TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
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Testimony of

Mr. William J. Dennis, Jr.

before the

Senate Committee on Small Business & Entrepreneurship

on the subject of

**the Implementation of the Affordable Care Act:
Understanding Small Business Concerns**

on the date of

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Chairwoman Landrieu, Ranking Member Risch, and Members of the Committee, thank you for the opportunity to present NFIB views on the current state of the Affordable Care Act (ACA), and offer suggestions to improve the current condition of the law and its implementation.

On July 2, the Administration surreptitiously announced postponement of: (i) the information reporting requirements that apply to insurance companies, self-insuring employers, and certain other entities that provide minimum essential health coverage under section 6055 of the Internal Revenue Code (the "Code"); (ii) the information reporting requirements that apply to applicable large employers under section 6056 of the Code, and (iii) the employer shared responsibility provisions under section 4980H of the Code.[1],[2] Effectively, the Administration had failed to produce regulations implementing certain data collection provisions of the Affordable Care Act, thereby effectively rendering the so-called employer mandate provisions of the Act temporarily unenforceable, and hence moot. The reprieve is to last one year.

All communication NFIB has had to date with its members and other small business owners indicates that this Administration decision was well-received. Small-business owners seemed relieved. The reason is that the reprieve gives them another year to obtain the specific information necessary to translate the glowing generalities that pass for a communications program into the explicit facts that allow them to make business decisions. Quite frankly, the Administration's communication with small-business owners about ACA requirements has been terrible. But in fairness to those charged with that portion of the program, it is very difficult to communicate the content of a "no decision".

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. Unless the Administration acts shortly, we may be looking at the same situation next year at this time.

I do not need to remind Members of this Committee that getting useful and correct information to five and one-million small employers let another one-half million starting every year is no modest task. They typically do not paw through the *Federal Register* or Treasury blogs in their limited spare time. Small employers are most likely to discover what government requires of them through trusted secondary channels.[4] Those channels include accountants and lawyers, other affected business owners, and trade websites. A necessary process is therefore "teaching the teachers" before understanding and compliance can be expected from the population. The key points of contacts must first understand what the ACA requires, not in generalities, but in specifics. (They now are simply passing on the contents of no decisions.) Only then can they pass useful information to their colleagues and clients.

Some might suggest that the Internal Revenue Service (IRS) or some other agency of government simply send notices 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

[1] 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.

[2] 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 Subcommittee on Health, House Committee on Ways and Means Committee, July 17, 2013.

[3] Mazur, op. cit.; Iwry, op. cit.

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

don't expect immediate awareness and knowledge as a result. Despite broad outreach by the IRS,[5] including mailing over four million post cards about the small-business health insurance tax 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.

Relief is the initial reaction of affected small-business owners from the one-year delay in the employer mandate. The second reaction is a bit different. It is recognition that, despite the reprieve, nothing has fundamentally changed, both in terms of the law per se and the general lack of confidence, in part stemming from the ACA, that dampens economic growth. Small business continues to be in an economic holding pattern.[8] Economic activity remains tepid. Plans to invest and hire remain low by historical standards (last 40 years). Nothing on the horizon portends an abrupt positive change, including the one-year delay. Moreover, the current postponement of the employer mandate exacerbates questions in light of prior delays, such as delay of competition within most SHOP exchanges, about the ability of this Administration or any Administration, to implement and administer ACA in any type of cost-effective and fair manner.

Hopefully, the Congress will use the reprieve to recognize some of the problems it has created in the Affordable Care Act and make reasonable efforts to change them. You would not only help small business, but the people attempting to implement the Act. I list below just five examples of needed changes, specifically focused on small business: 1. definition of part-time employee - the 30/35 hour question, 2. Section 6055 and Section 6056 record-keeping rules, 3. business aggregation rules, 4. the HIT tax, and 5. the mandate per se. Let me briefly address each.

1. *Definition of "Part-Time Employee"*

Employers with more than 50 employees must offer coverage to full-time employees or pay a penalty; the same does not apply to part-time employees. These employers may choose to offer part-time employees health insurance or not. The ACA defines a full-time employee as working 30 hours or more 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.[9] That is also common use of the terms in the private sector, although some place the division at 40 hours. The federal government in the Fair Labor Standards Act even makes it policy to require additional compensation (overtime pay) only after 40 hours.

The ACA's differential classification has already caused employers to start juggling hiring practices and forcing the hours of many employees to fall beneath the 30 hour standard.[10] 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[11] and some colleges.[12] This is not simply an

[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] Small Business Economic Trends, (ed.) William C. Dunkelberg and Holly Wade, NFIB Research Foundation, series.
[9] http://www.bls.gov/cps/lfcharacteristics.htm#fullpart Accessed 7/8/2013
[10] 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
[11] 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.
[12] Colleen Flaherty, "So Close Yet 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.

administrative and cost issue for offering employers, large and small, but an income issue for employees who would like to work more hours for an employer, but are now effectively barred from doing so. While it is too early to claim definitive evidence of an impact from the ACA definition,[13] one must note that the only net new employment (seasonally adjusted) this year (January – June) has been part-time, with the trend exacerbated in June.[14]

2. *Sections 6055 and 6056 Paperwork*

Postponement of the employer mandate was technically a delay in the promulgation of the paperwork/ reporting in Sections 6055 and 6056 of the Act. Those provisions require among other things a listing of the names and addresses, etc., of employees and the firm's offer/lack thereof of "adequate and affordable" health insurance. A major purpose of the list is for the government to determine which firms pay what penalty, if any, for failure to offer, and which employees pay what penalty, if any, for failure to carry the mandated insurance. The information from these reports appear critical to enforcement on both businesses and individuals.

I need not reiterate here small-business owners' absolute distain for paperwork and record-keeping. However, in the current context, they have two principal concerns regarding these two sections of ACA, and their implementing rules which have yet to be proposed. The first is who is covered? The second is what paperwork and reporting will be required?

Section 6056 covers those businesses required to offer, including small businesses with 50 employees or more. These enterprises automatically incur the new reporting burden, whatever it eventually is. However, the fate of offering small businesses with fewer than 50 employees is less clear, while it is even murkier for non-offering businesses employing fewer than 50.

The Administration in testimony before the Health Subcommittee of the House Ways and Means Committee referred to information reporting requirements that apply to insurance companies, self-insuring employers, and *certain other entities* (italics added) that provide minimum essential health coverage.[15] Section 6055(b)(2)(C) refers to the small group market offered through an exchange and the small business tax credit. Further, without reports on employees and offers of "adequate and affordable" insurance, government has no way of knowing which employees are potentially liable for penalties as well as their eligibility for subsidies in the exchange. NFIB interprets these factors collectively to mean that small businesses (fewer than 50 employees) offering employee health insurance must report, though the Administration's witness at the Ways and Means hearing referred to many groups except small business.[16]

Statute language would seem to exclude reporting by non-offering small employers. The only possible motivation to require this group to report would be to demonstrate that the employee has no

[13] The Labor Center at the University of California-Berkeley estimates from *Current Population Survey* data (March, 2010-2012) that 8.9 percent of employees have jobs working 30-36 hours per week. However, the authors consider about 3.1 percent (2.3 million) vulnerable to work reduction because they are below 400 percent of the Federal Poverty Level and do not have insurance through their own employer. These data apply only to firms with 100 or more employees. The number would rise in absolute, if not in percentage, terms by including small employers. See, David Graham-Squire and Ken Jacobs, Data Brief – Which workers are most at risk of reduced hours under the Affordable Care Act?, February, 2013. http://laborcenter.berkeley.edu/press/coverage_reduced_hours_aca13.shtml. Accessed 7/16/2013.

[14] http://www.bls.gov/web/empsit/cpseea06.pdf Accessed 7/19/13.

[15] Iwry, op. cit.

[16] Iwry, op.cit.

employment-based insurance and therefore has not refused an employer's offer. This would appear a stretch thereby allowing us to assume that the reporting requirements do *not* apply to these employers.

The second issue is the paperwork/reporting that IRS will require. As a general rule, the less paper and the less frequent the better. Additionally, it would be helpful to piggy-back on existing paperwork to the extent possible. An extension of the W-2 filing is the obvious candidate. The names, addresses, and TIN's of all employees are already part of that filing. The statute also requires 6055 and 6056 reports to be filed by January 31, the same date W-2's are to be mailed to employees. There is also already a small, but new requirement on the W-2 pertaining to health insurance (implementation temporarily postponed for businesses with fewer than 250 employees). The issue that is not clear is whether the added ACA reporting requirements piggy-backed on the W-2 is too much at one time. We have no current information to assist with that question.

Small employers will not be happy whenever the IRS promulgates its ACA paperwork requirements. Businesses of all sizes will have to make adjustments to the way they maintain records. Reprogramming computers and/or purchasing new software will be additional costs. But the longer the lead time (assuming rational requirements), the easier it will be for everyone concerned. So, moving forward on these requirements with all deliberate speed, at least to the extent of offering insights about what will be demanded, seem warranted.

3. *Business Aggregation Rules*

The *New York Times* recently carried an article about a small business owner in Maryland struggling to find the right mix of full- and part-time employees to crawl under ACA's 50 employee employer mandate level.[17] The business apparently could not survive if it were compelled to offer employees health insurance or pay a fine. The owner thought he had found a formula. But in an almost throw-away line, the article mentioned that the owner and his family obtained their health insurance through a much smaller business they owned across the street. It apparently did not occur to either the business owner or the *Times* reporter that the owner was likely subject to the business aggregation rules, and therefore was likely to have more than 50 employees under ACA, despite his view to the contrary.

The business aggregation rules define a single business unit in instances where a firm may have different locations or operating units. For example, if John Doe owns a retail store in Virginia with 35 full-time employees and a repair shop in Maryland with 15 full-time employees, the firm is a single business with 50 employees for purposes of ACA. The rules' presumed purpose is to prohibit small employers from subdividing their firms into multiple parts in order to avoid the mandate. The provision appears unknown to most owners and is likely to trip up many small-business owners due to its opacity, the number of firms potentially affected, and its complexity.

An aggregation rule might work if the world consisted of individual small employers owning individual small firms, such as the example cited above.[18] But the world consists of many single firms with multiple

[17] Abby Goodnough, "At Restaurant Delay is Help on Health Law," *New York Times*, July 9, 2013, http://mobile.nytimes.com/2013/07/10/us/at-restaurant-delay-is-help-on-health-law.html?pagewanted=2. Accessed 7/11/2013.

[18] Opinion has been voiced that ACA impacts only about 3-4 percent of small businesses. That number is apparently derived from the proportion of employers who have 50 employees or more. However, that opinion is misinformed. Small offering firms will be directly impacted by ACA's reporting requirements. A substantial, but unknown, number will also be impacted by the business aggregation rules. Others have been impacted by required changes in the benefits that must be included in the health plans they offer (or would have offered). All are supposed to provide employees information about the exchanges.

owners and many single 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 combination as a single person).[19] Reverse the situation and one finds that 39 percent of people owning a small business with 20 or more employees also hold 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.[20] At the same time, owners are likely to participate in the critical decisions of a second firm they own, though they are somewhat less likely to participate in the critical decisions of a third firm that they own.[21]

The rules proposed to handle these complexities and determine the meaning of a single business entity are ERISA rules. The practical problem is that ERISA rules are intricate, meant for interpretation by legal specialists in employment benefits law, not for the general public or even for attorneys generally. That means that perhaps as many as 100,000 small businesses should have an interpretation from a specialist in benefits law to be confident about his or her status. That is not likely to happen.

4. *HIT Tax*

The ACA included as one of its revenue raisers an annual "fee" on insurer beginnings in 2014. The "fee", a euphemism for tax, is substantial. It is designed to collect over $100 billion in the next ten years. A predetermined amount of revenue will be collected each year: $8 billion in 2014, $11.3 billion in 2015 and 2016, $13.9 billion in 2017, and $14.3 billion or more annually in years 2018 and beyond. The tax is not only large, but astonishingly discriminatory. The tax formally falls on the sale of fully-insured health plans, hence the name HIT tax, which means it falls on plans sold in the small group market, a market consisting of business owners having fewer than 50 employees. As a result, the HIT Tax targets *only* small-business owners who offer, a behavior that ACA specifically, and health policy generally, intends to encourage.

The critical point is that this tax, ostensibly an industry fee targeted at health insurers, will ultimately be shifted. The Congressional Budget Office (CBO) explicitly asserted that this tax/fee/surcharge "would be largely passed through to consumers in the form of higher premiums for private coverage."[22] A March 2011 report by former Congressional Budget Office Director Douglas Holtz-Eakin concurred in that view[23] as did the Joint Committee on Taxation (JCT) in a letter to Senator Jon Kyl dated June 3rd, 2011.[24] The JCT estimates the HIT tax would raise premiums offered by covered entities by 2.0 percent to 2.5 percent[25] and the Holtz-Eakin by as much as 3 percent, a price increase that cumulatively amounts to nearly $5,000 per family over the current decade.[26]

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[19] Business Structure, *National Small Business Poll*, (ed.) William J. Dennis, Jr., NFIB Research Foundation, Vol. 4, Iss. 7, 2004.
[20] Businesses Within Families, *National Small Business Poll*, (ed.) William J. Dennis, Jr., NFIB Research Foundation, Vol. 12, Iss. 4, 2012.
[21] Ibid.
[22] An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act, Congressional Budget Office, November 30, 2009, pp. 15-16.
[23] Holtz-Eakin, Douglas, "Higher Costs and the Affordable Care Act: The Case of the Premium Tax," American Action Forum , March 9, 2011.
[24] Barthold, Thomas A., letter to Senator Jon Kyl, Joint Committee on Taxation, Washington, DC, June 3, 2011.
[25] Ibid.
[26] Holtz-Eakin, op. cit.

The NFIB Research Foundation modeled the impact of the HIT tax earlier this year to determine its broad economic effects.[27] Simulations were run using various assumed health insurance inflation rates. Depending on the assumed inflation rate, the HIT tax is forecast to reduce private sector employment by between 146,000 and 262,000 jobs in 2022. Approximately 59 percent of the jobs lost would be in small firms. We could not estimate the impact on health insurance offers that result from the higher premiums.

5. *The Employer Mandate Per Se*

The employer mandate has been effectively postponed. So, to come full-circle, it is fair to ask why it exists at all. If it is simply a means to raise revenue, most would not consider it good tax policy. But if it is a means to increase health insurance coverage, it is creating huge dislocations and considerable costs for little if any return. Ninety-eight (98) percent of employers with more than 200 employees currently offer health insurance; about 60 percent under 50 employees do, including half among the 3-9 employee group.[28] Small-employers, who have much lower rates of coverage, are not required to offer. Thus, the mandate adds a minimal number of people to the covered population. A recent paper from the Urban Institute[29]estimated that postponement of the mandate would impact only about one million people (out of about 160 million). The Congressional Budget Office (CBO) has not yet made a direct estimate, but interpreting their net numbers yields an estimate of about two million.[30] Unless one assumes that large employers would soon start massively dumping of their health plans, coverage is largely unaffected by elimination of the employer mandate.[31]

The current tie between health insurance and employment arose from a quirk of historical circumstance, not from a rational policy decision about health. The ACA freezes that quirk and continues to lock health insurance to employment. But, the future is another direction, a direction with greater flexibility, one in which individuals have their own insurance and carry it with them from job to job and in and out of employment. The ACA's employer mandate therefore is in sum a strike against a rational future.

Reflection

Small-business owners became interested in health years ago due to the rapid increase in health insurance costs,[32] costs that they recognized were rising unsustainably even when others did not. What will happen to small business rates? Some will likely benefit; some likely will not. Everyone will have an example that aligns with their expectations. But the real issue is what will be the rate trend for small employers overall.

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[27] Michael J. Chow, "Effects of the PPACA Health Insurance Premium Tax on Small Businesses and Their Employees: An Update," NFIB Research Foundation, March 19, 2013, http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/ppaca/health-insurance-tax-study-nfib-2013-03.pdf. Accessed 7/20/13.

[28] Kaiser Family Foundation, 2012 Employer Health Benefits Survey, September, 2012. http://kaiserfamilyfoundation.files.wordpress.com/2013/03/8345-employer-health-benefits-annual-survey-full-report-0912.pdf Accessed 7/20/2013.

[29] Linda J. Blumberg, John Holahan, and Mathew Beuttgens, "It's No Contest: The ACA's Employer Mandate Has Far Less Effect on Coverage and Costs Than the Individual Mandate," Urban Institute, July 15, 2013, endnote 16. http://www.urban.org/publications/412865.html. Accessed 7/16/2013.

[30] CBO and JCT's Estimates of the Effects of the Affordable Care Act on the Number of People Obtaining Employment-Based Health Insurance, Congressional Budget Office, March, 2012.

[31] Blumberg, et. al., op. cit.

[32] Holly Wade, Small Business Problems and Priorities, NFIB Research Foundation, August 2012, Table 5. http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-problems-priorities-2012-nfib.pdf. Accessed 7/20/2013.

The small business health insurance tax credit has been put forward as one way the ACA will help owners with health insurance costs. While "free money" is always welcome, the credit is essentially a windfall (rather than an incentive) for eligible small business owners and a "bait and switch" for those who actually use it as incentive. The credit was touted as a good deal for four million eligible small businesses.[33] But after reading the fine print, the number eligible was actually 244,094 for the full credit and 1,165,505 for a partial credit.[34] The GAO confirmed the credit's minimal use and identified several reasons for it, including the perfectly reasonable requirement that one had to purchase health insurance before attaining eligibility.[35] But, the credit pretty much became a bait and switch. Announcements about the credit forgot to mention that it is temporary. It is available for two years once SHOP exchange opens. Thus, the owner gets the credit once he or she committed to purchase health insurance. The unspoken caveat is that once ensnarled, it will be very difficult to drop it should circumstances warrant. The IRS Web page touting the credit, for example, explains the benefits in some detail, but fails to mention that it expires.[36] The credit will be helpful to some small businesses, despite its inherent problems, and that is welcome. But as a serious attempt to alleviate small-business owners' health insurance costs, it is a bit of a farce.

Conclusion

The postponement of the employer mandate has been helpful to small employers. It gives them breathing space to be able to determine what is required of them under the ACA. But it has also been helpful in another respect: it has given all parties a chance to reflect on the shortcomings of the law as enacted. While we may disagree on the severity of those shortcomings and precisely what they are, I know of no one who argues that improvements cannot be made. This hearing provides a good place to identify the needed improvements that directly impact small business.

[33] http://www.whitehouse.gov/health-care-meeting/questions/small-business-6. Accessed 7/20/2013.

[34] William J. Dennis, Jr., Small Business and Health Insurance: One Year After Enactment of PPACA, NFIB Research Foundation, July, 2011.

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

[36] http://www.irs.gov/uac/Small-Business-Health-Care-Tax-Credit-for-Small-Employers. Accessed 7/18/13.