

TESTIMONY BEFORE THE UNITED STATES CONGRESS
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NATIONAL FEDERATION OF INDEPENDENT BUSINESS

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Testimony of Kevin Kuhlman,
House Committee on Small Business

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*Reimagining the Health Care Marketplace for America's Small
Businesses*

Chairman Chabot, Ranking Member Velázquez, and members of the Small Business Committee, thank you for the invitation to testify at this important and timely hearing titled *Reimagining the Health Care Marketplace for America's Small Businesses*. My name is Kevin Kuhlman; I am the Director of Government Relations at the National Federation of Independent Business (NFIB). I manage NFIB's health care legislative and regulatory advocacy.

NFIB is the nation's leading small business advocacy organization. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 325,000 independent business owners located throughout the United States.

The rising cost of health insurance has been the number one problem for small business owners for thirty years.¹ Because of the cost problem, NFIB was active from the outset of health care reform and throughout the legislative and regulatory processes of the Affordable Care Act (ACA).² After passage, NFIB tracked implementation of the ACA through four scientific research surveys. NFIB continues to collect member stories about the ACA's impact. According to this feedback, the costs to small businesses outweighed the benefits, and the ACA led to higher health care costs, increased compliance burdens, and decreased flexibility.

These consequences led to a significant 25 percent reduction in the offer rate for small businesses between 2010 and 2015.³ For the first time, fewer than 30 percent of businesses with under 50 employees offered health insurance to their employees in 2015. Small business was clearly an afterthought during ACA consideration and implementation.

As Congress considers a partial repeal of the ACA through reconciliation and a repair of the health insurance markets, please prioritize affordability, flexibility, and predictability for small businesses. Health reform that works for small business will work for the rest of the country.

Under the ACA

Higher Health Insurance Costs

The cost problem predates the ACA, but the law exacerbated the problem. The ACA was the most significant federal overhaul of the individual and small business health insurance markets ever. Forty-one percent of small business

¹ Small Business Problems and Priorities, NFIB Research Foundation, August 2016, <http://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf>.

² Dan Danner comments at White House Health Care Summit, March 6, 2009, <https://www.c-span.org/video/?284447-3/white-house-health-care-summit-closing>.

³ Medical Expenditure Panel Survey, Agency for Healthcare Research and Quality, Department of Health and Human Services, 2010-2015, https://meps.ahrq.gov/data_stats/summ_tables/insr/national/series_1/2015/tia2.pdf.

owners purchase health insurance in the individual market and 33 percent purchase insurance through their business.⁴ The ACA added new insurance requirements⁵ and taxes to these markets. Insurance requirements such as community rating and the essential health benefits package drove up plan costs. These costs were passed along to small business owners and employees in the form of higher health insurance premiums and out-of-pocket costs.

New taxes and fees on health insurance products also drove up costs. Congress thankfully approved temporary relief from two of the taxes created in the law in late 2015. Congress suspended the health insurance tax for 2017, saving small businesses and employees from an additional \$400 per family,⁶ but the tax restarts in 2018 and escalates in future years. Congress also delayed the Cadillac tax on high-cost group plans for two years, but the new implementation date of 2020 remains in the not-so-distant future.

Small businesses also suffer from higher administrative costs than both the individual market and larger businesses.⁷

For small business owners, the requirements, taxes, and administrative costs are less likely to be offset by tax credits than the overall population. Only six percent of small employers receive advanced premium tax credits (APTCs) in the individual exchange marketplaces.⁸ Many of the nine million unsubsidized individual market enrollees are small business owners. Few small businesses qualified for the small business health insurance tax credit, and the credit expired last year for businesses that did initially qualify.⁹ This population needs the most cost relief.

Increased Compliance Burden

Inevitably, any major legislative overhaul is complex, and agencies details much of the implementation through regulations. ACA implementation by the Departments of Health and Human Services (HHS), Labor (DOL), and Treasury increased compliance and paperwork burdens for small businesses.

All businesses, regardless of size, are required to provide new employees with a Notice of Coverage Options document describing the health insurance exchange

⁴ Small Business's Introduction to the Affordable Care Act, Part III, National Federation of Independent Business Research Foundation, November 2015, <http://www.nfib.com/surveys/aca-2015/>.

⁵ Report to Congress on the impact on premiums for individuals and families with employer-sponsored health insurance from guaranteed issue, guaranteed renewal, and fair health insurance premiums provisions of the Affordable Care Act, Centers for Medicare and Medicaid Services Office of the Actuary, February 21, 2014, <https://www.cms.gov/research-statistics-data-and-systems/research/actuarialstudies/downloads/aca-employer-premium-impact.pdf>.

⁶ Joint Committee on Taxation, Letter to Senator Jon Kyl, June 3, 2011, <http://www.ahipcoverage.com/wp-content/uploads/2011/11/Premium-Tax-JCT-Letter-to-Kyl-060311-2.pdf>.

⁷ Congressional Budget Office, Private Health Insurance Premiums and Federal Policy, February 2016, https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51130-Health_Insurance_Premiums.pdf.

⁸ Small Business's Introduction to the Affordable Care Act, Part III, National Federation of Independent Business Research Foundation, November 2015, <http://www.nfib.com/surveys/aca-2015/>.

⁹ Small Employer Health Tax Credit, Limited Use Continues due to Multiple Reasons, Government Accountability Office, <http://www.gao.gov/assets/680/675969.pdf>.

marketplaces. All offering employers must additionally provide employees with an annual Summary of Benefits and Coverage document describing the group insurance the company offers.

The biggest current compliance headache is the employer mandate. Businesses with 50 or more employees – considered large by the ACA but small by the Small Business Administration (SBA) – must offer affordable and adequate health insurance coverage to employees, or pay penalties. The mandate seems intuitive, and the provision reads only four pages in the statute. But the proposed regulation spanned 144 pages,¹⁰ and the final regulation read 227 pages long with 50 definitions, many of which were new.¹¹

This mandate – fully implemented in 2016 – requires significant compliance responsibilities. The compliance provision in the statute was three pages long, the proposed regulation was 72 pages long,¹² the final regulation was 84 pages long,¹³ and the IRS instructions are 19 pages long.¹⁴ Businesses must track the cost of coverage to each employee monthly, provide current and former employees with a transmittal form (Form 1095), and provide the IRS with another form (Form 1094). Self-insured businesses, even those with under 50 employees, must also comply using this method.

I listed those figures to demonstrate that the IRS estimation of 4 hours and 12 minutes to conduct research, complete paperwork, and file forms is grossly understated. In reality, it takes much more time to comply. Treasury also disagreed with NFIB and the SBA Office of Advocacy¹⁵ that the employer mandate requirement and compliance would have a significant economic impact on a substantial number of small businesses, triggering a regulatory impact analysis. That unrealistic estimate and lack of analysis are frustrating for small business owners.

These details are timely because this spring is when communication between the IRS and businesses will begin for the tax year 2015. Business owners must comply with the employer mandate requirements in 2016, while simultaneously reconciling their 2015 compliance.

¹⁰ Shared Responsibility for Employers Regarding Health Coverage, Notice of Proposed Rule Making (Public Inspection), Internal Revenue Service, January 2, 2013, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2012-31269.pdf?1356729431>.

¹¹ Shared Responsibility for Employers Regarding Health Coverage, Final Regulations (Public Inspection), Internal Revenue Service, February 12, 2014, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-03082.pdf?1392067029>.

¹² Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Insurance, Notice of Proposed Rulemaking (Public Inspection), Department of Treasury, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2013-21791.pdf>.

¹³ Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Insurance, Final Regulations (Public Inspection), Department of Treasury, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-05050.pdf>.

¹⁴ Instructions for Forms 1094-C and 1095-C, IRS, 2016, <https://www.irs.gov/pub/irs-prior/i109495c--2016.pdf>.

¹⁵ Wilkins, Letter to IRS re: Shared Responsibility for Employers Regarding Health Coverage (REG-138006-12), Small Business Administration Office of Advocacy, February 11, 2013, https://www.sba.gov/sites/default/files/files/IRS_Employer_Mandate_Letter_2_11_2013.pdf.

Whether outsourced to a payroll company or handled within the business, these increased compliance requirements lead to higher costs for small businesses.

Decreased Flexibility

IRS regulations limited flexible arrangements that were a common market practice for small businesses. Fewer and fewer small businesses can afford the high cost of group health insurance. Instead, to assist employees with health care costs, many small businesses directly paid for or reimbursed employees' individual market health insurance plans and qualified medical expenses. These arrangements – which the IRS termed “employer health care arrangements” – worked for both employers and employees. NFIB estimated 16 percent of businesses reimbursed employees for insurance they purchased on their own in 2015.¹⁶

In 2013, the IRS published sub-regulatory guidance that prohibited employers from further assisting employees with these arrangements, declaring they violate the ACA's group health plan requirements.¹⁷ One year later, in a frequently-asked-questions (FAQ) document, the IRS attached a \$100 per employee per day penalty for continuing the practice.¹⁸ Penalties of this magnitude would be catastrophic for small businesses, forcing many to close their doors. These businesses are not required to offer health insurance, but are trying to help their employees.

Congress thankfully protected businesses from the penalties and partially restored the practice in the *21st Century Cures Act*, but more can be done through legislation or regulation to encourage a defined-contribution health insurance system for small businesses.

The Small Business Need for Replace

Repeal will eliminate taxes and mandate penalties, providing relief for small business owners. But more action must be taken to lower costs and increase coverage options. Congress cannot only pass repeal legislation without considering replacement legislation that focuses on affordability, flexibility, and predictability for small businesses.

Affordability

Reconciliation rules prevent reconsidering the increased health insurance requirements in repeal legislation. These insurance requirements, included in

¹⁶ Small Business's Introduction to the Affordable Care Act, Part III, National Federation of Independent Business Research Foundation, November 2015, <http://www.nfib.com/surveys/aca-2015/>.

¹⁷ Notice 2013-54, Application of Market Reform and other Provisions of the Affordable Care Act to HRAs, Health FSAs, and Certain other Employer Healthcare Arrangements, Internal Revenue Service, September 13, 2013, <https://www.irs.gov/pub/irs-drop/n-13-54.pdf>.

¹⁸ Employer Health Care Arrangements, Frequently Asked Questions, Internal Revenue Service, January 3, 2017 (last updated), <https://www.irs.gov/affordable-care-act/employer-health-care-arrangements>.

Title I of the ACA, were cost drivers for individuals and small businesses. In any replacement or repair legislation, revisit these requirements with a focus on affordability.

To assist with affordability for individuals, Congress can equalize the tax treatment between the group market and the individual market. Self-employed individuals do not enjoy the same tax-preferred benefits as businesses purchasing group coverage. S-corporation business owners also face restrictions on deducting health insurance expenses. A more equal tax treatment will help with health insurance affordability for this population.

Adjusting tax and insurance rules with a laserlike focus on affordability will organically increase coverage for the small business population.

Flexibility

NFIB continues to advocate for innovative offering arrangements. Ten years ago, NFIB led the effort to allow for Association Health Plans and Small Business Health Plans. NFIB more recently supported the *Small Business Health Care Relief Act* that allowed businesses to contribute to their employees' individual market health insurance with tax-preferred dollars. The ACA eliminated these innovative offering arrangements, but NFIB helped lead the effort to restore them on a limited basis in the *21st Century Cures Act*. Improving and expanding these arrangements will allow small businesses to tailor benefits that fit their employees' needs and could help stabilize the individual health insurance market.

Expand and enhance consumer-driven health insurance products like health savings accounts (HSAs), flexible spending accounts (FSAs), and health reimbursement arrangements (HRAs) will allow more individuals to take advantage of the products, saving tax-preferred funds for predictable and unforeseen medical expenses.

Increasing flexibility will restore small businesses' ability to tailor their health benefits to their businesses' budgets and their employees' needs.

Predictability

Small businesses were promised that if they liked their health insurance plans, they could keep their health insurance plans. While it is too late for many small business owners who suffered a wave of cancellations, some still maintain transitional plans. Congress or the Administration should allow individuals and businesses to keep transitional policies by relaxing grandfather plan regulations and extending the Obama Administration's grandmother plan extension policy.¹⁹

¹⁹ Memo from Kevin Counihan, Extended Transition to Affordable Care Act-Compliant Policies, February 29, 2016, <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/final-transition-bulletin-2-29-16.pdf>.

These policies could enroll new individual and business customers to ensure true choice.

During the repeal and repair process, Congress and the Administration must avoid disrupting the individual and small business health insurance markets. Repeal legislation must be accompanied by replacement proposals.

Conclusion

NFIB remains committed to actively advocating for solutions that promote affordability, increase flexibility, and ensure predictability for small businesses. Again, health reform that works for small business will work for the rest of the country. Thank you for allowing me to testify today, I look forward to any questions.