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Examining the Use of Administrative Actions in the Implementation of the Affordable Care Act

Subcommittee on Oversight
Committee on Ways and Means
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Mr. Chairman and members of this subcommittee, thank you for the opportunity to present testimony on how federal agencies have been implementing the Affordable Care Act (ACA).

My name is Jonathan H. Adler and I am the inaugural Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, where I teach courses on administrative and constitutional law, among other subjects. I have written extensively on questions of administrative law generally, as well as on the implementation of the ACA.

As you know, I have serious concerns with the how the ACA has been implemented. In particular, I am concerned that the Departments of Treasury and Health and Human Services (HHS)have repeatedly disregarded the plain text of the ACA and the limits on their statutory authority when implementing this law. Whatever the policy merits of specific administrative actions, insofar as any federal agency has taken administrative actions that contradict the plain statutory text or exceed the scope of authority delegated by Congress they are unlawful.

The core structure of our Constitution divides power among the three branches of our federal government. "All legislative powers" granted in the Constitution are "vested" in Congress.[1] Federal agencies, while generally a part of the executive branch, are creatures of the legislature in that they only have that authority which Congress has delegated to them.[2] The executive branch has no inherent legislative authority, and executive agencies are responsible to the President, who has a constitutional obligation to "take Care that the Laws be faithfully executed."[3]

While the executive branch maintains the discretion over how the laws are to be enforced, such discretion does not entitle administrative agencies to disregard statutory provisions that are deemed unwise or inconvenient, let alone the authority to waive legal obligations that are written into federal law. The constable's authority to decide not to arrest every lawbreaker is not the authority to waive the law's obligations. An agency's authority to allocate resources in accord with the executive branch's policy choices does not allow it to disregard unwanted statutory mandates. Thus, enforcement discretion cannot excuse an administrative agencies disregard of relevant statutory text or an attempt to waive statutory requirements.

In the context of ACA implementation, federal agencies have repeatedly failed to uphold the law as it was enacted by Congress. There are numerous instances in which federal agencies have sought to waive relevant ACA requirements or implement the law in a manner that does not conform to the relevant statutory text and authority granted by Congress. A few examples follow.

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[1] U.S. Const. art. I, § 1.

[2] *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

[3] U.S. Const. art. II, § 3.

Employer Mandate Delays

The ACA imposes a "shared responsibility" requirement obligating employers with more than 50 employees to provide qualifying health insurance.[4] Employers who fail to comply with this "employer mandate" are required to pay a penalty or "tax" that can reach $2,000 per employee beyond the 30th employee (i.e. a firm with 50 employees would pay the penalty on 20).[5] This provision exposes larger employers to substantial penalties if they fail to offer qualifying health insurance to their employees. According to the federal government, the penalty for failing to comply with the employer mandate is a "tax."

Section 1513 of the ACA expressly provides that this mandate, and the accompanying tax liability, was to "apply to months beginning after December 31, 2013."[6] In other words, this provision of the law was due to take effect at the start of 2014. In July 2013, however, the Department of the Treasury announced in a blog post that it would delay the employer mandate by a year.[7] The stated reason for this delay was "the complexity of the requirements" imposed on employers and "the need for more time to implement them effectively."[8] Later that month the IRS published a guidance detailing the "transition relief" to be afforded employers from the employer mandate and associated information reporting requirements.[9]

Seven months later, in February 2014, Treasury Department announced further delays of and modifications to the employer mandate.[10] Specifically, Treasury declared that the mandate would be delayed until 2016 for firms with fewer than 100 employees. In addition, Treasury announced that firms with over 100 employees would only need to provide qualifying insurance to 70 percent of their full-time employees in 2015, and 95 percent of employees thereafter, in order to avoid the statutory penalties. The Administration not only waived the effective date for the employer mandate, it also invented a new set of staggered requirements for firms. Again, agency officials said their intent was to help employers adjust to the law's requirements, though some observers saw more political motivations.[11]

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[4] *See* 26 U.S.C. §4980H(a)-(c).

[5] *Id*.

[6] See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1513(d), 124 Stat. 119 (2010) ("The amendments made by this section shall apply to months beginning after December 31, 2013.").

[7] See Mark Mazur, "Continuing to Implement the ACA in a Careful, Thoughtful Manner," Treasury Notes, U.S. Department of the Treasury (July 2, 2013), http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx.

[8] *Id*.

[9] *See* Internal Revenue Service, Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions), NOT-129718-13 (July 9, 2013), http://www.irs.gov/pub/irs-drop/n-13-45.pdf.

[10] *See Shared Responsibility for Employers Regarding Health Coverage*, 79 Fed. Reg. 8544, 8574 (Feb. 12, 2014).

[11] *See, e.g.*, Juliet Eilperin & Amy Goldstein, *White House delays health insurance mandate for medium-size employers until 2016*, WASH. POST (Feb. 10, 2014), http://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html ("By offering an unexpected grace period to businesses with between 50 and 99 employees, administration officials are hoping to defuse another potential controversy involving the 2010 health-care law").

In justifying these delays, the Treasury Department claimed that it has broad authority to offer "transition relief" in implementing a complex law like the ACA. That may often be true in other cases, but not here. When Congress provides that a given legal requirement takes effect on a date certain, that is when the legal requirement takes effect. If, as the Administration has claimed, the employer mandate penalty is a tax, that tax liability for non-complying employers began to accrue at the start of 2014. As Congress did not delegate the executive branch authority to waive or delay this requirement, there was no authority for these delays.

Whatever the stated reason for the two delays, nothing in the ACA authorizes the executive branch to waive the application of the employer mandate penalties. The text of the ACA is quite clear. It provides that the employer mandate provisions "shall apply" after a date certain: December 31, 2013.[12] Were this not enough, other provisions of the ACA reinforce the statutory requirement. For example, the ACA expressly provides for the amount of the employer penalty to be assessed in 2014, and then provides for the penalties to be adjusted for inflation in subsequent years.[13]

That Congress expected the employer mandate to take effect in 2014 is reaffirmed by the fact that implementation of this requirement is essential for the proper implementation of other parts of the law. For instance, the employer mandate reporting provisions are essential to determining eligibility for tax credits and cost-sharing subsidies in state health insurance exchanges. These tax credits were to be available beginning January 1, 2014 and serve as the trigger for assessing the penalty.[14] The tax credits and employer penalties were supposed to take effect together, and the Administration never suggested delaying the credits (though it did waive verification of eligibility).[15]

The Treasury Department claimed delaying the effective date of the employer mandate was an ordinary exercise of its "longstanding authority to grant transition relief when implementing new legislation."[16] Despite this claim, the Treasury Department failed to identify an applicable precedent that would justify waiving a tax liability prospectively as the Administration sought to do. Treasury cited cases in which the IRS waived potentially applicable penalties or allowed deferred payment of tax liabilities, but these are easily distinguishable. Further, if the mandate penalty is a tax — as the administration currently maintains in various ACA-related cases pending in federal court — then the employer mandate delay constitutes more than deferring

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[12] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1513(d), 124 Stat. 119 (2010) ("The amendments made by this section shall apply to months beginning after December 31, 2013.").

[13] *See* 26 U.S.C. §4980H(c)(5).

[14] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1401(e), 124 Stat. 119 (2010) ("The amendments made by this section shall apply to taxable years ending after December 31, 2013.").

[15] *See* Sarah Kliff & Sandhya Somashekhar, *Health insurance marketplaces will not be required to verify consumer claims*, WASH. POST (July 5, 2013), http://www.washingtonpost.com/national/health-science/health-insurance-marketplaces-will-not-be-required-to-verify-consumer-claims/2013/07/05/d2a171f4-e5ab-11e2-aef3-339619eab080_story.html.

[16] *See* Letter from Mark Mazur, Assistant Secretary of the Treasury for Tax Policy, to Rep. Fred Upton, Chairman of the Committee on Energy and Commerce, U.S. House of Representatives, July 9, 2013, http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf.

payments or declining to seek penalties. Rather it constitutes a unilateral decision by the executive branch to waive an accrued tax liability.

Even legal commentators who have been generally supportive of this Administration's implementation of the ACA have acknowledged that the Treasury Department lacked the legal authority to delay employer mandate. University of Michigan law professor Nicholas Bagley, for instance, wrote in the *New England Journal of Medicine* that these delays "appear to exceed the scope of the executive's traditional enforcement discretion" and cannot be justified as an exercise of executive branch authority to prioritize limited agency resources.[17] As Bagley explains, the employer mandate delays cannot be justified as the sort "discretionary judgment[s] concerning the allocation of enforcement resources" approved by the Supreme Court in *Heckler v. Chaney*.[18] In his view, the purported precedents relied upon by Treasury provided "slim support for a sweeping objection that will relieve thousands of employers from a substantial tax for as long as 2 years."[19] I concur with this assessment.

The assertion of unilateral authority to delay the employer mandate – if ratified and accepted as a precedent for agency action in the future – could mark a dramatic shift in the separation of powers. As Bagley explains:

> the Obama Administration's claim of enforcement discretion, if accepted, would limit Congress's ability so specify when and under what circumstances its laws should take effect. That circumscription of legislative authority would mark a major shift of constitutional power away from Congress, which makes the laws, and toward the President, who is supposed to enforce them.[20]

At stake is more than a contested an unpopular provision of the ACA. This assertion of executive authority has far-reaching implications and should concern all members of this Committee, whatever one's view of the employer mandate or the ACA.

Minimum Coverage Requirement

The ACA imposes a suite of minimum coverage and other requirements on all private health insurance plans. Insurance plans that do not meet all of these requirements are non-compliant and, as a consequence are illegal under the ACA. The law contained a "grandfather" provision allowing the continuation of some such plans for a limited time, but this provision was relatively narrow, and interpreted by the Department of Health and Human Services to be even narrower.[21] Even though ACA supporters repeatedly promised that those Americans who liked their

[17] *See* Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, 370 NEW ENGL. J. MED. 1967, 1968 (2014).

[18] 470 U.S. 821 (1985).

[19] *Id.* at 1969.

[20] *Id.*

[21] *See* 45 C.F.R. § 147.140(g).

insurance plans would be able to keep them, the ACA, as written, ensured that many who liked their pre-existing health insurance plans would not be allowed to keep them.[22]

In 2013, many Americans learned that their existing health insurance plans would not be renewed for failing to meet the ACA's minimum coverage requirements and could not be renewed. Modest year-to-year changes in pre-existing plans resulted in the loss of "grandfather" status. In response, the Administration announced a fix.

On November 14, 2013, the Administration declared that insurance companies would be allowed to renew policies that were in force as of October 1, 2013 for one additional year, even if they failed to meet relevant ACA requirements.[23] This announcement was made initially in a Presidential press conference, and was subsequently reaffirmed in guidance documents issued by the Department of Health and Human Services.[24] As with the delays of the employer mandate, there was no clear legal authority for this change.[25] Indeed, no citation of legal authority accompanied the President's announcement or the subsequent letter from the Administration to state insurance commissioners encouraging them to allow the renewal of noncompliant plans.

As with the employer mandate, the relevant statutory provisions are clear. Under the ACA, only plans that provide the prescribed list of "essential benefits" can be "qualified health plans" (QHPs), and only QHPs may be sold on exchanges or satisfy the minimum coverage requirement (the individual mandate).[26] Further, the ACA bars insurers from offering health insurance plans in individual and small group markets that do not include the essential health benefits package.[27] These requirements cannot be waived by administrative fiat. A Presidential announcement cannot overcome the legal jeopardy health insurers could face should they agree to renew such plans and seek enforce any terms that have been declared illegal under the ACA and its implementing regulations.

The only legal justification the Administration offered for this move was "enforcement discretion." Specifically, the Administration claimed it was not changing the law so much as it was merely announcing that it would not enforce relevant requirements for a given period time. This legal justification does not work, however. Among other things, the Administration's announcement did not alter the underlying legal requirements contained in the ACA or its implementing regulations, nor did it bind state insurance commissions or affect state laws governing insurance policies.

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[22] The Department of Health and Human Services, for instance, predicted in June 2010, that that between 40 and 67 percent of individual market policies would lose grandfather status in any given year. See 75 Fed. Reg. 34,538, 34,553 (June 17, 2010); *see also* Colleen McCain Nelson, Peter Nicholas & Carol E. Lee, *Aides Debated Obama Health-Care Coverage Promise*, WALL ST. J. (Nov. 2, 2013).

[23] *See* Statement by the President on the Affordable Care Act (Nov. 14, 2013), http://www.whitehouse.gov/the-press-office/2013/11/14/statement-president-affordable-care-act.

[24] *See* Letter from Gary Cohen, Director, Ctr. for Consumer Info. & Ins. Oversight, Dept. of Health & Human Servs. (Nov. 14, 2013), http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF.

[25] *See* Bagley *supra*.

[26] *See* 42 U.S.C. § 18021(a); 26 U.S.C. § 5000A.

[27] *See* 42 U.S.C. § 300gg–6

Although the Administration claimed it was relying on enforcement discretion, the announced policy did more than pull back enforcement of the law's requirements. It also sought to impose new obligations on private insurers. Specifically the new policy conditioned the exercise of enforcement discretion on private insurers agreeing to a series of disclosures to those who might wish to renew their policies for an additional year. As detailed in a guidance letter explaining the change, insurers wishing to renew their policies would be required to provide their customers with a notice explaining that the relevant policies fail to comply with the ACA's requirements, that other more comprehensive policies are available, and how such policies may be obtained. Whether or not requiring such disclosure is a good idea, nothing in the ACA authorized the Administration to take this step. As with the employer mandate delay, these policy steps cannot be justified as an exercise of enforcement discretion.

Exchange Tax Credits

Among the most high-profile and controversial examples of an administrative agency implementing the ACA in an unlawful manner is the IRS rule purporting to authorize tax credits in health insurance exchanges established by the federal government. [28] Four lawsuits were filed against this rule. The challengers include individuals, employers, states, and local school boards that are adversely affected by the authorization of tax credits in federal exchanges. The Supreme Court heard oral argument in one of these cases, *King v. Burwell*, in March, and a decision is expected by the end of June.

Section 1311 of the ACA directs each state to create an "American Health Benefit Exchange" ("Exchange").[29] Despite the obligatory language of Section 1311, the ACA gives states a choice of whether to take responsibility for (and bear the cost of) operating its own Exchange. States that agreed to set up their own Exchange were eligible for start up funds from the federal government. Moreover, the ACA provides for tax credits and cost-sharing subsidies to assist low-income individuals with the purchase of qualifying health insurance on state-established exchanges.

As written, the ACA only provides tax credits and cost-sharing subsidies for the purchase of qualifying health insurance plans in exchanges that are "established by the State" under Section 1311 of the Act. Specifically, the ACA authorizes tax credits for each month in a given year in which a taxpayer has obtained qualifying health insurance. As defined by the law, a "coverage month" is any month in which the taxpayer is "covered by a qualified health plan . . . that was enrolled in through an Exchange established by the State under section 1311."[30] The amount of the tax credit is also calculated with reference to a qualifying health insurance plan "enrolled in through an Exchange established by the State under [Section] 1311."

[28] For an extensive treatment of this issue, see Jonathan H. Adler & Michael F. Cannon, *Taxation without Representation: The Illegal IRS Rule to Expand Tax Credits under the ACA*, 23 HEALTH MATRIX: JOURNAL OF LAW-MEDICINE 119 (2013); *see also* Jonathan H. Adler & Michael F. Cannon, King v. Burwell*: Desperately Seeking Ambiguity in Clear Statutory Text*, 40 JOURNAL OF HEALTH, POLITICS, POLICY & LAW 577 (2015).

[29] *See* 42 U.S.C. §18031(b)(I).

[30] *See* 26 U.S.C. § 36B(c)(2)(A)(i).

If a state refuses to establish its own exchange, the federal government is required to "establish and operate" an exchange for that state.[31] While a federal exchange may operate like a state exchange, nothing in the ACA authorizes the provision of tax credits or cost-sharing subsidies in federal exchanges. To the contrary, as noted above, the relevant provisions of Section 1401 only provide for tax credits for the purchase of health insurance in state-established exchanges.

When the ACA was enacted, it was generally assumed that most if not all states would willingly create exchanges.[32] As President Obama explained shortly after signing the legislation into law, "by 2014, each state will set up what we're calling a health insurance exchange."[33] Few expected that many (if any) states would refuse. But states turned out to be far less cooperative than anticipated. Despite the Administration's best efforts to encourage state cooperation, some three dozen states refused to create their own exchanges.

Faced with the prospect that widespread state refusal to establish Exchanges under the ACA would make tax credits and cost-sharing subsidies unavailable in much of the country, the IRS promulgated regulations in May 2012 providing that tax credits would be available for the purchase of qualifying health insurance plans in states established under either Section 1311 *or* 1321, and without regard for whether the exchange was established by a state or established by the federal government.[34] To justify its decision, the IRS explained:

> The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.[35]

Although commentators had argued that the express language of the ACA precluded the IRS interpretation, this paragraph – lacking any citation to relevant statutory provisions, legislative history, or other legal authority – was the entirety of the IRS's justification for the rule upon its promulgation.

The IRS did not identify any statutory language to justify its interpretation when it finalized the rule. There is a simple explanation for this: There isn't any. This is key because in the absence of

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[31] *See* 42 U.S.C. § 18041(c)(I).

[32] *See* Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, NY TIMES, Aug. 5, 2012 ("When Congress passed legislation to expand coverage two years ago, Mr. Obama and lawmakers assumed that every state would set up its own exchange").

[33] Barack Obama, U.S President, Remarks on Health Insurance Reform in Portland, Maine (Apr. 1, 2010), available at: http://www.whitehouse.gov/the-press-office/remarks-president-health-insurance-reform-portland-maine.

[34] Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 Federal Register 30377 (May 23, 2012), available at: http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf.

[35] *Id*. at 30378.

such language, the IRS lacks the authority to extend tax credits where Congress has failed to do so.

Months later, under pressure from members of Congress to offer a more complete explanation, the Department of the Treasury began to identify potential authority for its rule. Specifically, the Treasury Department suggested that the language of Section 1321 could be interpreted to make a federally established exchange "the equivalent of a state exchange in all functional respects," including an Exchange for purposes of determining eligibility for tax credits.[36]

According to this later justification, an exchange established by the federal government under Section 1321 may be treated as an exchange established by the State under Section 1311. This is because HHS is required to "establish and operate *such Exchange* within the State."[37] "Such exchange," according to Treasury, is a Section 1311 Exchange and should be treated as such for the purposes of authorizing tax credits and cost-sharing subsidies. Concluding otherwise, Treasury maintained, would undermine the ACA's stated purpose of expanding health insurance coverage.

Treasury's interpretation would be a plausible interpretation of the relevant statutory text were it not for repeated references to the state role in establishing those Exchanges through which tax credits may be offered. As noted above, Section 1311 expressly requires that an authorized Exchange must be "established by a State." Section 1304(d) also expressly defines "state" as "each of the 50 States and the District of Columbia."[38] Yet even if one were to set this language aside, as the Treasury Department suggests, and conclude that a Section 1321 Exchange is the equivalent of a Section 1311 Exchange, this is not enough to establish that tax credits are available in exchanges established by the federal government.

The eligibility requirements for the tax credits are not found in either Section 1311 or Section 1321, but in Section 1401, which creates Section 36B of the Internal Revenue Code. This section repeatedly defines qualifying health insurance plans eligible for tax credits as those purchased "through an Exchange *established by the State*" under section 1311. So even if one reads Section 1321 to provide that an Exchange established by the federal government is, for all intents and purposes, a Section 1311 Exchange, a federal Exchange is still not an Exchange "established by the State" as required by Section 1401. Put another way, "such Exchange" may well be the same type of exchange called for under Section 1311, but an exchange established by the federal government is not an exchange "established by the State."

The repeated reference to the state role in creating the relevant exchanges is significant. Not all references to exchanges in the ACA reference the state role as Section 1401 does. Section 1421, for example, provides tax credits to small businesses that make nonelective contributions to employee plans offered through an Exchange. Yet whereas Section 1401 repeatedly references Exchanges "established by a State," Section 1421 only references "Exchanges." Under the

[36] *See* Letter from Mark J. Mazur, Assistant Secretary for Tax Policy, U.S. Treasury Department, to the Honorable Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, (Oct. 12, 2012) (on file with author).

[37] *See id.* (citing 42 U.S.C. §18041(c)(1).

[38] *See* 42 U.S.C. § 18024(d)

Treasury Department's interpretation, the additional language in Section 1401 is reduced to surplusage.

The Treasury Department claims that its interpretation merely reaffirms well-established Congressional intent. Yet neither the federal government – nor anyone else – has been able to identify a single contemporaneous statement indicating that tax credits would be available for the purchase of health insurance in federal exchanges under the ACA. The lack of any such statement is more than a bit conspicuous, especially since numerous health care reform proposals considered prior to enactment of the ACA conditioned subsidies on state cooperation.[39]

While the IRS claimed that "relevant" legislative history supports its interpretation, it has failed to identify a single statement prior to or contemporaneous with the passage of the ACA indicating that tax credits were to be available in federal exchanges. Contrary to the IRS's suggestion, the burden is not on opponents of its rule to identify legislative history or statutory language prohibiting the issuance of tax credits in federal exchanges. As the U.S. Court of Appeals for the D.C. Circuit has instructed federal agencies on numerous occasions, Congressional failure to withhold power does not indicate such power was delegated, nor does it constitute a statutory ambiguity of the sort that would trigger *Chevron* deference to the Agency's interpretation of the statute.[40] A failure to delegate authority to an agency is just that: A failure to delegate authority.

The IRS rule purports to provide tax credits in over thirty states that opted not to create their own exchanges. Because these are "refundable" tax credits, this means that the credits do more than provide tax relief to eligible individuals. They result in payments from the U.S. Treasury. Because the Administration has announced that it will not require exchanges to verify eligibility for tax credits, the cost could be significantly greater than many have anticipated. Issuance of the tax credits triggers cost-sharing subsidies that are paid to insurance companies – another draw on the U.S. Treasury. Tax credit eligibility also triggers substantial penalties on employers who fail to provide qualifying health insurance. The availability of tax credits will also expose many individuals to the individual mandate tax penalty who would not otherwise have been so exposed. As a consequence, this rule has substantial fiscal and legal consequences.

As noted above, the Supreme Court is expected to rule on the lawfulness of the IRS rule later this year in *King v. Burwell*. Should those challenging the rule prevail, it will be important to monitor how the Administration responds to an adverse ruling. While the IRS and HHS would have some administrative flexibility in developing a response to such a ruling, they would be somewhat constrained by the text of the ACA and the Court's specific holding.

However the Court rules in *King*, this rule is not the only example of the IRS taking liberties with the text of the ACA in implementing Section 36B of the Internal Revenue Code. Professor Andy Grewal of the University of Iowa School of Law has identified two additional instances of the IRS departing from the text of the statute in ways that expands tax credit eligibility beyond

[39] *See* Adler & Cannon supra.

[40] *See, e.g.*, American Bar Association v. Federal Trade Commission, 430 F.3d 457 (D.C. Cir 2005); Railway Labor Executives Association v. National Mediation Board, 29 F.3d 655 (D.C. Cir. 1994).

what Congress has authorized.[41] Specifically, Grewal notes that IRS regulations implementing 36B in such a way as to extend tax credit eligibility to some low-income aliens not lawfully residing in the U.S. as well as to some individuals who fall outside the income requirements explicitly established by the text of the ACA. In neither case, Grewal notes, did the IRS cite any legal authority for its actions. Most likely this is because, in both instances, the IRS regulations contravene the express statutory text of the ACA.

These IRS rewrites have potential consequences beyond the extension of tax credits beyond what Congress authorized. As with the tax credit regulation at issue in *King v. Burwell*, the latter of these changes has the potential to expose employers to penalties that are not authorized by the text of the ACA. Again, by expanding eligibility for tax credits the IRS is also expanding employer exposure to the employer mandate and its associated penalties.

Cost-Sharing Subsidies

Not only has the Treasury Department purported to authorize tax credits beyond what was authorized by Congress under the ACA, it has also issued payments to health insurance companies under Section 1402 of the ACA where no money was appropriated by Congress. This is unconstitutional. As the Constitution makes clear, "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[42] While it may be desirable for the federal government to provide money to health insurance companies to offset the costs of meeting various ACA requirements, neither Treasury nor HHS has the authority to make such payments unilaterally.

While the ACA authorizes the payment of subsidies to health insurance companies to help defray the costs of providing health insurance to eligible consumers, Congress has not appropriated the funds necessary to make these payments. Specifically, Section 1402 of the ACA requires insurers to make cost-sharing reductions that reduce the out-of-pocket costs of health insurance for eligible low-income individuals. Section 1402 also authorizes offset payments to health insurance companies to help defray the costs of making these cost-sharing reductions. Such authorization, however, is not the same as an appropriation. In order for an expenditure of taxpayer dollars to be lawful, spending authorization, such as that contained in Section 1402, must be followed by an actual appropriation, whether in the form of an annual appropriations bill (aka a "temporary appropriation") or a permanent appropriation such as those which fund entitlements, interest payments, and tax refunds, among other things.

That Congressional appropriations were necessary to fund payments to health insurance companies under Section 1402 was acknowledged by the Administration in the 2014 budget request. Congress did not appropriate these funds, however. As a consequence, there are no funds to be spent on payments to insurance companies under Section 1402. Nonetheless, the Treasury Department made nearly $4 billion in payments to health insurance companies. As I understand it, the Administration is instead relying upon the permanent appropriation which provides funds to the IRS for income tax refunds to make these payments, yet Congress has not

[41] *See* Andy Grewal, *Lurking Challenges to the ACA Tax Credit Regulations*, BLOOMBERG BNA TAX INSIGHTS (2015 forthcoming) *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2598317.

[42] U.S. Const. art. 1 § 9.

authorized this step. In other words, the Treasury Department has, in conjunction with HHS, usurped the legislature's authority to control appropriations from the U.S. Treasury.

Conclusion

In my testimony, I have sought to briefly review a handful of instances in which federal agencies entrusted with implementing the ACA have departed from the statutory text and acted in an unlawful manner. I doubt these are isolated instances. Earlier this year, Ohio Attorney General Mike DeWine brought suit against HHS for its attempt to impose taxes on state and local government health insurance plans. Based on my initial review of the filings, I believe Ohio may have identified yet another example of unlawful ACA implementation.

There may well be good policy justifications for many of the measures discussed above. I offer no opinion in this testimony as to the policy wisdom of the various steps Treasury and HHS have taken. My focus has instead been on the lack of legal authorization for these actions. Whatever steps are taken to implement the ACA, whether by this Administration or its successors, they must conform to the law. Administrative agencies have no warrant to rewrite statutes or waive statutorily imposed obligations, no matter how compelling the policy arguments in support of such changes may be.

The ACA was controversial when it was enacted, and many provisions of this law remain controversial today. If they are to be amended, however, it is a job for the legislature. Only Congress has the authority to revise the ACA and cure its imperfections.

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Mister Chairman and members of this committee, I recognize the importance of these issues to you, your constituents, and this nation. I hope that my perspective has been helpful to you today, and I will seek to answer any additional questions you might have. Thank you.