

Testimony Presented to the House Ways and Means Committee:

“The Obama Administration’s Delay of the Employer Mandate”

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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.