"Rewriting the Law: Examining the Process That Led to the ObamaCare Subsidy Rule"

U.S. Senate Judiciary Committee, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

June 4, 2015

Testimony of Professor Andy S. Grewal

Subcommittee Chairman Cruz and other distinguished members,

Thank you for inviting me to testify at this hearing. My name is Andy Grewal and I am an Associate Professor of Law at the University of Iowa College of Law. The views expressed here are solely my own.

I am testifying today to provide some further context for the Subcommittee's investigation into Treasury regulations that grant credits under Section 36B of the tax code, regarding policies purchased on the federally-established health insurance exchange. The validity of the Treasury regulations,[1] referred to by this Subcommittee as the ObamaCare Subsidy Rule, will be decided by the Supreme Court at the end of this month.

I do not take any position on the validity of the ObamaCare Subsidy Rule, nor do I take any position on the wisdom, or lack thereof, of the Patient Protection and Affordable Care Act of 2010 (the ACA). However, my research has revealed several instances where the IRS has promulgated regulations that plainly and unequivocally contradict provisions of Section 36B. I believe that an understanding of these instances may provide some context for the Subcommittee's investigation.

Ultimately, the IRS's repeated overreaches make it difficult to believe that the agency has tried to carefully obey its statutory authority when interpreting the tax-related provisions of the ACA, including the provision referring to "an Exchange established by the State." I have elsewhere[2] fleshed out the highly technical details of the IRS's overreaches and will offer only a brief summary here:

1. *Extension of Credits to Persons Outside of Statutory Income Range.* Section 36B plainly provides premium tax credits to citizens only when their household incomes come within a specified income range (100 to 400 percent of the poverty line). IRS regulations

[1] *See* Treas. Reg. § 1.36B–2(a)(1) (providing tax credit eligibility to anyone "enrolled in one or more qualified health plans through an Exchange") *and* Treas. Reg. § 1.36B–1(k) (defining "Exchange" to include federally established exchanges).

[2] See Grewal, "Lurking Challenges to the ACA Tax Credit Regulations," *Bloomberg BNA Tax Insights*, 98 DTR J-1 (May 2015), available at http://tinyurl.com/grewalACA. I am continuing to study Treasury regulations under Sections 36B and 4980H and expect to discuss further instances of IRS overreach at Notice & Comment, the blog of the Yale Journal on Regulation, accessible at http://yalejreg.com.

disregard the statutory limitation and grant credits to potentially several million persons below the 100 percent statutory floor.[3]

2. *Extension of Credits to Persons Receiving Employer-Sponsored Minimum Essential Coverage*. Section 1511 of the ACA instructs the Department of Labor to issue regulations requiring large employers (200+ employees) to automatically enroll their employees in any health benefits plan offered by the employer. Section 36B correspondingly denies credits to employees who are covered by an employer plan, since they don't need to purchase policies on an Exchange. IRS regulations contradict this statutory scheme and allow persons to enjoy premium tax credits when they are automatically enrolled in an employer plan by reason of Section 1511 or in some other circumstances.[4]

3. *Extension of Credits to Some Unlawful Aliens*. Section 36B allows aliens to enjoy premium tax credits even though they fall outside of the statutory income range, when those aliens themselves lawfully reside in the United States. However, IRS regulations contradict the statute and allow unlawful aliens to receive premium tax credits when only a family member resides lawfully.[5]

Putting aside issues of legal authority, and focusing solely on the beneficiaries of the IRS's largesse, these 3 regulations may be reasonable. That is, the IRS's rewrites may reflect an improvement over the enacted law. However, the executive branch cannot re-write a statute any time that it subjectively believes that doing so would serve the general welfare or serve favored constituencies.

Additionally, although the IRS regulations seemingly provide beneficial results to a class of taxpayers, they impose costs on others. When persons outside of the statutory income range receive a tax credit (Bullet Point #1), the receipt of that credit may trigger or increase employer penalties under Sections 4980H(a) & (b). In other words, an unlawful premium tax credit leads to unlawful penalty collections.

---

[3] *See* Treas. Reg. § 1.36B-2(b)(6).

[4] *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,381 (May 23, 2012) (acknowledging that § 36B(c)(2)(C)(iii) flatly denies premium tax credit for any month in which employee pays for and obtains minimum essential coverage under employer plan, even if such coverage is unaffordable or does not provide minimum value, but breaking from statute and proposed regulations to "clarify," in Treas. Reg. § 1.36B-2(c)(3)(vii)(B), that § 36B(c)(2)(C)(iii) does not apply in some circumstances where employee obtains coverage via automatic enrollment). To qualify for credits under the regulation, employees must eventually opt-out of automatic enrollment. However, because the Section 4980H penalties are calculated on a monthly basis, even one month's worth of unlawful credits can have severe financial consequences on an employer.

[5] *See* Treas. Reg. § 1.36B-2(b)(5).

Regarding Bullet Point #2, the extension of credits to persons who are automatically enrolled in employer-sponsored coverage will potentially trigger or increase large penalties on employers. Penalties for such employers seems exquisitely unfair, given that these employers are actually offering health coverage to their employees and may be contributing amounts to their employees' monthly premiums. The ultimate costs of the IRS regulation will largely depend on the DoL's future actions. However, even if the potential burdens of the regulation remain speculative at this point, the regulation nicely illustrates an instance where the IRS has contradicted the clear language of Section 36B.

For technical reasons, the extension of tax credits to some unlawful aliens (Bullet Point #3) does not seem likely to trigger or increase penalties on employers. However, the granting of credits to persons who do not reside lawfully in the United States reflects a sensitive issue that should be handled by the Congress, and by an agency only when it enjoys statutory authority to do so.

Although these cases of IRS overreach do not directly relate to *King v. Burwell*, they may help inform the Subcommittee of the process that led to the ObamaCare Subsidy Rule. Whatever nuances might exist regarding the debate over that Rule, in each of these cases, the statutory provisions clearly say one thing and the implementing regulations say something else. This suggests that the IRS has not carefully obeyed its statutory authority in implementing Section 36B.

None of this proves that the ObamaCare Subsidy Rule is invalid. Even a careless rifleman occasionally hits his target. But it's doubtful that the ObamaCare Subsidy Rule can be vindicated on the grounds that the IRS has done its best to respect its statutory authority under Section 36B.

I thank the Members for providing the opportunity to testify on these important matters.