ACA, Regulation, and America's Small Businesses

U.S. House of Representatives
Committee on Small Business

Douglas Holtz-Eakin, President*
American Action Forum

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Chairman Graves, Ranking Member Velázquez, members of the Committee, thank you for the opportunity to testify today regarding the Patient Protection and Affordable Care Act (ACA)'s impact on small businesses. The American Action Forum keeps a close eye on the impacts of the law's implementation, and carefully tracks the regulatory burden of federal rules and administrative actions. I'm pleased to share some of those details with the Committee.

The review provides four main lessons regarding the Affordable Care Act and the growth of small businesses:

- It imposes numerous costly regulatory burdens,
- It creates further regulatory uncertainty at a time when we need small business entrepreneurs to hire,
- The law's taxes and fees create disincentives for small businesses to expand, and
- It raises the cost of providing insurance for employees while concurrently penalizing firms that fail to do so.

Let me discuss each in turn.

The Regulatory Burden of the ACA

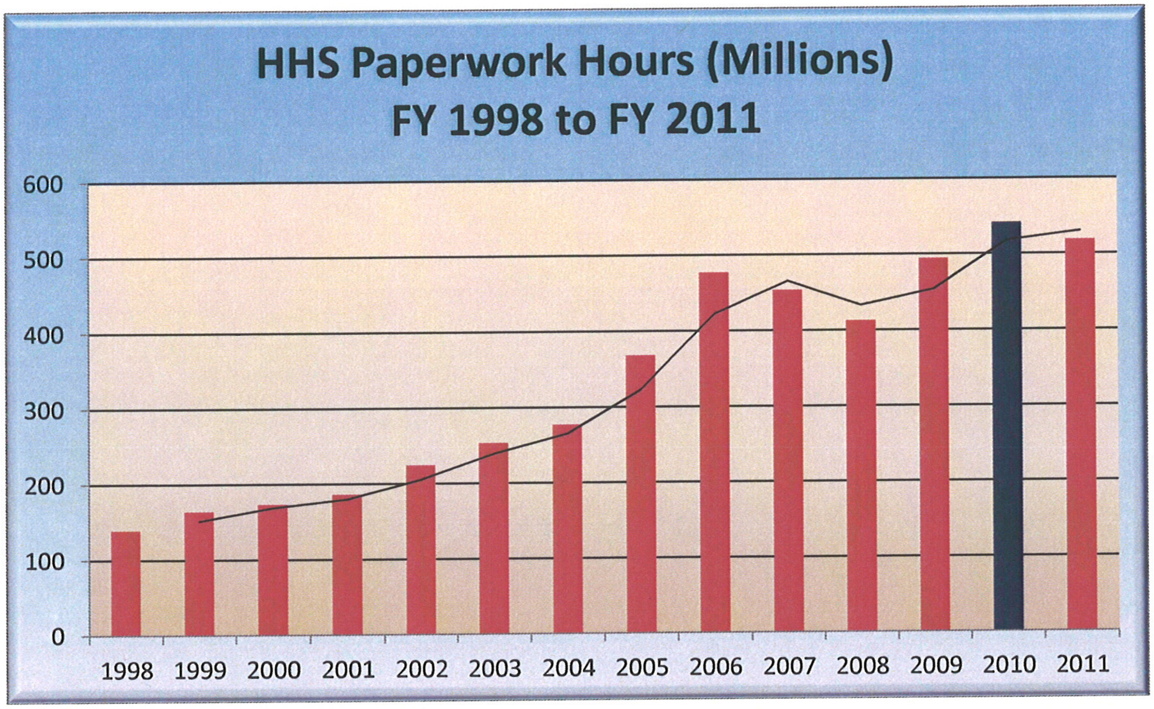
The ACA's regulatory burden already exceeds $30 billion on private, state, and local entities. With more than 80 million paperwork burden hours, the law's implementation also imposes heavy burdens for small businesses and rural hospitals, two aspects that even the Administration's own regulations concede.

When the Congressional Budget Office (CBO) reviewed ACA under the Unfunded Mandates Reform Act (UMRA), it acknowledged the law "would greatly exceed" statutory cost thresholds ($70 million for local governments and $141 for the private sector) "in each of the first five years that the mandates would be in effect." After approximately three years of implementation, ACA's regulatory burdens have greatly exceeded UMRA's thresholds.

According to AAF's database of all federal regulations, ACA has imposed $24 billion in costs on private entities, $9.8 billion in burdens on state and local governments, and more than 80 million paperwork burden hours. These regulatory costs will place tremendous pressure on doctors, hospitals, health issuers, and small businesses.

For example, ACA's 80 million hours of paperwork is the equivalent of 39,822 employees working an entire year filling out the law's new paperwork (assuming a 2,000-hour work year). We can conceptualize paperwork burdens by examining gross domestic product per hour worked. According to the Bureau of Labor Statistics, that figure was $61.59 in 2011. Thus, ACA's red tape alone costs the U.S. approximately $4.9 billion annually, a figure that will grow as the pace of implementation quickens this year.

White House estimates confirm that HHS's paperwork burden has increased. In FY 2008, HHS imposed 412.8 million hours of red tape; in FY 2011, that figure stood at 518.8 million, a jump of 106 million hours, or 25 percent in just three years. ACA is the direct cause of many of these new requirements. The figure below details HHS's rising regulatory burden, with the pronounced jump in 2010.



Finally, AAF did not end its analysis with the law's costs alone. We also searched the relevant Regulatory Impact Analyses (RIA's) to determine aggregate benefits. Sadly, costs outweigh benefits by a factor of at least 3 to one – \$33.8 billion in costs to \$9 billion in quantified benefits. ACA not only fails the regulatory cost-benefit test, but the budgetary and policy tests as well.

Regulations with "a significant economic impact on a substantial number of small entities." Under the Regulatory Flexibility Act (RFA) and its subsequent amendments, all federal agencies must consider the impact of their proposal on small entities, seek appropriate input, and develop regulatory alternatives for small businesses. Agencies have the flexibility to ignore the RFA, mostly because the key term is undefined, so acknowledging that a regulation imposes a "significant economic impact on a substantial number of small entities" is rare.

Below are the eleven regulations that HHS estimated would place significant burdens on small businesses. Combined, rural hospitals and doctors would incur more than \$1.9 billion in burdens and 11.3 million paperwork hours.

ACA Rules Burdening Small Businesses According to HHS

Regulation	Cost	Paperwork Burden
Proposed Menu Labeling	$757.1 Million	622,000 Hours
Final Shared Savings Program	$451 Million	N/A
Proposed Vending Machine Labeling	$423.1 Million	842,000 Hours
Final Physician Fee Schedule	$172.9 Million	365,197 Hours
Proposed Covered Outpatient Drugs	$81.4 Million	391,212 Hours
Final Billing for Skilled Nursing Facilities	$29.93 Million	913,884 Hours
Final Payment Policies	$11.58 Million	196,509 Hours
Final Patient Notification Requirements	$2.55 Million	138,032 Hours
Final Outpatient Prospective Payment	N/A	1,010,876 Hours
Final Inpatient Prospective Payment	N/A	6,838,293 Hours
Final Hospital Payment System	N/A	N/A[1]
Aggregate Small Business Impact: $1.9 Billion and 11.3 Million Hours		

These regulations are only part of the law's overall burden. Several of the administration's regulatory analyses admit they will adversely affect small rural hospitals. One proposal covering Skilled Nursing Facilities [SNF] stated, "We anticipate that the impact on small rural hospitals would be similar to the impact on SNF providers overall. Therefore, the Secretary has determined that this final rule may have a significant impact on the operations of a substantial number of small rural hospitals."

Although $1.9 billion in costs, and adverse impacts on doctors and rural hospitals might appear significant, the actual burden is much higher. Many of the administration's formal regulatory publications never capture the macroeconomic impact. The impact on small businesses is likely much greater than $1.9 billion.

Increased Regulatory Uncertainty

Since 1996, after the latest round of amendments to the Regulatory Flexibility Act, the White House has published two "Unified Agendas" of federal regulations every year. Last year, however, the administration decided simply not to publish a spring agenda, leaving industries across the U.S. guessing about long-term regulatory actions. The lone agenda was not published until shortly before Christmas.

This policy toward the Unified Agenda was unprecedented, and did little to foster transparency in an administration that touts its openness. In addition to delays in the Unified Agenda, the administration has also imposed several self-inflicted delays that only add to this uncertainty. In an AAF study last year, we found HHS missed nearly half of its self-imposed deadlines for proposed and final ACA rules.

[1] According to the rule, "These requirements are exempt from the PRA [Paperwork Reduction Act] in accordance with the provisions of the Affordable Care Act." 75 *Fed. Reg.* 72238.

This tardiness has reached into approving state exchanges as well, which are supposed to be open for enrollment to individuals and small businesses in October 2013. The timeline for certifying state exchanges under the law has been modified frequently during the past years; few think the administration will be ready with functioning exchanges by the ACA deadlines.

Two recent polls do suggest that businesses and consumers are concerned about this uncertainty. The latest, from Gallup, found that 56 percent of small-business owners worry about "new government regulations." The survey of 601 participants concluded, "[T]hat so many owners say worries about such things as potential healthcare costs and potential new government regulations are holding back hiring is troublesome for the job market outlook."

This evidence echoes an earlier poll from Gallup on regulations. In a September 2012 poll of 1,017 adults, 47 percent said there was "too much" regulation, as opposed to 26 percent who stated there was "too little" regulation. Gallup notes this data is hardly an aberration. "In fact, over the 15 times since 1993 that Gallup has asked this question, never have more than a third of Americans said there is too little regulation of business and industry."

Regulatory uncertainty does not have to be the norm. It gives markets and states the expectation that the law will move forward based on partisan motives, as opposed to good public policy. The least the administration could do is ensure transparency and issue timely regulations with the legally prescribed cost-benefit analysis.

Unfortunately, in a difficult economy, and an otherwise uncertain spending and regulatory environment, ACA leaves small employers with a large paperwork burden, higher costs, and an even greater degree of uncertainty. Those in health-related fields are more directly impacted than others, but many firms now have at least eleven more regulatory reasons not to expand. Although the law may have been well intentioned, its implementation negatively affects the small businesses and start-ups that might otherwise be hiring new employees and creating wealth.

Taxes and Fees Hamper Small Businesses

Beyond the regulatory impact, the law contains new fees and taxes that negatively affect small businesses and their employees.

Businesses with fifty or more employees are subject to a $2,000 per employee (in excess of 30 full-time employees (FTEs)) penalty if they do not provide coverage. This penalty includes businesses that have less than 50 full-time employees, if they have a significant number of part-time employees. For example, a company with 33 full-time employees and 30 part-time employees is considered an employer of 50 full time employees, given that 30 part-time employees amount to the equivalent of 17 full-time employees. Notably, a business does not avoid the penalty if they opt to cover employees with plans deemed inferior to those offered in exchanges. Therefore, regulations dictate that small employers who offer plans that are "unaffordable" or inadequate are subject to the full penalty.

In its most recent Budget and Economic Outlook, the Congressional Budget Office estimated that the government would collect $13 billion more than previously estimated from this penalty. This projected increase indicates that a substantial number of Americans will lose whatever employer sponsored coverage that they have now.

The 2.3 percent excise tax on medical devices will tilt the playing field against smaller companies who are less able than larger companies to absorb lost revenue because of higher fixed costs and smaller cash reserves. Since about 90 percent of medical device companies in the U.S. are small to medium-sized firms, the tax will lower employment and raise prices in one of the few manufacturing industries where the U.S. remains dominant. Beyond concerns about the business impact, it is simply an ill-conceived tax policy. Removing $20 billion from this industry merely undercuts employment and increases cost throughout the healthcare sector.

New legislative and regulatory requirements may lead to further decline in the number of practicing independent doctors. Physicians who own their own practices or are members of small groups are already feeling pressure to consolidate or become employees of larger hospitals and healthcare systems. Doctors in private practice have declined from 59 percent of all physicians in 2000 to 39 percent in 2012. Legislative and regulatory changes, including Medicare payment reductions, Accountable Care Organization incentives, and a host of health IT, quality, and reporting requirements mean that it is easier to be part of a large system than a solo practitioner. Although consolidation may have benefits and drawbacks in some areas, it has a decidedly negative impact on physicians who run small businesses or do not have the opportunity to consolidate themselves.

The administration often points to the ways in which ACA helps small businesses afford health insurance for their employees. To address the existing difficulty, small businesses that provide coverage can qualify for a healthcare tax credit. Unfortunately, due to its structure, very few companies actually qualify for the credit, and the Government Accountability Office has stated that the complicated application process and numerous exceptions meant that fewer have claimed the credit than expected.

In 2011, 170,300 claimed some amount of the credit, even though anywhere from 1.4 to 4 million businesses were eligible. Those eligible for the full credit must have fewer than 10 FTEs, and an average wage of $25,000 or less. The expected cost of this credit for 2010 was $2 billion, and it amounted to a mere one-quarter of this projection. ACA exceeds expected cost projections in terms of expanded bureaucracy and public entitlement programs, but comes in dramatically under budget on a tax credit that might have assisted small businesses trying to provide affordable coverage.

Given the additional burdens facing small businesses when they cross the threshold from 49 to 50 employees, ACA's new regulations actually encourage small businesses to stay small. Uncertainty about the law's impact on future insurance premium costs, payroll, prices, and profit margins can only continue to adversely affect the ability of a typical small business to grow.

Health and Insurance Costs Continue to Rise

There are legitimate policy debates over the implementation of ACA and its role in health care costs. However, there is no dispute that its regulations will increase premiums. For example, the final ACA rule on "Preexisting Condition Exclusions" noted that if HHS failed to grant a waiver, "[T]he restricted annual limit provisions of these interim final regulations would result in a significant decrease in access to benefits or a significant premium increase."

Likewise, the proposed "Notice of Benefit and Payment Parameters for 2014," which is currently in final form at the White House, acknowledged it too could lead to premium price hikes. "There are administrative costs to States to set up and administer these programs. For issuers not receiving payments, any contribution is an additional cost, which an issuer could pass on to beneficiaries through premium increases." Critics of the law warned this could happen during passage, it has come to pass, and new research is putting a price tag on these increases.

In a paper released last month, I examined possible health care premium spikes in 2014. We surveyed large health insurers that cover a majority of patients in the U.S. The survey areas included Atlanta, GA, Austin, TX, Chicago, IL, Phoenix, AZ, and Milwaukee, WI. The results are sobering: young and healthier individuals, including small employers, can expect a 169 percent premium increase, averaged across the five cities. Consumers in Milwaukee could experience the greatest sticker shock, with a 190 percent increase in 2014.

These younger, healthier individuals are likely to subsidize the cost of insurance for older patients, but not by nearly enough to avoid an overall increase. Older and less healthy individuals could enjoy a 22 percent premium decrease. It is no surprise that ACA will have an enormous impact on the structure and pricing of insurance. However, a 169 percent premium increase begs the attention of policymakers to address the structural flaws in the legislation.

Thank you for the chance to appear. I look forward to answering your questions.