes all of the regulations about how the exchange must be designed, and we have to go back and start over and rebuild our systems from scratch."

And that happened so many times in the last 12 to 24 months that at a certain point, a lot of these State exchange directors said, "We give up. We are going to ignore HHS and just set up the exchange because if we do not, we will not meet the October 1 deadline to get the exchange going."

So it is not merely that the laws are poorly designed and that businesses are facing this. Individuals are facing this. State governments are facing this, the regulatory uncertainty because the law is so complex and so difficult to administer, and the employer mandate is Exhibit A.

Mr. KELLY. And I understand, and that is why I wanted Mr. Falk, because it is about a relationship that exists between the owner of the business and those folks that work with them in a common effort to be successful. Both parties participate in it and both parties benefit from it.

I know it is going to be hard on you.

Chairman BRADY. All time has expired. I would like to thank our witnesses for their testimony today. It has been an eye-opening discussion. Clearly we need to get real answers also from the Treasury Department, and we will do so next week.

Just as a reminder any Member wishing to submit a question for the record will have 14 days to do so. Any questions submitted I would ask the witnesses to respond in a timely manner, which I know you will.

With that, thank you again, and so the Committee is adjourned.

[Whereupon, at 12:04 p.m., the Subcommittee was adjourned.]

[Submissions for the Record follow:]

July 9, 2013

Chairman Kevin Brady
Committee on Ways and Means
Subcommittee on Health
U.S. House of Representatives
Washington, D.C. 20515

Ranking Member Jim McDermott
Committee on Ways and Means
Subcommittee on Health
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Brady and Ranking Member McDermott:

On behalf of Associated Builders and Contractors (ABC), a national trade association representing 22,000 members from more than 19,000 construction and industry-related firms, I am writing in regard to the subcommittee hearing on the "Delay of the Employer Mandate."

Providing quality health care benefits is a top priority for ABC and its member companies. ABC continues to call on Congress to advance common-sense proposals that will address the skyrocketing costs of health insurance, especially for employer-sponsored plans and the rapidly rising number of uninsured Americans. ABC believes true reform should provide greater choice and affordability and allow private insurers to compete for business.

March 23, 2013, marked the third anniversary of the massive health care law, known as the Patient Protection and Affordable Care Act (PPACA). Three years later, PPACA fails to lower health care costs. Many employers have watched their insurance premiums increase, and some have even seen their plans be discontinued altogether, forcing some to purchase more expensive policies or drop their coverage. Further, PPACA continues to create uncertainty and confusion in the construction industry, making it difficult for the nation's contractors to plan for the future and create jobs.

The Employer Mandate

For more than three years, ABC has advocated for the repeal of the complex and costly employer mandate included in PPACA. On July 2, the Obama Administration finally acknowledged employers' concerns about implementing the burdensome requirements in a timely and effective manner. In a small step forward, the Treasury Department issued a blog post that announced the delay of the employer shared responsibility (or employer mandate) tax penalties until 2015.

Beginning in 2014, PPACA mandated that employers with 50 or more full-time equivalent employees offer a certain level of coverage or be subject to new taxes. According to the Treasury Department blog post, the administration is extending transition relief for the employer shared responsibility payments (under section 4980H). These payments will not apply for 2014.

It is important to note the employer mandate tax penalties are only delayed—the employer mandate provision is not repealed. The increased costs related to this onerous mandate are still of significant concern to ABC members. By forcing employers to offer government-prescribed health insurance, ABC members will no longer have the choice or flexibility to structure health care coverage options that meet the needs of their fluctuating workforce. The resulting increased costs will jeopardize the ability of ABC

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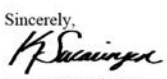
member companies to maintain affordable coverage options for their employees and will force some to drop coverage altogether.

ABC members also have major concerns about the implementation of PPACA's employer mandate provisions, which require significant employer education. The regulations implementing the employer mandate are complex, confusing and unclear. They create an environment of uncertainty in the construction industry that makes it difficult for firms to adequately plan for the future—ultimately stifling job creation.

ABC supports the American Job Protection Act (H.R. 903), introduced by Rep. Charles Boustany (R-La.), which would repeal the employer mandate provision in PPACA and protect existing jobs by removing some of the uncertainty facing employers and helping America's job creators get back to work.

We appreciate your attention to this important matter and look forward to working with you to repeal the costly employer mandate.

Sincerely,



Kristen Swearingen
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Title of Hearing: Chairman Brady Announces Hearing on the Delay of the Employer Mandate, U.S. House of Representatives Committee on Ways & Means, Subcommittee on Health, July 10, 2013

Chairman Brady, Ranking Member McDermott, and Members of the Subcommittee on Health, I would like to provide a written statement regarding the delayed implementation of the employer reporting and shared responsibility requirements included in the Patient Protection and Affordable Care Act. Specifically, my remarks focus on the importance of the economic incentive created by the shared responsibility requirement for influencing employer decisions to offer insurance.

As background, I am a health economist and Associate Professor in the Division of Health Policy and Management at the University of Minnesota. In 2008-2009, I took leave from the university to serve as the senior economist on health issues for the President's Council of Economic Advisers under both the Bush and Obama Administrations. In collaboration with Dr. Roger Feldman (Blue Cross Professor of Insurance at the University of Minnesota) and Mr. Peter Graven (Research Economist at Oregon Health & Science University), I have been leading a study to investigate how the economic incentives created by the Affordable Care Act (ACA) will affect the probability that private-sector U.S. employers will offer employer-sponsored insurance (ESI).

In 2012, 35.2% of small firms in the United States (defined as those with less than 50 employees) offered health insurance, while 95.9% of large firms did so.[1] Currently, the preferential tax treatment of employer and employee premium contributions provides a strong economic incentive for employers to offer coverage. The Affordable Care Act introduces new factors expected to influence employers' incentives to offer coverage.

The three most important factors are:

[1] Medical Expenditure Panel Survey Insurance Component.
http://meps.ahrq.gov/mepsweb/data_stats/summ_tables/insr/national/series_1/2012/tia2.pdf

(1) Employer shared responsibility requirement. Employers with at least 50 full-time equivalent workers that do not offer coverage will pay an annualized penalty of $2,000 per full-time employee (exempting the first 30 employees) if *any* full-time employee buys subsidized insurance in a new health insurance exchange.

(2) Availability of premium tax credits to purchase Exchange-based coverage for lower-income individuals without access to affordable ESI. Beginning in 2014, individuals with family incomes between 133% and 400% of the federal poverty level (FPL) who do not have access to an offer of affordable ESI will be able to obtain premium assistance credits to reduce the cost of health insurance to 3 percent of income for those at 133% FPL[2], phasing out to 9.5 percent of income at 300-400% FPL.

(3) Individual mandate. At full implementation in 2016, the penalty for a single person who does not hold coverage will be the greater of $695 (up to three times that amount for a family) or 2.5% of household income.

Using the nationally representative Medical Expenditure Panel Survey (MEPS) for 2008, 2009, and 2010, we have developed a model to predict an employer's decision to offer insurance in both the pre-2014 period and at full ACA implementation. In both periods, we account for the importance of the ESI tax subsidy for an employer's workforce. In modeling employers' offer decisions at full-ACA implementation, we also account for the economic incentives created by the employer shared responsibility requirement, the individual mandate, and Exchange-based premium tax credits for each employer and its workforce. With this information, we then estimate how these incentives change employers' decisions to offer coverage, given the introduction of a new choice – individual Exchange-based coverage.

Consistent with the original intent of the employer shared responsibility requirement, we find that this provision plays an *economically meaningful* role in encouraging employers to offer insurance. For example, among medium-sized employers that offer insurance, the employer "penalty" expressed on a per worker basis is estimated to be $1,156, which is almost 23% of the average single coverage premium.[3]

Our model predicts that the average probability of a private-sector establishment offering ESI (weighted by the number of employees in private-sector U.S. establishments) will decline from .83 to .66 with full ACA implementation. However, much of this decline is offset by workers who opt for individual Exchange-based coverage, which has an average

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[2] The 2013 federal poverty level (FPL) is $11,490 for one person, increasing to $39,630 for a family of eight. Modified Adjusted Gross Income (MAGI) will be used to determine premium subsidies, resulting in an effective rate of 138% FPL after a 5% offset.

[3] Based on the 2010 MEPS-Insurance Component single coverage premium estimate for large employers.

predicted probability of .26. The probability of remaining uninsured or obtaining coverage from other sources falls from .17 at baseline to .08 with full ACA implementation.

On July 2, 2013, the Obama Administration delayed the implementation of the employer reporting and shared responsibility requirements for one year, citing their desire to simplify reporting requirements and to provide additional time for employers to adapt coverage and reporting systems to comply.[4]

We emphasize that this provision in the ACA is economically significant in terms of its potential impact on an employer's likelihood of offering insurance and individuals' access to health insurance through their workplace. To gauge the importance of the employer shared responsibility requirement for encouraging employer provision of coverage, we re-estimated the employer offer model described above removing the employer shared responsibility requirement incentive. Our key finding is that the average probability of an employer offering ESI would decrease further to .58 should this provision not be implemented.

In conclusion, based on our economic analysis, the ACA's employer shared responsibility requirement is expected to be an influential factor affecting employers' decisions to offer insurance. If this provision is not enforced in the future, fewer employers will offer insurance and more workers will use the individual Exchanges to access health insurance.[5]

[4] Written Testimony of J. Mark Iwry, Senior Advisor to the Secretary and Deputy Assistant Secretary for Retirement and Health Policy, U.S. Department of the Treasury, Before the House Committee on Ways and Means Subcommittee on Health, July 17, 2013.

[5] Any opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of the U.S. Census Bureau. All results have been reviewed to ensure no confidential information is disclosed.

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